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A Study of Guardianship in North Dakota

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A STUDY OF GUARDIANSHIP IN NORTH DAKOTA

I. INTRODUCTION

When a court determines that a person lacks the capacity to make or communicate the decisions necessary to manage his own personal affairs, a guardian may be appointed.[1] Guardianship procedures allow the guardian to provide a proxy consent on behalf of the ward.[2] Guardianship is a result of the legal process by which a court appoints a guardian to supervise and protect a person and, in some instances, the property of an incapacitated or incompetent person.[3] The state, acting under its *parens pariae* power, is permitted to intervene and act in the "best interests" of those unable to care for themselves.[4]

The casual and informal atmosphere of most guardianship proceedings is deceptive.[5] Determining whether a proposed ward is

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1. N.D. CENT. CODE ch. 30.1-28 (1983).

2. Schmidt, *Guardianship of the Elderly in Florida*, 55 FLA. B. J. 189 (1981).

3. N.D. CENT. CODE ch. 30.1-26 (1976). Although the Uniform Probate Code (UPC) divides guardianship into two parts: guardianship, provisions for protecting the ward's person, and conservatorship, provisions for protecting property; a guardian is also responsible for the property of the ward if a conservator is not appointed. N.D. CENT. CODE § 30.1-28-12 (Supp. 1983).

4. Dussault, *Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens*, 13 GONZ. L. REV. 585, 598 (1977-78).

Many commentators have indicated that while there are stringent procedural protections when the state exercises its police power, the *parens patriae* power of the state has traditionally been exercised in an informal, nonadversarial setting: "Proceedings labled *parens patriae* continue to deprive individuals of fundamental rights without the procedural requirements which would assure a fundamentally fair hearing." Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 221 (1975).

5. Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates*, 12 CLEARINGHOUSE REV. 451, 454 (1978). Mitchell states that many guardianship hearings are

capable of making rational judgments concerning his personal affairs is an extremely difficult and complex task for a court.[6] Further, the proceeding is particularly important because a judicial declaration of incompetence or incapacity can involuntarily transfer the alleged incompetent's power of consent to a court-appointed guardian.[7] Thus, for a prospective ward, the consequences of being adjudicated incompetent are drastic.[8] In addition to the stigma of being labeled incompetent,[9] the ward loses the fundamental liberties of the right to choose where to live, the right to consent or refuse medical care or treatment, and the right to control and manage property.[10] Anyone can, of course, voluntarily give another person the power to act in his behalf; but only a judicial determination of incapacity or incompetence involuntarily transfers the power to consent.[11]

Recently, there has been renewed interest in the area of

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meaningless formalities, which may only last for a few minutes. *Id.* (citations omitted). Typically the petitioner and his or her attorney are the only parties present. *Id.* (citations omitted). Consequently, the court relies on information supplied by the petitioner and the hearing usually ends with the court adopting the petitioner's conclusions. *Id.* (citations omitted).

6. Address by Hofstra Law School Professor John J. Regan, *North Dakota Department of Human Services Workshop* (September 20, 1983). One commentator has suggested the use of a minimum rationality test similar to that used by courts to determine the constitutionality of legislation. *Id.*

7. *See* N.D. CENT. CODE § 30.1-28-12 (Supp. 1983). Section 30.1-28-12 provides in relevant part as follows:

> 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 except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court when the guardianship is limited:
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> . . . .
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> A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

Id.

8. Sherman, *Guardianship: Time for a Reassessment*, 49 FORDHAM L. REV. 350, 358 (1980). Being labelled an "incompetent" can be especially devastating to the elderly who once had keen minds and were able to function as productive citizens. *Id.*

9. The term "incompetent" is not used in the Uniform Probate Code (UPC), which was adopted by North Dakota in 1973. *See* N.D. CENT. CODE tit. 30.1 (1976 & Supp. 1983). The UPC uses the terms "incapacitated" and "disability" rather than incompetent. *See generally* UNIF. PROB. CODE (West 5th ed. 1977). The definition of "incapacitated person" provides the basis for the appointment of a guardian. N.D. CENT. CODE §30.1-26-01 (1)(1976). "Disability," as defined in § 30.1-01-06 (10), is keyed to the causes listed in § 30.1-29-01 (1). *Id* § 30.1-01-06(10) (1983). *See also id.* § 30.1-29-01 (1) (1976). Although the change avoids the negative connotations of the word "incompetent," the UPC's scheme of guardianship and conservatorship actually expands the availability of guardianship and conservatorships.

10. N.D. CENT. CODE § 30.1-28-12 (Supp. 1983). A number of other rights may also be at stake in a guardianship proceeding. For example, after a guardian is appointed, the court shall determine "whether the incapacitated person is mentally incompetent and as such is not qualified to vote." *See id.* § 30.1-28-04 (1). Also, an attorney must withdraw from representing a client if "his mental or physical condition renders it unreasonably difficult for him to carry the employment effectively." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (B) (3) (1979).

11. Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405, 1434-35 (1979).

guardianship law. One factor contributing to this renewed interest is the dramatic increase in the number of elderly persons who often are likely to require supportive services.[12] Demographic trends reflect an increase in the number of people sixty-five years old and older, and a sharp proportionate increase in the number of those seventy-five and older.[13] One report indicated that there are 814,000 persons sixty-five years old and over in state hospitals and similar institutions.[14] Although this figure represents only approximately five percent of all elderly persons,[15] it is the source of many of the commonly held stereotypes concerning aging and the elderly,[16] including the view reflected by the Uniform Probate Code (UPC) that old age is a disability and an indication of incompetency.[17]

A second factor contributing to renewed interest in guardianship is the aggressive program pursued by advocates for the developmentally disabled and their support of the principle of normalization of programs and services for developmentally disabled persons.[18] In addition, recent federal court cases have contributed to increased interest in guardianship by identifying a right to appropriate treatment and habilitation,[19] a right to treatment in the least restrictive and appropriate setting,[20] and the right to special education for developmentally disabled persons.[21]

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12. *See* Schmidt, *supra* note 2, at 189.

13. *Families: Aging and Changing: Hearing Before the House Select Comm. on Aging,* 96th Cong., 2d Sess. 52 (1980) (statement of Elaine Brody, Pres., Gerontology Society and Director of Human Serv., Philadelphia Geriatrics Center).

14. M. WEINER, A. BROK, & A. SNADOWSKY, THE INSTITUTIONALIZED AGED, WORKING WITH THE AGED 56-57 (1978).

15. *Id.*

16. *Id.*

17. The UPC defines an "incapacitated person" as "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age . . . or other cause (except minority) to the extent he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." UNIF. PROB. CODE § 5-101 (1) (West 5th ed. 1977); N.D. Cent. Code § 30.1-26-01(1) (1976). The National Conference of Commissioners on Uniform Laws amended this definition in 1982 by deleting the words "concerning his person." UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-201(7) (1982). This amendment has not been adopted by North Dakota. *See* N.D. CENT. CODE § 30.1-26-01(1) (1976).

18. W. WOLFENSBERGER, NORMALIZATION 27 (1972).

19. *See* Youngberg v. Romeo, 102 S.Ct. 2452 (1982) (mentally retarded individual, involuntarily committed to a state institution, has constitutionally protected right of reasonable care and safety, reasonably nonrestrictive confinement, and training or habilitation as may be required); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.,* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (when mentally ill patients are involuntarily committed through noncriminal procedures, the patient has a constitutional right to receive treatment).

20. *See* Shelton v. Tucker, 364 U.S. 479 (1960). The Court stated that "even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488. The least restrictive alternative doctrine has been applied to regulations involving both the mentally retarded and the mentally ill. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (regulations for the mentally ill); Lake v. Carmeron, 346 F.2d 657, 661-62 (D.C. Cir. 1966) (treatment for senility).

21. Youngberg v. Romeo, 102 S. Ct. 2452, 2463 (1982). In *Youngberg,* the Court held that the respondent, a mentally retarded person involuntarily committed to a Pennsylvania state institution,

As the result of a federal district court order, many of the residents of the Grafton State School at Grafton, North Dakota, will be transferred to community programs.[22]

The concept of using guardianship as a device to assist developmentally disabled persons in less restrictive community settings was one of the primary considerations leading to the passage of a limited guardianship bill during the 1983 legislative session.[23] The limited guardianship amendments explicitly allow the court to tailor the guardianship to the actual needs and disabilities of a prospective ward.[24] Thus, by providing for guardianship for limited purposes, guardianship in North Dakota is no longer an all-or-nothing proposition.[25]

North Dakota case law in the area of substitute decision-makers has been limited primarily to guardianships involving property matters and conservatorships. Furthermore, while the UPC and the North Dakota Century Code (Century Code) contain numerous provisions concerning the rights, duties, and liabilities of conservators, there is a conspicuous absence of statutory direction and case law regarding the responsibilities of guardians.[26] This Project will, therefore, focus on the guardianship of incapacitated persons under North Dakota guardianship law and will include the following areas: First, an overview of the development of North Dakota's guardianship statute; second, the guardianship process; and third, some of the problematic powers of guardianship.

II. THE DEVELOPMENT OF NORTH DAKOTA'S GUARDIANSHIP LAW

A. PRE-1973 GUARDIANSHIP LAW

Under North Dakota's pre-1973 guardianship law, the county

had constitutionally protected liberty interests under the due process clause of the fourteenth amendment, including the right to training necessary for the acquisition of needed skills. *Id.* at 2458-63. In addition, the North Dakota Constitution provides for public education for all children extending through all grades. N.D. CONST. art. VIII §§ 1, 2. The North Dakota Supreme Court has interpreted these provisions to include handicapped children who can benefit from an education. *In re* G.H., 218 N.W.2d 441, 446 (N.D. 1974).

22. Association of Retarded Citizens v. Olson, 561 F. Supp. 473, 494 (D.N.D. 1982). The court in part ordered that a comprehensive system of services be developed by North Dakota for the "diagnosis, evaluation, habilitation and rehabilitation of class members, including but not limited to institutional services, family care and support to the family, foster care, day care, respite care, crisis intervention, community residences, development centers, and work activity centers." *Id.*

23. *Limited Guardianships, 1983: Hearings on H.B. 1057 Before the Senate Comm. on Social Services and Veteran's Affairs,* 48th N.D. Leg. (1983) (statement of Representative Earl Pomeroy, District 24, Valley City).

24. N.D. CENT. CODE § 30.1-28-04(1) (Supp. 1983). Section 30.1-28-04(1) provides in relevant part: "The court shall exercise the authority conferred in this chapter consistent with the maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure." *Id.*

25. *Id.*

26. *Compare* N.D. CENT. CODE ch. 30.1-28 (guardianship) *with id.* ch. 30.1-29 (conservatorship).

court could appoint a guardian for the person or the estate of any incompetent state resident.[27] In 1960, section 30-10-02 of the Century Code defined an incompetent person as a minor without a legal guardian, a habitual drunkard who was incompetent to manage his property, a spendthrift, or a person of unsound mind or other mental incapacity or otherwise incompetent to manage his property.[28] The statute, however, failed to define the terms habitual drunkard, spendthrift, unsound mind, or to specify the degree of incompetence required to render persons unable to manage property or care for themselves.[29]

This lack of definition permitted the county court unlimited discretion in determining whether or not to appoint a guardian.[30] The guardianship proceeding was initiated by the filing of a petition in a county court.[31] The alleged incompetent was served a citation, giving notice of the filing and the date of the hearing on the petition.[32] After an informal hearing, which the attendance of the alleged incompetent was not required, the court could appoint a guardian if it determined that an appointment was either necessary or convenient.[33] Furthermore, the statutes did not require a medical evaluation or other evidence demonstrating that the proposed ward was actually incompetent.[34] The court, in its discretion, could appoint a guardian ad litem.[35] As distinguished from the UPC, the Century Code established no standard of proof for determining whether a person was incompetent.[36]

This statutory scheme permitted, in theory at least, a person who resided with the alleged incompetent to secure an appointment as guardian by merely filing a petition asserting that the proposed ward was incompetent.[37] Since the North Dakota Rules of Civil Procedure allowed substitute service of the notice to a competent adult residing at the same address as the alleged incompetent,[38] it

27. *See* N.D. CENT. CODE § 30-10-02 (1960) (repealed 1973).

28. *Id.*

29. *See id.* in the case of *In re* Thoreson's Guardianship, 82 N.D. 101, 4 N.W.2d 822 (1942), the court suggested that while physical incapacity is a factor to be considered in determining incompetency, it is not a true measure of incompetency. *Id.* at 106, 4 N.W.2d at 824. Later, in *In re* Guardianship of Frank, 137 N.W.2d 218 (N.D. 1965), the court affirmed a finding of competency even though the prospective ward's I.Q. was only 67 due to advancing age. *Id.* at 221.

30. *See generally* N.D. CENT. CODE ch. 30-10 (1960) (repealed 1973).

31. *See id.* § 30-10-05.

32. *Id.*

33. *Id.*

34. *See id.* ch. 30-10.

35. *Id.* § 30-10-24.

36. *Compare* N.D. CENT. CODE ch. 30-10 (1960) (repealed 1973) *with id.* ch. 30.1-28 (1976 & Supp. 1983). North Dakota courts have permitted a finding of incompetence based upon a preponderance of the evidence. *See In re* Thoreson's Guardianship, 82 N.D. 101, 104, 4 N.W.2d 822, 825 (1942).

37. N.D. CENT. CODE § 30-10-05 (1960) (repealed 1973).

38. N.D.R. CIV. P. 5(b) (1960) (amended 1976, 1977, 1979 & 1983).

was possible to satisfy the statutory notice requirements and secure appointment as a full guardian of both the ward's person and property without ever actually notifying the ward.[39] Once adjudicated incompetent, it was, and still is, difficult for a ward to terminate the guardianship since a presumption of incapacity prevails.[40]

The pre-1973 guardianship statute also permitted the appointment of a guardian for the estate of nonresidents.[41] The statute provided that one interested in the estate of the alleged incompetent could file a petition in the court of the county in which the estate was located.[42] After issuing a citation to all interested parties and conducting a hearing, which the presence of the alleged incompetent was not required, the court could appoint a guardian of the estate even though the only evidence before the court was the unsupported petition of a person whose interests may have conflicted with those of the ward.[43] Another provision allowed the summary appointment of a guardian for an estate when the value of the property did not exceed five hundred dollars or include real estate.[44]

The potential for abuse is apparent. The lack of adequate procedural protection is perhaps understandable, however, given the belief that guardianship is a benevolent proceeding instituted for the protection of the alleged incompetent. Nevertheless, one should remember that guardianship may strip individuals of their right to make personal decisions under the facade of protecting them.[45]

B. GUARDIANSHIP UNDER THE UNIFORM PROBATE CODE IN NORTH DAKOTA

In 1973, North Dakota adopted the Uniform Probate Code (UPC).[46] Article V of the UPC divides guardianship into two parts:

39. *Id.*

40. Goetz v. Gunsch, 80 N.W.2d 548, 552 (N.D. 1956) (the presumption of incapacity prevails in absence of a showing of restoration to capacity).

41. N.D. CENT. CODE § 30-10-22 (1960) (repealed 1973).

42. *Id.*

43. *Id.* It is readily apparent that the primary concern of North Dakota's pre-1973 guardianship statute was the protection of the incompetent's property. Historically, in both England and the United States, a concern to preserve the finances and estate of incompetents was the motive that prompted local authorities to intervene in the affairs of those considered incompetent or insane. Mitchell, *supra* note 11, at 1409-10.

44. *See* N.D. CENT. CODE § 30-10-25 (1960) (repealed 1973).

45. Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from Their Zealous Protectors*, 56 CHI. KENT L. REV. 1087, 1088-91 (1980). As Justice Brandeis once said: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

46. *See* Uniform Probate Code Act, ch. 257, 1973 N.D. Sess. Laws 627 (codified as amended at

guardianship, provisions for protecting the person;[47] and conservatorship, provisions for protecting the estate.[48] The primary innovations of the UPC were the separation of guardianship of the person and conservatorship of estates and property,[49] improved due process provisions,[50] and improved powers of supervising courts.[51] Nevertheless, the UPC, like its precursors, reflects greater concern for property than the welfare of the person.[52] For instance, the powers of a conservator are much more detailed and specific than the powers of a guardian.[53] Article V of the UPC also provides for a durable power of attorney that does not terminate on the disability or incompetence of the principal.[54] In addition, article V contains separate provisions for guardianships of minors and mental incompetents.[55]

Chapter 30.1-29 of the Century Code offers a system of protective proceedings designed to allow the management of substantial estates by a court appointed conservator.[56] The definition of disability, which permits the appointment of a

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N.D. CENT. CODE tit. 30.1 (1976 & Supp. 1983) (since North Dakota adopted the entire Uniform Probate Code in 1973 but not all of the subsequent amendments to the Uniform Act, all references hereinafter to the UPC are cited only to the Century Code unless the Century Code did not adopt a certain amendment).

47. *See* N.D. CENT. CODE chs. 30.1-27 (guardians of minors); 30.1-28 (guardians of incapacitated persons).

48. *See id.* ch. 30.1-29 (protection of property of persons under disability and minors).

49. The UPC provides a system of protective proceedings, including conservatorship, to provide for the management of property for persons unable to manage their own property. *See* N.D. CENT. CODE ch. 30.1-29 (1976 & Supp. 1983).

50. *Compare* N.D. CENT. CODE § 30-10-05 (1960) (repealed 1973) *with id.* § 30.1-28-03 (Supp. 1983). The Uniform Probate Code provides for appointment of a guardian ad litem to represent the proposed ward. Section 30.1-28-09 now provides that waiver of notice by the proposed ward is not effective unless the proposed ward actually attends the hearing or his waiver is confirmed by the court-appointed visitor. *See id.* § 30.1-28-09 (1976).

51. *See id* § 30.1-28-13(1) (Supp. 1983). Section 30.1-28-13(1) provides for concurrent jurisdiction between the court in the county where the ward resides and the court that made the guardianship appointment. *Id.* The pre-1973 guardianship statute gave exclusive jurisdiction to the court of appointment in any proceedings subsequent to appointment. *See id.* § 30-14-04 (1960) (repealed 1973). The Uniform Probate Code, however, eliminated the mandatory reporting requirement of the pre-1973 statute in cases in which the appraised value of the ward's estate exceeded $500 in value. *Compare* N.D. CENT. CODE § 30-14-10 (1960) (repealed 1973) *with id.* § 30.1-29-19 (1976).

52. *See* Mitchell, *supra* note 11, at 1435-36. Mitchell intimates that although most petitions are filed with the stated purpose to prevent waste of the alleged incompetent's estate, most petitions are actually filed to protect the petitioner's own interests. *Id.*

53. *Compare* N.D. CENT. CODE §§ 30.1-29-24,-25 (1976) (the powers and duties of a conservator) *with id.* § 30.1-28-12 (Supp. 1983) (the powers and duties of a guardian).

54. *See* N.D. CENT. CODE ch. 30.1-30 (1976). Normally, a power of attorney expires upon the death, disability, or incompetence of the principal provided that the attorney in fact or agent has knowledge or notice of the expiration. *Id.* § 30.1-30-02 (1). If a power of attorney is to extend beyond death, disability, or incompetence of the principal, the document designating another his attorney in fact or agent must explicitly provide for such an occurrence. *See id.* § 30.1-30-01.

55. *Id.* chs. 30.1-27 (guardians of minors); 30.1-28 (guardians of incapacitated persons).

56. *See id.* ch. 30.1-29 (1976 & Supp. 1983). Chapter 30.1-29 provides for the appointment of a conservator to manage the property and financial affairs of a person who is not incompetent, yet is unable to manage his property and funds. *See id.* §§ 30.1-29-01 (editorial board comment); 30.1-28-04 (editorial board comment). The chapter also provides for the authorization of other protective arrangements without the appointment of a full conservator. *See id.* § 30.1-29-09 (1976). Although the UPC includes provisions for the creation of protective arrangements as alternatives to full

conservator or issuance of another protective order, is very broad.[57] In addition to minority, the causes of disability include mental illness, mental deficiency, physical illness or disability, old age, chronic use of drugs or alcohol, confinement, detention by a foreign power, or disappearance.[58] Although this Project focuses primarily on guardianship, rather than conservatorship and other protective arrangements, courts and advocates of incapacited persons can use conservatorships and other protective orders to create less restrictive alternatives to either guardianships or full conservatorships.[59]

Chapter 30.1-28 of the Century Code provides for guardianships of incapacitated persons.[60] Section 30.1-28-01 provides for the testamentary appointment of a guardian by a parent or spouse of an incapacitated person.[61] The Century Code allows a parent or spouse to confer full authority of guardianship on a person designated in the parent's or spouse's will even though the proposed ward has not been adjudicated incapacitated and found to need a guardian.[62] A testamentary appointment becomes effective when, after giving seven days' notice to the proposed ward, the person designated as guardian files acceptance of appointment in the court in which the will is probated.[63] Only the proposed ward's written objection, filed with the court in which the will was probated, terminates the testamentary appointment.[64] The

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conservatorship, there is scant evidence that courts have made use of less restrictive alternatives. *See* Note, *Limited Guardianship for the Mentally Retarded,* 8 N.M.L. REV. 231 (1978).

57. *See* N.D. CENT. CODE § 31.1-01-06(10) (defines disability as cause for a protective order). "Protective proceedings" is a generic term used in the UPC to describe proceedings for the appointment of conservators or to obtain protective orders. *See id.* § 30.1-29-01.

58. *See id.* § 30.1-29-01.

59. Note, *supra* note 56, at 237-39.

60. *See* N.D. CENT. CODE ch. 30.1-28 (1976 & Supp. 1983). The UPC uses the word "incapacitated" rather than "incompetent." See *supra* note 17 and accompanying text for a definition of "incapacity."

61. N.D. CENT. CODE § 30.1-28-01 (1976). The pre-1973 guardianship statute also permitted a parent to appoint a guardian by will or deed; however, it uses the word "child" rather than "incapacitated person." *See id.* § 30-10-01 (1960) (repealed 1973). It is therefore unclear whether the statute would have permitted the testamentary appointment of a guardian for an adult child.

62. N.D. CENT. CODE § 30.1-28-01(1), (2) (1976). The statute permits a testamentary appointment of a guardian; apparently relying on the unwritten assumption that neither a spouse nor a parent acts contrary to the best interests of the spouse or child. In the analogous area of civil commitment, the Colorado Supreme Court considered a challenge to Colorado's statutory scheme permitting a minor to be admitted to a state hospital against his will but with the consent of a parent or legal guardian. P.F. v. Walsh, ____ Colo. ____, 648 P.2d 1067 (1982). The Colorado Supreme Court declared the statutory procedure unconstitutional as a violation of due process since it contained no admission standard. *Id.* at ____, 648 P.2d at 1071-72. The court distinguished Colorado's commitment scheme from the Georgia procedure approved by the United States Supreme Court in Parham v. J.R., 442 U.S. 584 (1979). The distinguishing feature was that Colorado's scheme did not include statutory admission standards that could be applied by the hospital staff to determine whether to accept a minor for treatment when admitted by his parents or legal guardian. *Walsh,* ____Colo. at ____, 648 P.2d at 1071.

63. N.D. CENT. CODE § 30.1-28-01(1), (2) (1976).

64. *Id.* § 30.1-28-01(4).

editorial board comment to the UPC suggests that if there is any doubt concerning the actual incapacity of the proposed ward the testamentary appointee should follow the procedure for a court appointment.[65] This protection, however, is inadequate when balanced against the fundamental rights of the ward that are at stake when a guardian is appointed.[66]

The UPC's definition of "incapacity" cuts guardianship from its traditional moorings to functional competence.[67] The pre-1973 statute generally required the court to focus on the actual behavior of the alleged incompetent in determining whether the proposed ward was able to care for himself or to manage his own property.[68] Although the pre-1973 statute did single out habitual drunkards and spendthrifts for special attention, its primary emphasis was on the proposed ward's functional competence.[69] The UPC's definition of "incapacity," however, directs the attention of the court to a list of causes.[70] This list of causes not only misdirects the attention of the court; it is also unnecessary.[71] The cause of the proposed ward's disability is irrelevant to the determination of whether he actually needs a guardian or a conservator.[72] The need for the appointment of either a guardian or

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65. *Id.* § 30.1-28-01 (editorial board comment).

66. Mathews v. Eldridge, 424 U.S. 319 (1976). Although due process is a flexible concept and not all situations call for the same degree of procedural safeguards, the degree of due process required by the Constitution depends upon a balancing of the individual's interest and the governmental interest at issue in a particular situation, a consideration of the risk of an erroneous deprivation of the individual interest by the procedures used, and the value of additional procedural safeguards. *Id.* at 334.

67. See *supra* note 17 and accompanying text for a definition of "incapacity." Traditionally, the criteria for the appointment of a guardian was the ward's inability to care for his person or property. *See* Goetz v. Gunsch, 80 N.W.2d 548, 552 (N.D. 1956) (court may appoint a guardian of any person who "is of unsound mind, or from any cause mentally or otherwise incompetent to manage his property").

68. *See* N.D. CENT. CODE § 30-10-02 (1960) (repealed 1973).

69. *Id.*

70. *Id.* § 30.1-26-01(1)(1976). Section 30.1-26-01 (1) provides:

> '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.

Id.

71. Mitchell, *supra* note 5, at 456-57. The list of causes in the statutory definition of incapacity diverts the attention of the court from the real issue of whether the allegedly incapacitated person is able to provide essential care for himself. Furthermore, the interest of the state in securing guardians for those who have demonstrated a functional incompetence would not be hampered by the deletion of the list of causes from the statutory definition of incapacity. *Id.*

72. *See* N.D. CENT. CODE §§ 30.1-26-01, -29-06 (1976). The focal point of the judicial inquiry in a guardianship proceeding should be the individual's ability to make decisions regarding his basic needs. Horstman, *supra* note 4, at 263.

Read literally, the definition of incapacity found in the UPC imposes guardianships and conservatorships on the basis of the allegedly incompetent person's status, as mentally ill, physically disabled, drug addict, alcoholic, or aged and the court's subjective determination that the proposed

conservator can and should be determined by examining the recent past behavior of the proposed ward,[73] not his status as elderly, mentally ill, physically disabled, or alcoholic. Only behavior that actually endangers the life, health, or personal support of the proposed ward justifies the involuntary imposition of a guardianship or conservatorship.[74]

The second step in determining whether the proposed ward is incapacitated requires the court to determine whether the person is able to make or to communicate "responsible decisions concerning his person."[75] The statute, however, does not define "responsible decisions."[76] Consequently, due to the vagueness of the term, a determination of whether a proposed ward, who can be labeled with one of the specified suspect conditions, is capable of making "responsible decisions" concerning his person is left to the discretion of the court.[77]

Despite the vague statutory standards of the UPC, it is largely an improvement over the pre-1973 guardianship statute. For instance, the UPC requires the appointment of a physician to examine the proposed ward and a visitor to interview both the proposed ward and the person seeking appointment as the guardian.[78] A visitor is defined as "a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings."[79] The notice provisions of the UPC partially remedy the defects of the pre-1973 statute.[80] Under the UPC, a waiver of

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ward is unable to make "responsible decisions." *See* N.D. CENT. CODE §§ 30.1-26-01, -29-06(10) (1976).

73. *See* N.D. CENT. CODE ch. 30.1-28 (1976 & Supp. 1983). The statute does not require that the allegedly incapacitated person have actually demonstrated his inability to care for himself. *Id.* The potential for abuse is enhanced by the absence of standards for determining whether the alleged incompetent is able to make "responsible decisions concerning his person." *See id.* § 30.1-26-01 (1976).

74. Sherman, *supra* note 8, at 358. In contrast to civil commitment cases in which the state also has a policy interest in confining those mentally ill persons who are dangerous, the only purpose of guardianship is to further the well-being of the ward. *Id.*

75. N.D. CENT. CODE § 30.1-26-01(1) (1976). See *supra* note 70 for the text of § 30.1-26-01(1).

76. N.D. CENT. CODE § 30.1-26-01 (1976). Using the "responsible decisions" standard, the danger exists that a court may appoint a guardian if it disagrees with the substance of the proposed ward's decisions. Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 78 (1975). Thus, a judge's decision may be based upon what he would do in a similar situation. *Id.* This is particularly important in cases involving the appointment of a guardian for the purpose of consenting to medical treatment, which the proposed ward has refused. *Id.* at 78-80. This becomes apparent if one considers that the proposed ward's refusal to submit to the needed medical procedure may be viewed as evidence of incompetence. *Id.*

77. *In re* Boyer, 636 P.2d 1085, 1089 (Utah 1981). The Supreme Court of Utah recently rejected the "responsible decisions" standard and concluded that a guardian may be appointed only when it is proven by clear and convincing evidence that the proposed ward's health or safety is endangered. *Id.* at 1085, 1092.

78. N.D. CENT. CODE § 30.1-28-03(2) (Supp. 1983).

79. *Id.* § 30.1-28-08 (1976).

80. *Id.* § 30.1-28-09.

notice by the proposed ward is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the court appointed visitor.[81] Additional improvements, however, are still necessary. For example, the content of the notice is not specified and the UPC's notice provision specifically provides that "representation of the alleged incapacitated person by a guardian ad litem is not necessary" for an alleged incompetent person to waive his right to notice.[82] Whether this procedure for waiver of notice satisfies due process requirements is open to question since the guardianship petition alleges that the person is not competent to make responsible decisions concerning his personal welfare.[83]

The UPC does provide for the appointment of a guardian ad litem who may be either an attorney or an "appropriate official."[84] Although the appointment of a guardian ad litem is mandatory if the proposed ward has not retained counsel, there is no requirement that the proposed ward be represented by appointed counsel if the proposed ward does not agree with a position taken by the court appointed guardian ad litem.[85] The proposed ward has the right to be represented by counsel but there is no requirement for representation by counsel if the proposed ward cannot afford to hire his own attorney since the court can appoint an "appropriate official."[86] The traditional role of a guardian ad litem is to protect and promote the best interests of the

81. *Id.* § 30.1-28-09(2).

82. *Id.* The UPC notice provision requires only that the proposed ward be given notice of the hearing. *See id.* § 30.1-28-09. Furthermore, the UPC terms "incapacitated person," "protective proceeding," and "disability," are of doubtful value in a notice to alert proposed wards to the serious legal and personal consequences of a guardianship hearing.

83. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In *Mullane* the United States Supreme Court addressed the question of the constitutional sufficiency of notice and stated the critical due process requirement as follows: "[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. In a later case in which a "known incompetent" was a defendant in a foreclosure of a tax lien case, the Court concluded that. even though otherwise valid, the notice requirement was not sufficient for a person who was known to lack the ability to understand the nature of the proceedings. Covey v. Town of Somers, 351 U.S. 141, 146 (1956). *But see* Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978). In *Rud,* the plaintiff attacked the facial constitutionality of the Illinois statutory scheme for guardianship and conservatorship. The plaintiff alleged that the notice was deficient since it did not define the terms "incompetent" or "conservator," state the legal standard used to determine incompetence, and did not point out the legal and practical consequences that would result if the petition were granted. *Id.* at 677. The court found that the notice given the plaintiff was sufficient as a matter of due process to inform him of the nature and consequences of the proceeding. *Id.* The plaintiff, an 81-year-old resident of a nursing home, was served with a summons to appear at a hearing on a petition to appoint a conservator. *Id.* at 676. The plaintiff did not appear at the hearing and no inquiry was made into the reasons for his absence. *Id.* On the basis of the petition and a physician's affidavit that the plaintiff was incapable of managing his person and his estate, he was adjudicated incompetent. *Id.* Whether the decision of the court of appeals was based on the content of the notice, the ability of the plaintiff to comprehend the notice given, or the insufficiency of the plaintiff's complaint, however, is unclear. *Id.* at 678-79.

84. N.D. CENT. CODE § 30.1-28-03(2) (Supp. 1983).

85. *Id.*

86. *Id.*

ward.[87] Consequently, a guardian ad litem may be obligated to act contrary to the expressed desires of the ward and to adopt a position other than the one urged by the ward.[88] Recent amendments to article V of the UPC provide for the mandatory appointment of counsel to represent the proposed ward in a guardianship proceeding.[89] The amendments also grant the court appointed attorney the powers and duties of a guardian ad litem.[90] This change gives the court some flexibility to appoint counsel who would advocate the position urged by his client, and also to impose the duties of a guardian ad litem when the proposed ward is incapable of forming or communicating an independent position.[91]

The adoption of the UPC resulted in other changes in North Dakota's guardianship law. For instance, in proceedings for the removal of a court appointed guardian, the UPC shifted the focus from the behavior of the guardian to the best interests of the ward.[92] Another change was in venue for proceedings subsequent to appointment.[93] The pre-1973 statute limited jurisdiction to the county court that appointed the guardian;[94] the UPC, however, gives the court in the county in which the ward resides concurrent jurisdiction with the appointing court in any subsequent proceedings relating to the guardianship.[95]

C. THE 1983 LIMITED GUARDIANSHIP AMENDMENTS

During the 1981 legislative session, the North Dakota Legislature approved a study resolution on guardianship, which was subsequently assigned to the interim Judiciary Committee.[96]

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87. *See id.* ch. 28-03 (1976 & Supp. 1983). *See also* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966); Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1542 (1975).

88. *See* Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and a Proposal*, 45 MISS. L.J. 43, 48 (1974). Merely appointing counsel to represent the proposed ward may not result in an adversary proceeding in instances where the mental competence of the attorney's client has been challenged. *Id.*

89. *See* N.D. CENT. CODE § 30.1-28-03(2) (Supp. 1983). Section 30.1-28-03(2) provides that upon the filing of a petition, the court shall appoint an attorney or appropriate official to represent the allegedly incapacitated individual unless that person has his own counsel. *Id.*

90. *See id.*

91. *Id.*

92. *See id.* § 30.1-28-07(1) (1976).

93. *Id.* § 30.1-28-13(1) (1976 & Supp. 1983). Section 30.1-28-13(1) provides in relevant part that "[t]he court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting, and other proceedings relating to the guardianship. . . ." *Id.*

94. *See id.* § 30-10-20 (1960) (repealed 1973).

95. *Id.* § 30.1-28-13(1) (1976 & Supp. 1983).

96. *Limited Guardianship, 1983: Hearings on H.B. 1057 Before the Senate Comm. on Social Services and Veteran's Affairs*, 48th N.D. Leg. (1983) (statement of Barbara Braun, Director of the Protection and Advocacy Project).

The immediate concern of state officials was the section of the North Dakota Century Code, which after ninety days designated the superintendent of the Grafton State School the guardian of all persons admitted to the institution unless the parents of those persons notified him in writing that they wished to retain their guardianship.[97] In addition to the constitutional defects of this provision, there is an inherent conflict of interest when the provider of services is also the guardian.[98] State officials also expressed concern for the potential liability of the superintendent under federal law.[99]

Additional impetus for new legislation was provided when the Association for Retarded Citizens filed a lawsuit in United States District Court on behalf of six Grafton State School residents.[100] The district court ordered the State to cut the population of the Grafton State School and its San Haven unit and to initiate a statewide service delivery system for the mentally retarded, including training and community based housing.[101] Although most of the testimony in support of the legislation focused on the delivery of services to the developmentally disabled, the limited guardianship amendments apply to all guardianship proceedings.[102]

The limited guardianship bill[103] can be roughly divided into three parts: first, the statutory guardianship of the superintendent of the Grafton State School;[104] second, the provisions relating only to services for developmentally disabled persons;[105] and third, the limited guardianship mandate.[106] Each division of the bill will be discussed separately below.

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97. *Id.*
98. *Id.*
99. *Id.*
100. Association for Retarded Citizens v. Olson, 561 F. Supp. 473 (D.N.D. 1982). This class action suit was initiated by six mentally retarded residents of North Dakota and the Association for Retarded Citizens of North Dakota. *Id.* at 475. The plaintiffs claimed that the defendants violated the due process clause of the fourteenth amendment to the United States Constitution by failing to provide a sufficient program of habilitation. *Id.* at 471. The plaintiffs also alleged that due process mandates that the defendants "develop less restrictive, community based alternatives for the care and treatment of voluntarily and involuntarily committed mentally retarded persons." *Id.* In addition, the plaintiffs alleged that both rights were guaranteed by chapter 25-01.2 of the North Dakota Century Code. *Id. See* N.D. CENT. CODE ch. 25-01.2 (Supp. 1983). Finally, the plaintiffs contended that certain conditions existed at the institutions that constituted cruel and unusual punishment in violation of the eighth amendment and the due process clause of the fourteenth amendment to the United States Constitution. 561 F. Supp. at 471.
101. 561 F. Supp. at 494-95.
102. Limited Guardianship Act, ch. 313, 1983 N.D. Sess. Laws 764, 768.
103. *Id.*
104. *Id.* at 764.
105. *Id.*
106. *Id.*

1. Statutory Guardianship of the Superintendent of the Grafton State School.

The Limited Guardianship Act amended section 25-04-13.1 of the North Dakota Century Code, which provided that the superintendent of the Grafton School became the guardian of any resident who did not have a court appointed guardian or whose parents had not indicated a desire to retain their natural guardianships.[107] The amendments directed the superintendent of the Grafton State School to divest himself of the statutory guardianships during the two year period from July 1, 1983, to July 1, 1985.[108] The Act provides two methods for this divestiture: first, by renunciation when the superintendent decides that a guardian is not necessary; or second, through seeking a court appointed guardian when guardianship is necessary.[109]

The qualifying clauses "when guardianship is not necessary" and "when guardianship is necessary" in section 1 of the Limited Guardianship Act indicate an intent that the superintendent weigh and consider the need of a resident for a guardian.[110] One of the best indicators of a resident's need for guardianship is the individualized habilitation plan (IHP)[111] since section 2 of the Act requires that the IHP "[s]tate whether the developmentally disabled person appears to need a guardian and determine the type of protection needed by the individual based on the individual's actual mental and adaptive limitations and other conditions which may warrant the appointment of a guardian."[112] Furthermore, the section of the Century Code that provides for statutory guardianship by the superintendent states that "the guardianship provided for by this section is in lieu of court appointment . . . but carries the same powers and duties."[113] Additionally, the Act itself provides that "[t]he guardianship provided by this section carries the same duties and powers as court appointed guardians provided for in chapters 30.1-26 through 30.1-30 [Article V of the Uniform

107. N.D. CENT. CODE § 25-04-13.1(1) (1976) (amended 1983).

108. Limited Guardianship Act, ch. 313, 1983 N.D. Sess. Laws 764, 765-67 (codified as amended at N.D. Cent. Code § 25-04-13.1 (1) (Supp. 1983)).

109. N.D. CENT. CODE § 25-04-13.1(1) (Supp. 1983).

110. *See* Limited guardianship Act, ch. 313, 1983 N.D. Sess. Laws 764, 764.

111. The term "individual habilitation plan" is not defined in the Century Code. *See* N.D. CENT. CODE ch. 25-01.2 (Supp. 1983). "Habilitation" is the term of art generally used to refer to that education, training, and care required by developmentally disabled persons to reach their maximum development. *See, e.g.*, Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1978), *modified*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

112. N.D. CENT. CODE § 25-01.2-14 (7) (Supp. 1983).

113. *Id.* § 25-04-13.1 (1977) (amended 1983).

Probate Code]."[114] Thus, an evaluation of the resident's need for a guardian as a part of his IHP should be a prerequisite to any action by the superintendent to renounce or transfer a guardianship. In addition, when the superintendent is the current guardian of a resident, he has an obligation to act in the best interests of his ward.[115]

The procedure provided in the Act suggests that the legislature did not intend a pell-mell rush by the superintendent of the Grafton State School to divest himself of his statutory guardianships but rather a procedure in which the superintendent carefully evaluates the needs of each resident.[116] Finally, as the present guardian of a number of residents of the Grafton State School, the superintendent has a fiduciary obligation to act in their best interests.[117]

2. Services for Developmentally Disabled Persons

The Limited Guardianship Act amended the statutory requirements for the IHP by requiring that the IHP state whether the developmentally disabled person needs a guardian and determine the degree of protection the person needs.[118] The assessment of need for a guardian is based upon the "individual's actual mental and adaptive limitations and other conditions which may warrant the appointment of a guardian."[119] The Act also provides that any member of the IHP team may petition for the finding of incapacity and the appointment of a guardian or notify an interested party to file such a petition.[120] Furthermore, discussions by the House Appropriations Committee of the legislature indicated that any member of the IHP team could file the petition even though the other IHP team members disagreed.[121]

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114. *Id.* § 25-04-13.1 (Supp. 1983).

115. *Id.* § 30.1-28-07 (1976). Section 30.1-28-07 provides as follows: "On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if *in the best interests of the ward.*" *Id.* (emphasis added). Section 30.1-27-06 states, "This court may appoint as guardian any person whose appointment would be in the *best interests of the minor.*" *Id.* § 30.1-27-06 (emphasis added).

116. *Id.* § 25-04-13.1 (Supp. 1983). The Act provides for a two-year period during which the superintendent may renounce after 30 days' notice in writing to the resident's parent, advocate, and case manager, and for an evaluation of the resident's need for a guardian by the resident's IHP team. *Id.* § 25-01.2-14.

117. *See* N.D. CENT. CODE §§ 25-04-13.1 (1976); 30.1-28-12 (Supp. 1983). *See also* Thompson v. First Nat. Bank, 269 N.W.2d 763 (N.D. 1978). In *Thompson* the North Dakota Supreme Court wrote, "A guardian or conservator is a fiduciary. . . . As such, he owes a very high degree of good faith to the ward, the estate of the ward, and other persons interested in the estate." *Id.* at 764 (citations omitted).

118. *See* N.D. CENT. CODE § 25-01.2-14 (Supp. 1983).

119. *Id.*

120. *Id.*

121. *Limited Guardianship, 1983: Hearings on H.B. 1057 Before the House Comm. on Appropriations*, 48th N.D. Leg. (1983).

The statute already required that the IHP be "reviewed and updated from time to time, but no less than annually."[122] Thus, the need of each developmentally disabled person for a guardian will be closely monitored.[123]

To facilitate the use of guardianships to help developmentally disabled persons function in community settings, the Limited Guardianship Act changes those persons who may be appointed guardian and the priority for appointment.[124] The Act provides that a designated person from a suitable institution, agency, or nonprofit home may be appointed guardian of an incapacitated person.[125] The Act, however, specifically prohibits the appointment of the institution, agency, or nonprofit home providing the care and custody of the ward.[126] Nevertheless, if no one else can be found to serve as the guardian, the court may appoint an employee of an agency, institution, or nonprofit home that provides the ward care and custody after making a specific finding that the appointment does not present a substantial risk of a conflict of interest.[127]

The Act adds two groups to the priority list for appointment as guardian.[128] If the incapacitated person's spouse, adult children, parent, or any relative with whom he has resided for more than six months prior to the filing of the petition does not desire to be appointed guardian, the court may appoint any relative or friend who has maintained significant contacts with the incapacitated person or a designated person from a volunteer agency.[129] Assuming that no one else can be found to serve as the guardian, the next level of priority permits the appointment of a designated employee of any appropriate government agency, including county social service agencies, when that employee does not provide direct care to the imcompetent person and the court makes a specific finding that the appointment presents no substantial risk of a conflict of interest.[130] An amendment was introduced to allow the

122. N.D. CENT. CODE § 25-01.2-14(2) (Supp. 1983).

123. *Id.* § 30.1-28-12. There is no mandatory requirement for judicial review of guardianship in North Dakota; however, the court may require a guardian to make periodic reports concerning the condition of his ward. *Id.* Some form of periodic review of involuntary guardianships may be required. O'Connor v. Donaldson, 422 U.S. 563 (1975) (periodic review is necessary to support continuing commitment for mental illness); *see also* NATIONAL SENIOR CITIZENS LAW CENTER, *Protective Services and Guardianship; Legal Services and the Role of the Advocate in Representing Older Persons* 43 (1982).

124. *See* N.D. CENT. CODE § 30.1-28-11 (Supp. 1983).

125. *Id.* § 30.1-28-11(1).

126. *Id.*

127. *Id.*

128. *Id.* § 30.1-28-11(2).

129. *Id.* § 30.1-28-11(2)(a)-(e).

130. *Id.* § 30.1-28-11(2)(f). This would, however, put the state back in the guardianship business. One authority has suggested that the state should encourage a private charitable agency to

court to pass over a person having priority and appoint a person having a lower priority when the court determined that it was in the best interests of the incapacitated person.[131] The legislature, however, rejected the amendment.[132]

Another provision of the Act is of only temporary significance because it requires the superintendent of the Grafton State School to divest himself of statutory guardianships by July 1, 1985.[133] When the petitioner makes a request on behalf of a proposed ward who is or was formerly a ward of the superintendent of the Grafton State School, the state's attorney of the county in which the petition is filed must handle the court proceeding for the petitioner.[134]

The petitioner may have a choice of venue.[135] In proceedings to appoint a guardian, venue lies in the county in which the proposed ward resides or is present.[136] This section provides that the petition can be filed in the county in which the mental health board that ordered the person admitted to the institution sits.[137] Since many of the residents of the Grafton State School were admitted by warrants for commitment issued by county boards, the petition can also be filed in that county.[138] Although the county in which the proposed ward is present may be the most convenient for the state and, in terms of physical access, for the ward; it may neither be the most convenient for the proposed guardian nor the most appropriate for the proposed ward.[139] In addition, the county

develop a guardianship program and the state agency could then maintain a supervisory role. Address by Hofstra Law School Professor John J. Regan, *North Dakota Department of Human Services Workshop* (September 20, 1983).

131. *Limited Guardianship, 1983: Hearings on H.B. 1057 Before the Senate Comm. on Social Services and Veteran's Affairs,* 48th N.D. Leg. (1983) (statement of Beth Wosick, Assistant Director, Mental Health Ass'n). The amendment read as follows: "With respect to persons having equal priority, the court shall select the one it deems best qualified to serve. The court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having a lower priority." *Id.*

132. *See* Limited Guardianship Act, ch. 313, 1983 N.D. Sess. Laws 769-70.

133. N.D. CENT. CODE § 25-04-13.1 (Supp. 1983). Section 25-04-13.1 provides that the superintendent of the Grafton State School must divest himself of statutory guardianships by July 1, 1985. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* State statistics reveal the following: 678 Grafton residents were admitted by warrant and 189 residents of San Haven were admitted by warrant. Defendant's Answer to Interrogatories at 6, Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473 (D.N.D. 1982). Until 1957, admissions to the Grafton State School were made by warrant. Section 25-04-05 of the North Dakota Revised Code of 1943 provided that commitments to the State School were to be conducted in the same manner as commitments to the State Hospital. N.D. REV. CODE § 25-0405 (1944) (amended 1967). Section 25-0301 of the Revised Code established insanity boards in each county, which were comprised of the county judges, a physician, and a practicing attorney. *Id.* § 25-0301 (amended 1957). Warrants for commitment were issued pursuant to Section 25-0317 of the Revised Code. *Id.* § 25-0312 (amended 1957). The county insanity boards later became county mental health boards. *Compare* N.D. REV. CODE § 25-0301 (1943) (amended 1957) *with id.* § 25-0311 (Supp. 1957) (repealed 1977).

139. Letter from Mary Deutsch Schneider, Ass'n. for Retarded Citizens Co-Counsel and Staff Attorney with Legal Assistance of North Dakota, to Melvin Webster (June 24, 1983) (discussing

in which a developmentally disabled person is present may not be the county of his legal residence.[140] For residents of Grafton State School, Walsh County is the county of actual residence; nevertheless, it may not provide the most appropriate venue.[141] The touchstone in determining venue is the protection of the proposed ward's rights and best interests.[142]

3. The Limited Guardianship Provisions

Arguably, even prior to the enactment of the limited guardianship amendments, the UPC's guardianship statute would have permitted a court to adopt the individualized approach to guardianship mandated by the new law.[143] Now there is no question. Limited guardianship is a part of North Dakota's general guardianship statute; and guardianship in North Dakota is no longer an all-or-nothing proposition.[144]

In addition to expanding the definitions of "conservator"[145] and "guardian"[146] to include limited conservators and limited guardians, the Act directs the court to exercise its authority consistent with the "maximum self-reliance and independence of the incapacitated person and make appointment and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure."[147] This requires the court to make item-specific determinations and that the powers of the guardian be tailored to the actual limitations of the ward.[148] Since the disabilities of an incapacitated person may diminish, the Act permits the court to limit the powers of the guardianship at the time of appointment or at a later date.[149]

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venue in guardianship proceedings). The convenience of the guardian, or the petitioner, should not be given precedence over the rights of the ward; nevertheless, it is a factor to be considered if the county of commitment offers convenience to the family of the resident, the proposed ward, an unbiased visitor, or is the proposed area of community placement. *Id.*

140. Determining the legal residence of a mentally retarded person can be difficult. Complicating factors such as minority, involuntary commitment, voluntary commitment, voluntary admission to a residential care facility, placement in a private facility, and the existence of a court appointed guardian should be carefully considered.

141. Letter from Mary Deutsch Schneider, Ass'n. for Retarded Citizens Co-Counsel and Staff Attorney with Legal Assistance of North Dakota, to Melvin Webster (June 24, 1983) (discussing venue in guardianship proceedings).

142. *Id. Cf.* N.D. CENT. CODE § 30.1-02-03 (3) (1976). Section 30.1-02-03 (3) provides in part: "[when] in the interest of justice a proceeding or a file should be located in another court of this state, the court making the findings may transfer the proceeding or file to [the] other court." *Id.*

143. *See* Note, *Limited Guardianship for the Mentally Retarded*, 8 N.M.L. REV. 231, 235-37 (1978).

144. *See* Limited Guardianship Act, ch. 313, 1983 N.D. Sess. Laws 764, 769; N.D. CENT. CODE § 30.1-28-04(1) (Supp. 1983).

145. N.D. CENT. CODE § 30.1-01-06(7) (Supp. 1983).

146. *Id.* § 30.1-01-06(17).

147. *Id.* §§ 30.1-28-04(1) (limited guardianship); 30.1-29-08 (1) (limited conservatorship).

148. *Id.* §§ 30.1-28-04, -29-08.

149. *Id.* § 30.1-28-04(3).

The Act specifically requires the court to determine whether the proposed ward is mentally incompetent and thus not qualified to vote.[150] The limited guardianship concept recognizes degrees of incapacity or incompetence and requires the court to match the guardian's responsibilities with the ward's actual mental and adaptive limitations.[151] Thus, some individuals under limited guardianships may be capable of making rational voting decisions and may retain their right to vote.[152]

III. THE GUARDIANSHIP PROCESS

A. THE DEFINITION OF INCAPACITY

The UPC standard of incapacity, which was adopted by North Dakota, authorizes the appointment of a guardian for any incapacitated person.[153] An "incapacitated person" is defined as follows:

> [A]ny 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.*[154]

The statutory definition has two components: the first describes the person's disability, his physical or mental condition; the second identifies the disability resulting from his physical or mental condition.[155] The definition also includes a catch-all category of "any other cause (except minority)."[156] Thus, a typical petition might allege, for instance, that the person is impaired due to advanced age and lacks the capacity to make or communicate responsible decisions concerning his personal welfare.[157]

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150. *Id.* § 30.1-28-04(1).

151. *Id.*

152. *Id.* The language of North Dakota's elector's statute is more restrictive than that of the North Dakota Constitution. *Compare* N.D. CONST. art. II, § 2 *with* N.D. CENT. CODE § 16.1-01-04 (1981). The language of the constitutional provision controls since the legislature cannot enlarge or diminish the qualifications necessary to entitle one to vote at a constitutional election. Johnson v. Grand Forks County, 16 N.D. 363, 368, 113 N.W. 1071, 1072 (1907).

153. *See* N.D. CENT. CODE § 30.1-26-01(1) (1976). In addition to North Dakota, the following states have adopted the UPC guardianship provisions: Alaska, Arizona, Colorado, Georgia, Hawaii, Idaho, Kansas, Maine, Montana, Nebraska, New Mexico, and Utah.

154. N.D. CENT. CODE § 30.1-26-01(1) (1976) (emphasis added).

155. *See id.*

156. *Id.*

157. *Id.* Since the UPC standard defines an "incapacitated person" to include a person who is impaired from any cause other than minority, the determination that the person is actually

This standard has frequently been criticized for focusing on the status of the proposed ward rather than on the proposed ward's actual conduct.[158] Once a proposed ward is labeled elderly, mentally ill, mentally retarded, physically disabled, a drug addict or alcoholic the court is given virtually unlimited discretion to determine whether the person has the understanding or capacity to make responsible decisions.[159] Therefore, some critics argue that the definition of incapacity is so vague that it denies the allegedly incapacitated person due process.[160] Procedural safeguards have little significance when the standard for determining incapacity is vague.[161] One key to the definition of incapacity is the status component of North Dakota's guardianship statute.[162] If a label such as elderly, mentally ill, or mentally retarded can be attached to the proposed ward, the court's attention is then directed to the functional component, the ability of the proposed ward to make or communicate "responsible decisions."[163] The adjective "responsible" focuses the judicial inquiry on the content of the decision rather than on the ability of the proposed ward to make decisions concerning his personal welfare.[164] Consequently, some commentators have suggested that the criterion of incapacity be more process centered.[165] Stated another way, the court should determine whether the proposed ward is able to provide recognizable reasons for his decision.[166] A commentator has suggested that courts use the "minimum rationality" test, which is often used by courts to determine the constitutional validity of

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incapacitated and needs a guardian depends on the court's evaluation of the proposed ward's ability to make responsible decisions concerning his personal welfare. Significantly, the phrase "responsible decision" is not defined in the statute. *See* N.D. CENT. CODE chs. 30.1-26; 30.1-28 (1976 & Supp. 1983).

158. Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates,* 12 CLEARINGHOUSE REV. 451 (1978).

159. Note, *In re Boyer: Guardianship of Incapacitated Adults in Utah,* UTAH L. REV. 427, 433-34 (1982).

160. Horstman, *supra* note 4, at 225-30. The Supreme Court of Utah recently examined the UPC's definition of incapacity and concluded that it was overly vague since its undefined notion of responsibility allowed the trier of fact to employ its own subjective concept of responsibility when evaluating the proposed ward's ability to make or communicate decisions. *In re* Boyer, 636 P.2d 1085, 1088 (Utah 1981). The Utah court noted that the "responsible decisions" standard of the UPC was overly broad since it permitted a guardian to be appointed for reasons unrelated to any valid state interest. *Id.* The court indicated that the protection of the proposed ward from injury to himself due to his impairment is the basic state interest justifying the appointment of a guardian. *Id.* at 1089. The *Boyer* court construed the "responsible decisions" standard to require that the proposed ward's "decision making process be so impaired that he is unable to care for his safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur." *Id.*

161. Mitchell, *supra* note 158, at 456.

162. *See* N.D. CENT. CODE § 30.1-26-01 (1976).

163. *Id.*

164. *See* Note, *supra* note 159, at 434. The Utah Supreme Court solved this problem by construing "the responsible decisions" standard very narrowly. *Id.*

165. Freedman, *Competence Marginal and Otherwise,* 4 INT'L J. OF L. AND PSYCH. 53 (1981).

166. *Id.*

legislative enactments.[167] Using this test, a court would be required to sustain a proposed ward's decision when the ward provides a recognizable premise for the decision or if the court itself can identify a rational reason for the person's decision.[168]

The problem of what considerations a court should utilize in determining whether a person is incompetent is not susceptible to easy answers. One solution is to require that the proposed ward's ability to decide be so impaired that he is unable to care for his personal safety or to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury might occur.[169] This standard shifts the focus in guardianship proceedings from the content of the proposed ward's decision to evidence of conduct that threatens the vital personal interests of the proposed ward.[170] Under this standard, the cause or source of the person's disability is of little significance; consequently, the implied statutory requirement that the source of incapacity be identified is unnecessary.[171] Other commentators have opposed standards based on either the reasonableness or rationality of a person's decisions and have suggested that if a person can hear a question and respond, his decision should be honored.[172]

Neither the UPC's "responsible decisions" standard, which allows the appointment of a guardian simply because the court disagrees with the substance of the proposed ward's decision, nor the extreme position that any decision should be honored is acceptable.[173] The UPC standard permits the appointment of a full guardian for a mildly retarded woman,[174] while a standard looking

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167. *See* Regan, *supra* note 6 and accompanying text.

168. Regan, *supra* note 6.

169. *In re* Boyer, 636 P.2d 1085, 1089 (Utah 1981).

170. *Id.* at 1088-89.

171. *Id.*

172. Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 78-80 (1975). The right to refuse medical treatment is a particularly difficult problem whether the patient is involuntarily committed or merely a resident of an institution such as a nursing home. Some psychologists argue that the psychiatric patient's refusal of treatment is evidence of the patient's mental illness rather than a valid exercise of civil rights. White & White, *Involuntary Committed Patients' Constitutional Right to Refuse Treatment*, 36 AM. PSYCH. 954, 960 (1981).

173. *See In re* Boyer, 636 P.2d 1085, 1089 (Utah 1981) (incompetency determination can be made only if "putative ward's decision-making is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur"); Northern v. State Dept. of Human Serv., 575 S.W.2d 946, 947 (Tenn. 1978) (capacity was lacking where person lacked understanding about her serious condition and she was thus unable to make a reasoned decision about surgery).

174. 636 P.2d at 1086-89. The court criticized the use of the "responsible decisions" standard because it allowed incompetency to be determined with the use of subjective factors and factors extraneous to any legitimate interest. *Id.* at 1088. The "reasonable decisions" standard would allow a guardian to be appointed for a person who has the capacity to function in a manner acceptable to himself but who makes decisions regarded by some as irresponsible. *Id.*

only to the ability to make a decision regardless of rationality would have prevented the appointment of a guardian for an elderly recluse in danger of dying because of a serious condition of gangrene.[175]

B. PROCEDURAL RIGHTS

Guardianship has traditionally been considered a benevolent action by the petitioner and the state; nevertheless, guardianship strips personal and legal autonomy from the ward and vests it in the court and the court appointed guardian.[176] A declaration of incompetency or incapacity and the appointment of a full guardian reduces the ward to the status of a child under the law.[177] Although the right to control property, to determine where to live, and to consent to medical treatment are at stake, the strict procedural safeguards accorded criminal defendants are not always extended to guardianship proceedings.[178] Under its *parens patriae* power, the state has a legitimate interest in protecting persons who are unable to care for themselves.[179] Consequently, the state also has an interest in not creating too many obstacles in the appointment of guardians.[180]

In the realm of civil proceedings, the requirements of due process depend upon the particular situation and the rights involved.[181] Although the United State Supreme Court has not yet determined what procedural safeguards are necessary in guardianship proceedings, the Court has rejected the criminal-civil distinction in examining the substance of juvenile delinquency proceedings.[182] Its decisions in the areas of juvenile proceedings[183]

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175. Northern v. State Dep't. of Human Serv., 575 S.W.2d 946, 946-47 (Tenn. 1978).

176. *See* N.D. CENT. CODE § 30.1-28-12 (1976 & Supp. 1983). In addition the limited guardianship amendments require the appointing court to make a specific finding to determine whether the incapacitated person is mentally incompetent to vote. *Id.* § 30.1-28-04 (Supp. 1983).

177. *See id.* § 30.1-28-12 (1976 & Supp. 1983). Section 30.1-28-12 reads as follows: "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* except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship." *Id.* (emphasis added). The comment following section 30.1-28-04 also contains the parent-child analogy: "a guardian, having custody, might arrange for a voluntary care arrangement like that which *a parent for a minor and incapacitated child* could establish." *Id.* § 30.1-28-04 (1976) (editorial board comment) (emphasis added).

178. Horstman, *supra* note 4, at 236-37. *See also* N.D. CENT. CODE § 30.1-28-12 (1976 & Supp. 1983).

179. Sherman, *supra* note 8, at 358.

180. *Id. See* Schmidt, *supra* note 2, at 191-92 (discussion of shortage of private guardians for persons who are legally incompetent).

181. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (social security disability benefits); Goss v. Lopez, 419 U.S. 565, 577-79 (1975) (public school suspension); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parole revocation).

182. *In re* Gault, 387 U.S. 1, 49-50 (1967) (due process applies in juvenile delinquency proceedings that may result in commitment to a state institution).

183. *Id.*

and commitment proceedings[184] indicate that certain procedural safeguards must be followed in proceedings when a person could be deprived of either property or liberty. This section will focus on some of the aspects of procedural due process in the context of guardianship proceedings.

1. *Notice*

The UPC requires that notice be served personally on the allegedly incapacitated person, his spouse, and parents if they can be found within the state.[185] Notice to the spouse and parents, if they cannot be located within the state, can be by mail or publication.[186] Notice to the proposed ward must be by personal service and cannot be waived unless the proposed ward attends the guardianship hearing or his waiver of notice is confirmed in an interview with the court appointed visitor.[187] The notice provision also provides that representation of the proposed ward, whom the petitioner alleges is not capable of making responsible decisions concerning his own person, by a guardian ad litem is not necessary for the waiver of notice to be effective.[188]

The general notice provision of the UPC specifies the content of the notice.[189] A copy of the petition is not specifically required; notice of the time and place of hearing satisfies the minimal requirements.[190] The UPC's notice requirement does not alert the allegedly incapacitated person to the serious legal and personal consequences of a hearing on the issues of incapacity, disability, and the appointment of a guardian or conservator and thus, could violate procedural due process due to inadequacy of notice.[191]

In *Dale v. Hahn*[192] the Court of Appeals for the Second Circuit

184. Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing standard of evidence required in civil commitment proceedings).

185. N.D. CENT. CODE § 30.1-28-09(2) (1976).

186. *Id. See also id.* § 30.1-03-01 (1) (a), (c) (general notice provisions of the UPC governing notice by mail and publication).

187. *Id.* § 30.1-28-09(2).

188. *Id.* Permitting a valid waiver of notice in an action based on the proposed ward's lack of capacity to make responsible decisions seemingly would be inconsistent. The UPC does, however, require that the waiver of notice be confirmed by the court appointed visitor. *See id.*

189. Section 30.1-03-01 is the general notice provision for the Century Code and provides in relevant part:

> If notice of a hearing on any petition is required. . . the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney.

N.D. CENT. CODE § 30.1-03-01(1) (1976).

190. *Id.*

191. *See id.* See *supra* note 83 and accompanying text for a discussion of the constitutionality of the notice.

192. 486 F.2d 76 (2d. Cir. 1973), *cert. denied sub nom.*, Dale v. Miller, 419 U.S. 826 (1974). In

noted that the state was not serving notice on an ordinary party to a civil suit when the defendant was committed to a state hospital as an incompetent.[193] The *Dale* court indicated that even personal service may not be sufficient for an alleged incompetent person unless the notice is reasonably calculated, under the circumstances, to inform an incompetent person of the nature of the proceeding and the substantial interests involved.[194] This casts a shadow on the use of guardianship by state mental hospitals to authorize medical treatment for incompetent persons.[195] Since the personal and legal consequences of guardianship are substantial, the type of notice provided and its content should be carefully scrutinized by the court.[196]

2. *Presence of the Proposed Ward at the Hearing*

Although most states require that the proposed ward be present for the guardianship hearing, the vast majority of these states also permit the court to dispense with the requirement when it would be in the best interests of the proposed ward.[197] The UPC provides that "the person alleged to be incapacitated is entitled to be present at the hearing in person" or by counsel.[198] This is, however, not a requirement.[199] If the proposed ward does not have counsel the court is required to appoint "an appropriate

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Dale the plaintiff had previously been involuntarily committed to a state mental hospital. Dale v. Hahn, 486 F.2d 76, 77 (2d Cir. 1973), *cert. denied sub nom.*, Dale v. Miller, 419 U.S. 826 (1974). The *Dale* court affirmed a finding that the plaintiff, whose incompetency was known to the state in light of the very nature of the proceeding, had not been adequately notified of the guardianship proceeding. *Id. But see* Rud v. Dahl, 578 F.2d 674, 677 (7th Cir. 1978) (summons served on alleged incompetent that included information as to pendency, time, date, and place of hearing together with petition that revealed further information was sufficient to fulfill due process requirements).

193. 486 F.2d at 77.

194. *Id.*

195. *See, e.g.*, Winters v. Miller, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 895 (1971). *Winters* involved an involuntarily committed woman, who was a Christian Scientist, protesting forced medication. *Id.* at 67-68. The court determined that even a mentally ill person, absent a finding of incompetency, may refuse treatment but suggested that forced treatment would be acceptable if the state were acting as *parens patriae* for a person adjudicated incompetent:

> While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found legally incompetent, there was never any effort on the part of appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be "best" for her.

Id. at 71.

The power to give or withhold consent for medical treatment on behalf of a ward is one of the powers of a guardian. N.D. CENT. CODE § 30.1-28-12(1) (c) (Supp. 1983). This section provides in pertinent part: "A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service." *Id.*

196. Sherman, *supra* note 8, at 360-61.

197. Horstman, *supra* note 4, at 241.

198. N.D. CENT. CODE § 30.1-28-03(3) (Supp. 1983).

199. *Id.*

official"[200] or attorney to function as a guardian ad litem and represent the proposed ward during the proceeding.[201]

One court has held that, not withstanding the substantial interests at stake, due process does not require the presence of the proposed ward at the hearing; but only requires that a person be given the opportunity to be present and be heard.[202] In the analogous area of civil commitment, however, courts have, indicated that the presence of the person to be committed is a requirement that can be waived only after a judicial determination that the person is competent to waive his rights or is too ill to attend.[203]

The absence of the proposed ward coupled with deficient notice and the possibility of representation by a guardian ad litem who is not an attorney makes it probable that the court will decide the issues of the proposed ward's incapacity or incompetency primarily on the basis of the petitioner's evidence and the written statements submitted by the court appointed physician and visitor.[204] Therefore, the absence of the proposed ward is a circumstance that merits close judicial scrutiny.

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200. *Id.* § 30.1-28-03 (2). "Appropriate official" is not defined by the Century Code. During the 1983 legislative session North Dakota's Department of Human Services estimated that the cost of court appointed counsel for all allegedly incapacitated persons for whom guardianship may be sought during the 1983-85 biennium was approximately $240,080, but a department spokesman pointed out that "assuming it will be the practice of the courts to appoint 'appropriate officials' as opposed to attorneys in these proceedings, there would be minimal fiscal impact." *Limited Guardianship, 1983: Hearings on H.B. 1057 Before the House Appropriations Comm.*, 48th N.D. Leg. (1983) (statement of Wayne Anderson, Dep't. of Human Serv.)

201. Commentators have raised serious doubts concerning the effectivenes of a guardian ad litem to act as an advocate on behalf of his ward. *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill,* 44 TEX. L. REV. 424 (1966).

Studies reveal that few proposed wards ever attend their guardianship hearing. G. ALEXANDER & T. LEWIS, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT 25 (1972). One reason frequently cited is the opinion of medical experts that such hearings are traumatic experiences that are detrimental to health of a patient. Horstman, *supra* note 4, at 242 n. 116.

202. *See* Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978). The court in *Rud* stated:

> It is true that in some quasi-criminal, as well as criminal proceedings, a defendant's actual presence in court is deemed a constituent element of due process. (citations omitted). This, however, results in large measure from the force of the Sixth Amendment, as incorporated in the due process clause, which by its own terms applies only to criminal proceedings. Apart from *Specht,* which involved a special sentencing proceeding following on the heels of a criminal conviction, the Supreme Court has never held that a civil proceeding requires the presence of the respondent as an element of due process. We are unpersuaded that the Court would extend its *Specht* holding outside the quasi-criminal context in which it arose, notwithstanding the substantial liberty interests implicated by an incompetency proceeding.

Id. at 678.

203. *See, e.g.,* Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976) (certain nonconsensual commitment provisions and authorization provisions of Hawaii's mental health, mental illness, drug addiction, and alcoholism law as written and applied did not provide sufficient due process).

204. The court appointed physician and visitor are required to submit written reports to the court. N.D. CENT. CODE § 30.1-28-03 (Supp. 1983). Even though the proposed ward has a right to cross-examine the physician and visitor it is doubtful if they will be present and available for cross-

3. *The Right to Counsel*

North Dakota's guardianship statute provides that a proposed ward has the right to be represented by counsel and to be present by counsel at a guardianship proceeding.[205] If the proposed ward does not have his own attorney, the court is required to appoint an "appropriate official or attorney, who shall have the powers and duties of a guardian ad litem."[206]

The appointment of a guardian ad litem prior to a determination of the proposed ward's ability to make responsible decisions for himself presents a catch-22 situation for a person unable to afford his own attorney to advocate his personal desires, not merely his best interests as perceived by a third party.[207] There are undoubtedly cases when the appointment of a guardian ad litem is necessary; nevertheless, it is unlikely that every allegedly incapacitated person is unable to determine his own best interests without assistance of a guardian ad litem.[208]

The requirement of counsel bears a direct relationship to the

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examination unless a subpoena is issued or an advance request is made. In addition, there may also be a conflict of interest. The Department of Human Services indicated that it intended to attempt to have personnel from Grafton and San Haven appointed to serve as court appointed visitors and physicians in guardianship proceedings for residents of those institutions. *Limited Guardianship, 1983: Hearings on H.B. 1057 Before the House Appropriations Comm.*, 48th N.D. Leg. (1983) (statement of Wayne Anderson, Dep't. of Human Serv.).

205. N.D. CENT. CODE § 30.1-28-03(3) (Supp. 1983).

206. *Id.* § 30.1-28-03(2).

207. *See, e.g.*, Quesnell v. State, 517 P.2d 568 (Wash. 1973). In *Quesnell* "assistance of counsel" was woefully lacking. *Id.* at 575. The individual charged with mental illness was provided "assistance of counsel" to the extent he had a fifteen minute conversation with the person charged to represent him at the hearing. *Id.* For representation to be meaningful, the guardian ad litem must provide the individual with adversarial services in the involuntary civil commitment proceedings. *Id. See also* Aho v. Rhodes, 347 N.E.2d 647, 383 N.Y.S.2d 285 (1976). In *Aho*, the nonadversarial role of a guardian ad litem was described as follows:

> A guardian ad litem may of necessity be obligated to act contrary to the desires of the incompetent and to adopt a position adverse to that urged by his ward. In the discharge of his objective responsibility the guardian may conclude that the best interest of the incompetent would not be served by prosecuting an appeal. . . . [T]he wishes of the ward will be relevant but not determinative.

Id. at 650-51, 383 N.Y.S. 2d at 288.

As previously noted, the UPC has been amended to require representation by counsel, who is not assigned the role of guardian ad litem unless the court deems it necessary. See *supra* note 200. The Model Guardianship and Conservatorship Act, prepared under the auspices of the American Bar Association's Commission on the Mentally Disabled, requires the appointment of counsel for the proposed ward, but it also provides for the appointment of a separate guardian ad litem if the proposed ward's disability prevents him from determining his own interests without assistance. *See* 3 MENTAL DISAB. L. REP. 264, 283-85 (reprint of Model Guardianship and Conservatorship act).

208. N.D. CENT. CODE § 30.1-28-03(2) (1976). Section 30.1-28-03(2) provides in relevant part:

> Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem.

Id.

accuracy of the fact finding process.[209] In addition, the requirement that counsel be appointed or expressly waived has been extended to other civil proceedings.[210] The United States Supreme Court, basing its decision on the due process clause, extended the right to counsel to juvenile proceedings.[211] In a case involving the involuntary commitment of a mentally retarded person to a state hospital the United States Court of Appeals for the Tenth Circuit concluded that it does not matter whether the proceedings are labeled "civil" or "criminal" or whether they are concerned with mental incompetence or juvenile delinquency.[212] Rather, it is the possibility of involuntary incarceration that mandates the observance of the constitutional safeguards of due process, including the duty to see that a person facing an involuntary commitment proceeding is provided the opportunity to secure the assistance of legal counsel at every step of the proceedings.[213]

The concepts articulated by the Supreme Court and the Tenth Circuit Court of Appeals appear to be applicable to guardianship proceedings and to mandate that the right to counsel be extended since the intrusion on a ward's liberty interests are extensive when the ward is adjudicated incompetent.[214] Nevertheless, in *Rud v. Dahl*[215] the court determined that "the nature of the intrusion on

209. *See* Sherman, *supra* note 8, at 361-64. Sherman argues that since the prospective ward is often disabled and unable to adequately protect his interests, it is imperative that counsel be appointed for all respondents in guardianship proceedings. *Id.* at 361. The writer also indicates that there may be a constitutional right to counsel, based on the due process clause of the federal constitution. *Id. But see* Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978). Although the court in *Rud* recognized that the appointment of counsel was closely related to the accuracy of the fact finding process, the court held that counsel was not constitutionally required at guardianship proceedings. *Id.* at 678-79.

210. *In re* Gault, 387 U.S. 1 (1967) (juvenile court proceeding); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (involuntary commitment).

211. *In re* Gault, 387 U.S. 1, 36 (1967). In the context of juvenile court proceedings when the liberty of the juvenile is threatened, the Supreme Court concluded the juvenile "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.*

212. Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). *Heryford* involved an application by a mother to have her minor child committed to a state school for retarded persons. *Id.* at 395. The state statute provided for the appointment of a guardian ad litem to represent the minor only if he did not have a parent or guardian. *Id.* at 394. Later, a habeas corpus petition was filed alleging that the minor had a constitutional right to the assistance of counsel at the hearing. *Id.* at 395. After rejecting the state's assertion that the rationale of *Gault* was not applicable, the appellate court stated, "[L]ike Gault, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies." *Id.* at 396.

213. *Id.*

214. Horstman, *supra* note 4, at 244-51.

215. 578 F.2d 674 (7th Cir. 1978). In *Rud*, the plaintiff, an 81-year-old resident of a nursing home, was served with a summons to appear at a hearing on a petition to appoint a conservator for him. Rud v. Dahl, 578 F.2d 674, 676 (7th Cir. 1978). The plaintiff did not respond to the summons and did not appear at the hearing either in person or by counsel. *Id.* No inquiry was made into the reasons for the plaintiff's absence, nor was counsel appointed to represent his interests at the proceeding. *Id.* On the basis of the petition and a physician's affidavit that alleged the plaintiff was physically and mentally incapable of managing his person and estate due to congestive heart failure, pulmonary fibrosis, generalized arteriosclerosis, and cerebral dementia, the court determined that

liberty interests resulting from an adjudication of incompetency is far less severe than the intrusion resulting from other types of proceedings in which the presence of counsel has been mandated."[216] The court also indicated that the skills of an attorney are less important at an incompetency hearing than at other judicial proceedings since the procedural and evidentiary rules are "considerably less strict than those applicable in other types of civil and criminal proceedings."[217] Furthermore, the court noted that the costs of mandatory appointment of counsel would undermine the protection of the limited resources of the incompetent's estate from dissipation.[218] The basis for this conclusion was the court's determination that "few alleged incompetents will be able to effect a 'knowing and intelligent' waiver of undesired counsel."[219] This is a startling statement from a court that had previously rejected a similar argument by the same plaintiff challenging the adequacy of the notice provided by the Illinois guardianship statute.[220]

Rud v. Dahl may be more limited than it appears at first glance.[221] The *Rud* court indicated its belief that, given the notice actually provided, there were no set of facts that the plaintiff could prove at trial rendering the notice constitutionally deficient.[222] The court also noted that the plaintiff had neither alleged that he did not understand the notice nor had he provided the court a statement of any circumstances challenging the reasonableness of the notice.[223] In addition, the court prefaced its analysis of the contention that the statutory scheme was deficient because it did not require that a guardian ad litem be appointed by noting that the plaintiff did not claim that the statute denied him the right to be represented by counsel if he elected to be represented.[224] The *Rud* court then

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the plaintiff was incompetent. *Id.* The plaintiff subsequently brought suit under 42 U.S.C. § 1983, challenging the facial constitutionality of the statutory scheme under which he was adjudicated incompetent and a conservator was appointed to manage his person and estate. *Id.* at 675. The Court of Appeals for the Seventh Circuit held that the notice was sufficient on its face as a matter of due process, that the plaintiff was not denied due process because the adjudication of incompetency proceeded in his absence, and that the statutory scheme was not constitutionally deficient because it did not require that a guardian ad litem be appointed to represent the rights of alleged incompetents at incompetency hearings. *Id.* at 678-79.

216. *Id.* at 679.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 677.

221. See *supra* note 83 for a discussion of the uncertainty for the basis of the court's decision in *Rud.*

222. 578 F.2d at 678.

223. *Id.* at 677-78.

224. *Id.* at 678. The concurring opinion also indicates that the decision of the *Rud* court was based to a large degree on the deficiencies of the plaintiff's complaint:

rejected the plaintiff's arguments that the state was constitutionally required to appoint counsel even when not requested by an alleged incompetent and that no adjudication of incompetency could take place in the absence of counsel or a valid waiver of the right of counsel.[225]

In cases that have applied the juvenile court proceeding analysis to involuntary civil commitment proceedings, there has been a state appointed prosecutor.[226] When the state is able to marshall its resources against an individual, the situation is fundamentally unfair and weighted against the individual when counsel is not appointed.[227] In guardianship proceedings, there is usually no prosecutor.[228] Instead, the proposed ward typically confronts another private party, who may be represented by counsel.[229] Nevertheless, one may argue that the right to counsel arises not merely because of the presence of the prosecutor but to correct the imbalance existing between the parties and to protect the liberty interests at issue in the proceeding.[230]

Under North Dakota's involuntary commitment statute, a respondent facing involuntary commitment is granted the right to appointment of counsel.[231] Although a finding that a person is "incapacitated" and in need of a guardian does not mean that the

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> He neither alleges nor contends that he did not receive and understand the process and notice of the hearing or that his failure to attend the hearing or to engage an attorney was not the result of an informed and voluntary decision. Nor has he alleged that he was not in fact legally incompetent at the time he was so adjudicated.

Id. at 679 (Tone, J., concurring).

225. *Id.* at 678.

226. *See, e.g.*, Heryford v. Parker, 396 F.2d 393, 394-95 (10th Cir. 1968).

227. *In re* Gault, 387 U.S. 1, 34-42 (1967).

228. *See* N.D. CENT. CODE § 30.1-28-03 (Supp. 1983). Section 3 of the 1983 Limited Guardianship Act, however, requires: "Court proceedings for the appointment of a guardian for an individual presently or formerly a ward of the superintendent of the Grafton State School pursuant to this section must, upon request of the petitioner, be handled by the state's attorney of the county in which the action is brought." *Id.* § 25-04-13.1.

In addition, § 2 of the 1983 Limited Guardianship Act requirements that individualized habilitation plans for developmentally disabled persons must:

> State whether the developmentally disabled person appears to need a guardian and determine the type of protection needed by the individual based on the individual's actual mental and adaptive limitations and other conditions which may warrant the appointment of a guardian. Any member of the individual habilitation plan team may petition, or notify any interested person of the need to petition, for a finding of incapacity and appointment of a guardian.

Id. § 25-01.2-14 (7).

Thus, the new guardianship amendments increase the amount of state involvement in the guardianship process when the proposed ward is a developmentally disabled person.

229. *See id.* § 30.1-28-03. Even if the petitioner is not represented by counsel, there is an inherent unfairness if counsel is not appointed to assist an individual when the basis of the action is the individual's alleged inability to make responsible decisions concerning his personal welfare. *See* Mitchell, *supra* note 11, at 1419.

230. Sherman, *supra* note 8, at 361-64.

231. *See* N.D. CENT. CODE § 25-03.1-13 (Supp. 1983).

person is mentally ill and can be committed, the potential loss of liberty and autonomy is substantial.[232] In addition to being stigmatized as incompetent to manage his own affairs, the ward can be involuntarily placed in a nursing home.[233] While nursing homes are not prisons or mental hospitals, they are similar in that they are places of residence in which similarly situated persons lead enclosed lives that are formally administered by the institution itself.[234] In effect, the ward becomes an inmate of that institution.[235] The appointment of a guardian strips the ward of the power to consent.[236] Furthermore, if the appointing court determines that the person is incompetent, the person loses his right to vote.[237] To refuse the right to counsel on the contention that the nature of the intrusion on liberty interests is less severe in guardianship proceedings than the intrusion resulting from civil commitment proceedings, therefore, is unrealistic.[238]

A more difficult question is the proper role of counsel in guardianship proceedings. If a client's capacity to make competent decisions is being challenged, an attorney may be reluctant to zealously advocate his client's wishes.[240] The nature of a guardianship proceeding in which the ostensible purpose is to promote the best interests of the proposed ward may persuade an attorney not to actively oppose the petition.[241] In the context of involuntary commitment proceedings, courts have held that the presence of a guardian ad litem does not satisfy the requirement of representation by counsel and that, if requested by his client, an

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232. *See* Horstman, *supra* note 4, at 231-35.

233. N.D. CENT. CODE § 30.1-28-12(1)(a) (Supp. 1983). Section 30.1-28-12(1)(a) provides:

> To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, [the guardian] is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this state.

Id. The nursing home environment is often nontherapeutic, and patients are likely to deteriorate and become increasingly less able to leave the nursing home the longer they remain. KANE, ALTERNATIVES TO INSTITUTIONAL CARE OF THE ELDERLY, H. R. DOC. NO. 165, 96th Cong., 2d Sess. 398 (1980). Furthermore, few nursing homes provide services to encourage independent living; custodial care rather than rehabilitative care is the norm in most nursing homes. *Id.* at 399.

234. E. GOFFMAN, ASYLUMS 1, 1 (1961).

235. M. WEINER, A. UROK, & A. SNADOWSKY, THE INSTITUTIONALIZED AGED, WORKING WITH THE AGED 56-57 (1978).

236. *See* Mitchell, *supra* note 11, at 1434. *See also* N.D. CENT. CODE § 30.1-28-12 (Supp. 1983).

237. N.D. CENT. CODE § 30.1-28-04 (Supp. 1983).

238. *See* Horstman, *supra* note 4, at 231-35.

240. Mitchell, *supra* note 11, at 1433. A Wisconsin judge found that attorneys representing respondents in involuntary commitment hearings waived the right to file habeas corpus petitions in 99% of 838 examined cases, the right to jury trial in 99% of 838 cases, and the right to appeal in 99% of 838 cases. Memmel v. Mundy, No. 441417 (Cir. Ct. Milwaukee County, Wis., Aug. 18, 1976) (mem. decision), *appeal dismissed as moot*, 75 Wis. 2d 276, 249 N.W.2d 573 (1977) (findings reprinted by Mitchell, *supra* note 11 at 1433).

241. *See* Mitchell, *supra* note 11, at 1433.

attorney must take an adversary position.[242] Both the recent amendments to the UPC and the Model Guardianship and Conservatorship Act indicate that the attorney should represent the interests of the client as determined by the client, not the attorney.[243] The role of the attorney in guardianship proceedings is more clearly defined by the Model Act since it provides for the appointment of a separate guardian ad litem when the proposed ward is unable to determine his own interests.[244]

4. *Standard of Proof*

As a result of being treated as a civil proceeding and the silence of the North Dakota Century Code regarding the standard of proof required for a determination of incompetency or incapacity in guardianship proceedings, North Dakota courts have permitted a finding of incompetency based upon a preponderance of evidence.[245] The traditional civil law standard may not be appropriate, however, in guardianship proceedings when substantial liberty interests are at stake.[246]

When the Utah Supreme Court considered this issue, it determined that clear and convincing evidence of incompetency was necessary to minimize error in guardianship cases.[247] It rejected the "beyond a reasonable doubt" standard after concluding that the "beyond a reasonable doubt" standard would undermine the purposes of Utah's guardianship statutes.[248] In contrast, a "preponderance of the evidence" standard would not, the court determined, provide adequate protection for the interests

242. See *supra* note 207 and accompanying text for a discussion of wnat constitutes sufficient assistance of counsel.

243. The Model Guardianship and Conservatorship Act § 30(1) provides: "[t]he principal duty of an attorney representing the subject of an intervention proceeding is to represent zealously that individual's legitimate interests." (reprinted in 3 MENTAL DISAB. L. REP. 264, 284 (1979)).

244. *See* 3 MENTAL DISAB. L. REP. 264, 285 (1979) (reprint of Model Guardianship and Conservatorship act § 31 (4)).

245. *See, e.g., In re* Thoreson's Guardianship, 72 N.D. 101, 107, 4 N.W.2d 822, 825 (1942) (court determined that findings by the trial court were in accord with the "weight" of the evidence).

246. *Cf.* Addington v. Texas, 441 U.S. 418 (1978) (involuntary civil commitment must be supported by clear and convincing evidence).

247. *See In re* Boyer, 636 P.2d 1085, 1091-92 (Utah 1981). The *Boyer* court considered an appeal from an order appointing a guardian for a 39-year-old woman who had a mild degree of mental retardation. *Id.* at 1086. The Letters of Guardianship did not set any limits to the powers of the guardian. *Id.* at 1087. The court construed Utah's guardianship statute — Utah was one of the states that had adopted the Uniform Probate Code, including its guardianship provisions — to limit the circumstances under which a guardian for an incapacitated adult may be appointed. *Id.* at 1089-92. The court determined that a guardianship may be imposed only when it is shown by clear and convincing evidence that the proposed ward's health or safety is endangered. *Id.* The *Boyer* court also concluded that the guardian's powers must be limited to those necessary to protect the ward's health and safety. *Id.* at 1091.

248. *Id.* The *Boyer* court rejected the "beyond a reasonable doubt" standard after it determined that such a standard would "tend to frustrate the beneficial purposes of the act by making a guardian unavailable to persons needing only a limited degree of supervision." *Id.* at 1091.

of the ward.[249] After considering the individual interests at stake in guardianship proceedings[250] and noting the similarity in the interests in guardianship cases and commitment cases, the court concluded that the higher standard of "clear and convincing" should also govern in guardianship cases as it did in commitment cases.[251]

In the context of involuntary commitment, when more is at stake than economic interests, courts have frequently required standards of proof higher than a "preponderance of the evidence."[252] The United States Supreme Court has also concluded that due process requires a standard of proof greater than a mere preponderance of the evidence in commitment cases, but that the standard of proof need not be "beyond a reasonable doubt."[253] Furthermore, some states, by statute, require proof of incompetency or incapacity by clear and convincing evidence.[254] North Dakota's involuntary treatment and commitment statutes also require that a petition be sustained by clear and convincing evidence.[255]

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249. *Id.* at 1091-92.

250. *Id.* at 1091.

251. *Id.* at 1092.

252. *See, e.g.*, Stamus v. Leonard, 414 F. Supp. 439 (S.D. Iowa 1976) ("clear and convincing" standard of proof is necessary for involuntary commitment); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975) (in civil commitment proceedings, standard of "proof beyond a reasonable doubt" is not constitutionally required, but "clear and convincing" standard is necessary because of loss of liberty and attendant stigmatization of involuntary commitment and a find of mental illness); *In re* Stephanson, 67 Ill. 2d 544, 10 Ill. Dec. 507, 367 N.E.2d. 1273 (1977) (appropriate standard of proof in involuntary civil commitment proceedings is clear and convincing evidence); *In re* Valdez, 88 N.M. 338, 540 P.2d 818 (1975) (standard of proof to be applied in civil commitment proceedings is "clear and convincing" evidence).

253. *See* Addington v. Texas, 441 U.S. 418 (1978). In *Addington* the appellant's mother filed a petition for his indefinite commitment to a state mental hospital. *Id.* at 420. The trial court instructed the jury to determine whether the appellant was mentally ill and required hospitalization, based on clear, unequivocal, and convincing evidence. *Id.* at 421. Although the appellant conceded that he was mentally ill, he argued that there was no substantial basis for deciding that he was dangerous to either himself or others. *Id.* The Texas Supreme Court reversed a lower appellate court's decision that decided any standard of proof less than the "beyond a reasonable doubt" standard violated the appellant's procedural due process rights. *Id.* at 421-22. The Texas Supreme Court held that a "preponderance of the evidence" standard of proof satisfied due process in a civil commitment proceeding. *Id.* at 422. The United States Supreme Court concluded that the standard of proof in civil commitment cases must be greater than the "preponderance of the evidence" standard used in other civil cases but that the "beyond a reasonable doubt" standard was not required. *Id.* at 431-33.

254. *See, e.g.*, MINN. STAT. ANN. § 525.551 (3) (West Supp. 1983). This section provides that "[t]he proposed ward or conservatee has the right to summon and cross-examine witnesses. The rules of evidence apply. In the proceedings, there is a legal presumption of capacity and the burden of proof is on the petitioner. The standard of proof is that of clear and convincing evidence." *Id. See also* NEB. REV. STAT. § 30-2620 (Cum. Supp. 1982). Section 30-2620 provides in relevant part:

> The court may appoint a guardian as requested if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care or supervision of the person of the incapacitated person.

Id.

255. N.D. CENT. CODE § 25-03.1-19 (Supp. 1983). Section 25-03.1-19 reads in part:

> There shall be a presumption in favor of the respondent, and the burden of proof in support of the petition shall be upon the petitioner.

C. VOTING RIGHTS

When North Dakota's guardianship statutes were amended by the 1983 legislature to provide for limited guardianship, the statute was also amended to require the appointing court to determine whether a ward is mentally incompetent and thus not qualified to vote.[256]

Support for the proposition that the states may specify the qualifications of voters in state and federal elections is found in article I, section 2 of the federal constitution and the seventeenth amendment to the federal constitution.[257] Absent discrimination forbidden by the federal constitution, the states have broad powers to determine the qualifications of voters.[258] The United States Supreme Court has described the right to vote as a fundamental political right, because it is preservative of all rights.[259] Thus, a state statute or constitutional provision that infringes upon the exercise of the right to vote is invalid unless the state meets the burden of proving that the restriction is narrowly tailored to promote a compelling state interest.[260] The test contains two steps: first, the exclusion must be necessary to promote the state's articulated interest; and second, the interest itself must be compelling.[261] Courts have indicated that the exclusion of mentally incompetent voters is necessary to promote the state interest in having a rational electorate.[262]

> If, upon completion of the hearing, the court finds that the petition has not been sustained by clear and convincing evidence, it shall deny the petition, terminate the proceeding, and order that the respondent be discharged if he has been hospitalized prior to the hearing.

Id.

256. *See id.* § 30.1-28-04 (Supp. 1983).

257. U.S. CONST. art. I, § 2; amend. XVII.

258. *See* Annot. 80 A.L.R.3D 1116, 1119 (1978).

259. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). In *Yick Wo*, the Court determined that a San Francisco laundry ordinance was void under the fourteenth amendment because it was administered to discriminate against Chinese subjects. *Id.* at 373-74. Writing for the Court, Justice Matthews identified the political franchise of voting as an example of a fundamental right: "Though not regarded strictly as a natural right, but as a privilege merely conceded by society. . . nevertheless it is regarded as a fundamental political right, because preservative of all rights." *Id.* at 370.

260. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). The court in *Kramer* held that a New York statute, which permitted the inclusion of many persons having only a remote and indirect interest in school affairs while excluding others having a distinct and direct interest, violated the equal protection clause of the fourteenth amendment. *Id.* at 632-33.

261. *Id.*

262. *See, e.g.*, Manhatten State Citizens Group, Inc. v. Bass, 524 F. Supp. 1270 (S.D.N.Y. 1981) (New York statute, prohibiting adjudged incompetents or those involuntarily committed to mental institutions from voting, was unconstitutional only as applied to persons involuntarily committed to hospitals but not adjudged incompetent); Boyd v. Board of Registration of Voters of Belchertown, 334 N.E.2d 629 (Mass. 1975) (residents of state facility for the mentally retarded were not ineligible to vote unless adjudicated incompetent or under guardianship in accordance with statutory procedures); Town of Lafayette v. City of Chippewa Falls, 70 Wis. 2d 610, 235 N.W.2d 435 (1975) (signatures of residents of state facility for mentally retarded were not necessary on an

When courts determine that disqualification statutes based upon mental incompetency are unconstitutional under either a state constitution or the federal constitution, a key factor has been the absence of a judicial determination of the elector's mental incompetence.[263] Courts have refused to allow a presumption of incompetence from the mere fact of residency in a state institution.[264] In contrast, North Dakota's constitution provides that "no person who has been declared mentally incompetent by order of a court or other authority having jurisdiction, which order has not been rescinded shall be qualified to vote."[265]

Similarly, the North Dakota electors' statute provides that a person who is under guardianship, *non compos mentis*, or insane shall not be qualified to vote.[266] The statute limits the disqualification to instances in which the person has a court appointed guardian, appointed "upon a finding of incompetence or incapacitation due to mental illness or defect."[267] The language of the electors' statute is more restrictive than that of the constitution since it would only disqualify those persons whose incompetence results from illness or mental defect.[268] In this instance, however, the language of the constitutional provision controls since the legislature cannot enlarge or diminish the qualifications necessary to entitle one to

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annexation petition because state constitution and electors' statute intends that persons who are mentally incapable of knowing or understanding nature and objective of election question should not be eligible to vote).

263. *See* Carrol v. Cobb, 139 N.J. Super. 439, 354 A.2d 355 (1976).

264. *Id.* at ____, 354 A.2d at 363. *See also* N.D. CENT. CODE § 25-01.2-03 (Supp. 1983). Section 25-01.2-03 provides:

> No developmentally disabled person shall be presumed to be incompetent or shall be deprived of any constitutional, civil, or legal right solely because of admission to or residence at an institution or facility or solely because of receipt of services for developmentally disabled persons. However, nothing in this section shall be construed to limit or modify section 16.1-01-04. The constitutional, civil, or legal rights which may not be varied or modified under the provisions of this section include, but are not limited to:
>
> 1. The right to vote at elections;
> 2. The free exercise of religion;
> 3. The right of reasonable opportunities to interact with members of the opposite sex; and
> 4. The right to confidential handling of personal and medical records.

Id.

265. N.D. CONST. art. II, § 2.

266. N.D. CENT. CODE § 16.1-01-04(5) (1981). Section 16.1-01-04(5) provides in relevant part:

> Pursuant to section 2 of article II of the Constitution of North Dakota, no person who is under guardianship, non compos mentis, or insane shall be qualified to vote at any election. To be denied the right to vote under this subsection, a person must have a guardian duly appointed by a court of competent jurisdiction, upon a finding of incompetence or incapacitation due to mental illness or defect.

Id.

267. *Id.*

268. *Compare* N.D. CONST. art. II, § 2 *with* N.D. CENT. CODE § 16.1-01-04(5) (1981).

vote at a constitutional election.[269]

The limited guardianship bill amended section 30.1-28-04 of the Century Code to require that the court "determine in all cases in which a guardian is appointed whether the incapacitated person is mentally competent and as such is not qualified to vote."[270] North Dakota's guardianship statute defines an incapacitated person as follows:

> 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 causes (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.[271]

Additionally, a definition of "mental incompetence" is conspicuously absent in the North Dakota Century Code and the state constitution. Moreover, the North Dakota Supreme Court has not defined the term in the context of voting. Courts should consider the new provisions for limited guardianship in determining whether a person is incompetent. The limited guardianship concept recognizes that there are degrees of incapacity or incompetence and requires the court to match the guardian's authority with the incapacitated person's actual mental and adaptive limitations.[272] Therefore, some individuals under limited guardianships may be capable of making rational voting choices.

D. APPEAL, MODIFICATION, AND TERMINATION

The decree of the county court, the court of original jurisdiction in guardianship and conservatorship matters, may be appealed by any party to the proceeding or by any other person who has or claims a right to interest in the subject matter of the decree or order.[273]

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269. Johnson v. Grand Forks County, 16 N.D. 363, 368, 113 N.W. 1071, 1072 (1907).
270. N.D. CENT. CODE § 30.1-28-04 (Supp. 1983).
271. *Id.* § 30.1-26-01(1) (1976).
272. *See id.* § 30.1-28-04(1) (Supp. 1983).
273. *Id.* § 30-26-01 (1976). Few decrees of incompetency and orders appointing guardians are appealed unless there is a quarrel over the disposition of the ward's property. *See, e.g., In re* Guardianship of Frank, 137 N.W.2d 218 (N.D. 1965) (dispute between children over sale of farmland).

Modification of the original guardianship order may be necessary due to changes in the ward's condition. Either the ward or another interested person may petition the county court in the county where the ward resides or the appointing court to limit or expand the authority previously conferred.[274] However, no mandatory requirement for judicial review of guardianships exists.[275] If the ward is a developmentally disabled person and participates in programs and services for the developmentally disabled, an IHP is required.[276] The plan must state whether the developmentally disabled person appears to need a guardian and determine the type of protection needed based upon the individual's actual mental and adaptive limitations.[277] The statute also requires that the plan be reviewed and updated at least annually.[278] Thus, there is at least a limited recognition that the disabilities of individuals under guardianship are not necessarily static.[279]

The authority and responsibility of a guardian terminates upon the death of either the guardian or ward, the incapacity of the guardian, or upon the removal or resignation of the guardian.[280] In addition, if a guardian is not satisfactory the ward or any person interested in the ward's welfare may petition for the guardian's removal.[281] The statute provides that "the court may remove a guardian and appoint a successor if in the best interests of the ward."[282] Furthermore, the ward or a person interested in his welfare may petition the court for an order that he is no longer incapacitated and for removal or resignation of the guardian.[283] The request may be made by filing a petition or writing an informal letter to either the county judge or the appointing court.[284] The original order may, however, specify a minimum period of one

274. N.D. CENT. CODE § 30.1-28-13(1) (Supp. 1983).

275. *See id.* ch. 30.1-28 (1976 & Supp. 1983).

276. *Id.* § 25-01.2-14 (1) (Supp. 1983). See *supra* note 111 and accompanying text for a definition of IHP.

277. N.D. CENT. CODE § 25-01.2-14(7) (Supp. 1983).

278. *Id.* § 25-01.2-14(2).

279. O'Connor v. Donaldson, 422 U.S. 563 (1975). In *O'Connor* the United States Supreme Court noted that states are under a continuing obligation to periodically review the justifications for involuntary commitments. *Id.* at 574-75. This decision places a burden on the state to periodically re-establish the basis for continuing confinement. *Id.* at 575.

Only ten states require judicial review of private guardianships and conservatorships. Sherman, *supra* note 8, at 364 (footnote omitted).

280. N.D. CENT. CODE § 30.1-28-06 (1976).

281. *Id.* § 30.1-28-07(1).

282. *Id.* Section 30.1-28-07(1) authorizes the removal of a guardian and the appointment of a successor if it is in the best interests of the ward. *Id.* The pre-1973 guardianship statute permitted the removal of a guardian only upon satisfactory proof of the guardian's incompetency or cause. *See* N.D. CENT. CODE § 30-12-02 (1960) (repealed 1973).

283. N.D. CENT. CODE § 30.1-28-07(2) (1976).

284. *Id.*

year or less during which no petition for review may be filed without special permission.[285]

Despite the explicit provisions for terminating a guardianship, it is unlikely that the ward will be successful.[286] To have his legal capacity or competency restored, the ward must prove that he is no longer incapacitated or incompetent.[287] This requires that the ward overturn the presumption of incompetency resulting from the initial determination.[288] This presumption tilts the scales against the ward's success unless he manages to secure the support of a third party.[289] In actions for termination, however, the burden should be on the original petitioners or the state to demonstrate that the ward is still incapacitated and in need of guardianship.[290]

E. PUBLIC GUARDIANSHIP

In North Dakota, the county public administrator can be appointed the legal guardian and conservator of the person and estate of an incapacitated person when no other competent person exists to act as guardian or conservator.[291] The public administrator has the same powers and duties as a private guardian or conservator.[292] The compensation of the public administrator is a percentage of the funds received from various agencies or from the ward's estate.[293] Since the public administrator receives no other compensation for his services, little incentive exists for him to assist any of his wards in terminating their guardianships. While there may be a limited justification for the appointment of the public administrator as conservator, it is doubtful that an appointment as guardian could be justified.[294]

F. DESIGNING THE LIMITED GUARDIANSHIP ORDER

Now that North Dakota's guardianship statute explicitly

285. *Id.*

286. Mitchell, *supra* note 11, at 1425-26.

287. Goetz v. Gunsch, 80 N.W.2d 548, 552 (N.D. 1956) (must show restoration to capacity to overcome presumption of incapacity once declared incompetent).

288. *Id.*

289. *See* Mitchell, *supra* note 11, at 1426.

290. *See* Mitchell, *supra* note 5, at 455-56. The Model Guardianship and Conservatorship Act requires a review hearing no more than six months after the appointment of a guardian or conservator and annually thereafter. *See* 3 MENTAL DISAB. L. REP. 264, 282 (1979) (reprint of the Model Guardianship and Conservatorship Act).

291. N.D. CENT. CODE § 11-21-05 (1976).

292. *Id.* § 11-21-06.

293. *Id.* §§ 11-21-08; 30.1-29-14.

294. Telephone conversation with S. M. Burdick, Public Administrator, Grand Forks County, in Grand Forks, North Dakota (Sept. 26, 1983). One public administrator was convinced that he was only a conservator and that the administrator of the nursing home in which his elderly ward resided exercised the powers of guardianship even though the court had appointed him guardian and conservator a number of years earlier. *Id.* In addition, he had never made a personal visit to his ward. *Id.*

allows a court to order a limited guardianship, the guardianship order may be necessarily more complex and require the court to specify the powers and duties of the guardian.[295]

Initially, the court must evaluate the proposed ward's incapacity. The Century Code provides some assistance by requiring the appointment of a physician to examine the proposed ward and a visitor to interview the proposed ward and the person seeking appointment as the guardian.[296] The Century Code also requires the visitor to inspect the present residence of the proposed ward and the place where the proposed ward would live if a guardian were appointed.[297] In addition, the court may utilize the services of any public, charitable, or nonprofit corporation that is willing to evaluate the condition of the proposed ward.[298] To prevent the decision from being determined solely on the basis of medical opinions, the court should consider the proposed ward's past behavior concerning income, property, employment, medical care, living arrangements, social and legal services, and family relationships.[299] The court should also determine the activities with which the proposed ward will need assistance.[300]

Next, if the court determines that the appointment of a guardian is necessary, the court must match the responsibilities of the guardian with the actual limitations of the ward.[301] The court

295. *See* N.D. CENT. CODE § 30.1-28-04(1) (Supp. 1983). The guardianship order will necessarily be more complex since the powers of the guardian must be tailored to the actual mental and adaptive limitations of each ward. *Id.*

296. *Id.* § 30.1-28-03 (2). Section 30.1-28-03 (2) provides:

> Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician appointed by the court who shall submit his report in writing to the court and shall also be interviewed by a visitor sent by the court. The visitor also shall interview the person seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made. The visitor shall submit his report in writing to the court.

Id.

297. *Id.*

298. *Id.* § 30.1-28-03(3).

299. Dussault, *supra* note 4, at 605-07.

300. *See* 3 MENTAL DISAB. L. REP. 264, 270 (1979) (reprint of the Model Guardianship and Conservatorship Act).

301. N.D. CENT. CODE § 30.1-28-04(1) (Supp. 1983). Section 30.1-28-04(1) provides in pertinent part:

> The court shall exercise the authority conferred in this chapter consistent with the maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure.

Id.

order should indicate those life areas that the ward is capable of handling by himself, those that require the concurrence of the guardian, and those for which the guardian is assigned sole responsibility.[302] Since it is improbable that an order could anticipate every situation, the order should require the guardian to promote the maximum self-reliance and independence of the ward.[303]

Finally, the court should determine the effect of the limited guardianship order on the ward's right to vote.[304] To prevent any confusion concerning the powers transferred to the guardian, the court should also indicate that some rights are of such a fundamental or personal nature that they cannot be exercised by the guardian on the ward's behalf.[305] Although some of these problematic powers are discussed in more detail in the next section, a few examples would include non-therapeutic surgery, sterilization, voting, marriage, and voluntary admission to treatment facilities. In these areas, prior court approval should be secured to permit the guardian to supply proxy consent.[306]

IV. PROBLEMATIC POWERS OF GUARDIANSHIP

A. MARRIAGE, DIVORCE, AND ANNULMENT

The North Dakota Century Code defines marriage as a "personal relationship arising out of a civil contract between a male and female *to which the consent of the parties is essential.* The marriage relation shall be entered into, maintained, annulled, or dissolved only as provided by law."[307] Consent of the parties to the marriage is required. In *Johnson v. Johnson*[308] the North Dakota Supreme

302. *See* 3 MENTAL DISAB. L. REP. 264, 272 (1979) (reprint of the Model Guardianship and Conservatorship Act). The court may, for instance, indicate an amount of money that the ward could spend each month as he wanted but require expenditures over that amount to be made only with the consent of the guardian. *Id.* at 272. The court may require the guardian to assist the ward in finding housing and securing medical care or education but permit the ward to make the final decisions. *Id.* at 270.

303. *See* N.D. CENT. CODE § 30.1-28-04(1) (Supp. 1983).

304. *See id.*

305. The UPC provides little statutory guidance in the area of powers transferred to the guardian. *See* N.D. CENT. CODE § 30.1-28-12 (Supp. 1983) (description of the general powers and duties of a guardian).

306. *See, e.g., In re* Moe, 385 Mass. App. 555, ____, 432 N.E.2d 712, 716-17 (1982). The court reasoned that since sterilization was an "extraordinary and highly intrusive form of medical treatment that irreversibly extinguishes the ward's fundamental right of procreative choice," a guardian must obtain an order from an appropriate court before validly consenting to the procedure. *Id.* Thus, a parent or guardian cannot consent to sterilization of a ward in their care and custody without statutory or judicial authorization. *Id.*

307. N.D. CENT. CODE § 14-03-01 (1981) (emphasis added).

308. 104 N.W.2d 8 (N.D. 1960). In *Johnson*, the plaintiff's guardian brought an action for annulment of his ward's marriage on the grounds that the ward, at the time of his marriage to the

Court said that "The consent [in marriage] is then present assent, freely, voluntarily and understandingly given, representing a mutual intention by *competent contracting parties.*"[309] A guardian of an incapacitated person, therefore, cannot by proxy furnish the ward's necessary consent.

The Century Code specifically prohibits, in certain instances, the marriage of persons institutionalized as severely retarded.[310] In addition, a marriage may be annulled when either party was of unsound mind at the time of the marriage.[311] While there is no precise definition of the phrase "unsound mind" as used in this section, the North Dakota Supreme Court has suggested that the best test of capacity sufficient to contract a valid marriage is whether there is capacity to understand the nature of the marriage contract and its attendant duties and responsibilities.[312] Thus, even though under guardianship, a person may still have sufficient capacity to validly contract marriage.[313] Moreover, the order of a county court is not conclusive concerning the ward's mental capacity since, "[t]ests judicially applied for a determination of incompetence in guardianship matters differ markedly from those applied for determination of mental capacity to contract marriage."[314]

North Dakota policy favors the validity of marriages.[315] Thus, even though the marriage is prohibited, "a marriage contracted by

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defendant, was both a drunkard and feebleminded. Johnson v. Johnson, 104 N.W.2d 8, 11 (N.D. 1960). After the plaintiff's discharge from a Minnesota hospital where he had received medical and psychiatric care, the plaintiff and the defendant were married. *Id.* Prior to the plaintiff's release from the Minnesota hospital, his relatives had filed a petition for the appointment of a guardian for the person and property of the plaintiff. *Id.* Although this initial petition was dismissed, another guardianship petition, filed after the plaintiff and defendant had separated, was granted. *Id.* at 11-12. After concluding that the evidence affirmatively established that the plaintiff had sufficient competence to validly contract marriage, the North Dakota Supreme Court reversed the annulment decreed by the district court. *Id.* at 18.

309. *Id.* at 12.

310. N.D. CENT CODE § 14-03-07 (1981). Section 14-03-07 provides that "[m]arriage by a woman under the age of forty-five years or by a man of any age, unless he marries a woman over the age of forty-five years, is prohibited if such a man or woman is institutionalized as severely retarded." *Id.*

311. *Id.* § 14-04-01 (3). Section 14-04-01 (3) provides in relevant part that:

> A marriage may be annulled by an action in the district court to obtain a decree of nullity for any of the following causes existing at the time of the marriage:
>
> . . . .
>
> That either party was of unsound mine, unless such party, after coming to reason, freely cohabitated with the other as husband or wife.

Id.

312. *Johnson,* 104 N.W.2d at 14.

313. *Id.* at 17.

314. *Id.*

315. *See id.* at 13. The validity of a voidable marriage can be questioned only by a direct challenger. *Id. See also* N.D. CENT. CODE § 14-03-03 (1981) (only incestuous marriages are absolutely void).

those parties is rendered merely voidable and not void."[316] Furthermore, when the parties have proven a marriage exists, "a presumption arises that such a marriage is in all things valid."[317] Nevertheless, if a ward marries and does not have sufficient mental capacity to validly consent to the marriage, the marriage is voidable and subject to annulment.[318] An action to annul may be brought by the party injured, a relative, or the guardian of the party of unsound mind.[319]

The Century Code does not indicate whether a guardian may sue for divorce on behalf of his ward.[320] It does provide, however, that a guardian of a ward of "unsound mind" may bring an action to annul the marriage.[321] An annulment may be granted when the ward lacks the mental capacity to give legally binding consent at the time of the marriage.[322] Although the right of a guardian to sue for divorce of his ward is questionable, courts generally hold that guardians may maintain an action on behalf of their wards to vacate and set aside a divorce decree.[323]

Moreover, the United States Supreme Court has indicated that the right to marry is fundamental to all citizens.[324] Therefore, any single categorical classification of mentally retarded persons or persons under guardianship, especially limited guardianship, that would prohibit the right to marry would violate the due process and equal protection clauses of the federal constitution.[325]

B. TERMINATION OF PARENTAL RIGHTS

The Century Code does not specifically give or deny a guardian the power to consent to the termination of a ward's parental rights.[326] There is, however, little doubt that without prior

316. 104 N.W.2d at 13.
317. *Id.* at 12.
318. *See* N.D. CENT. CODE § 14-04-01 (3) (1981). See *supra* note 311 for the text of § 14-04-01 (3).
319. N.D. CENT. CODE § 14-04-02 (3) (1981).
320. *See id.* § 30.1-28-12 (Supp. 1983).
321. *Id.* § 14-04-02 (3) (1981).
322. 104 N.W.2d at 14.
323. *See* Annot., 6 A.L.R.3D 681 (1966).
324. Loving v. Virginia, 388 U.S. 1, 12 (1967). The Court in *Loving* stated, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.*
325. Stanley v. Illinois, 405 U.S. 645 (1972). In *Stanley,* the Court struck down a state law that presumed an unwed father was an unfit parent and determined that a hearing was required:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issue of competence and care, when it explicitly distains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It, therefore, cannot stand.

Id.
326. *See* N.D. CENT. CODE § 30.1-28-12 (Supp. 1983).

court authorization a guardian does not have the power to give such consent on his ward's behalf.[327]

The Uniform Juvenile Court Act (UJCA) and the Revised Uniform Adoption Act have been adopted by North Dakota and provide for the termination of parental rights.[328] The North Dakota Supreme Court in *Kottsick v. Carlson*[329] indicated that the UJCA, which provides the grounds for termination of parental rights, was not amended by implication through the enactment of the Uniform Adoption Act.[330] Consequently, the UJCA controls in cases involving the termination of parental rights.[331] In *McGurren v. S.T.*[332] the North Dakota Supreme Court concluded that the basic premise in an action to terminate parental rights is that the parent has a fundamental, natural right to his or her child that is of constitutional dimension.[333] Although this right is not absolute, the court found that the legislature had indicated its intent for permitting removal of the child from his parents only when necessary for his welfare or in the interest of public safety.[334]

The United States Supreme Court has emphasized the fundamental importance of the family and has recognized that the right to conceive and to raise one's children is an essential, basic,

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327. *See* McGurren v. S.T., 241 N.W.2d 690, 693 (N.D. 1976) (parent of a child has a constitutional right to be heard on his fitness before the parent can be deprived of his parental rights to the child).

328. N.D. CENT. CODE ch. 27-20 (1974 & Supp. 1983) (Uniform Juvenile Court Act); *Id.* ch. 14-15 (1981 & Supp. 1983) (Revised Uniform Adoption Act).

329. 241 N.W.2d 842 (N.D. 1976).

330. Kottsick v. Carlson, 241 N.W.2d 842, 846 (N.D. 1976). The *Kottsick* court found that all indications pointed to the fact that the legislature did not intend to amend the Uniform Juvenile Court Act by enacting the Uniform Adoption Act. *Id.* at 845-46.

331. *Id.* at 846. Section 27-20-44 of the North Dakota Century Code provides the bases for termination of parental rights as follows:

> 1. The court by order may terminate the parental rights of a parent with respect to his child if:
>
> a. The parent has abandoned the child;
>
> b. The child is a deprived child and the court finds that the conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; or
>
> c. The written consent of the parent acknowledged before the court has been given.

N.D. CENT. CODE § 27-20-44 (1) (1974).

332. 241 N.W.2d 690 (N.D. 1976).

333. McGurren v. S.T., 241 N.W.2d 690, 695 (N.D. 1976).

334. *Id.* The court reviewed a petition to terminate the parental rights of a mother who was only 13 years old and unmarried at the time of the child's birth. *Id.* at 692. On the date of birth, the child was taken by the county social service board pursuant to a court order for placement in a foster home. *Id.* Although the mother did not have a steady job and was dependent on her own mother for support, the court concluded that because of the mother's tender years she was entitled to available expert counseling before any further hearings could be held on terminating her parental right. *Id.* at 697. The basic premise in the case, the court declared, was that a parent has a fundamental, natural right to her child. *Id.* at 695.

civil right.[335] In *Santosky v. Kramer*[336] the Court ruled that a clear and convincing standard of proof must be met before a state may completely and irrevocably sever the rights of natural parents to their children.[337] Thus, before the state may terminate the parental rights of a mentally or physically disabled parent, it must provide due process and meet the higher standard of proof.[338]

The North Dakota Supreme Court has often recognized the importance of the parent-child relationship. In *In re J.Z.*[339] the court noted that parents have a constitutional right to the custody and companionship of their children.[340] Although the right of a parent to the custody of his child is not absolute,[341] a parent's right is nevertheless paramount to that of any other person.[342] The burden of providing that a parent is not fit to retain custody of his child rests upon the challenger.[343] In *Waagen v. R.J.B.*[344] the court indicated that a child should be separated from his parents only when necessary for his welfare or in the interests of public safety.[345]

The importance of the parent-child relationship is also recognized by the Century Code, which provides that a parent is entitled to representation by legal counsel at all stages of any

335. *See* Stanley v. Illinois, 405 U.S. 645 (1972). The Court in *Stanley* held that the due process clause of the fourteenth amendment required a hearing to determine an unwed father's fitness as a parent before his children could be taken from him in a dependency proceeding after the death of the children's natural mother. *Id.* at 657-58.

336. 455 U.S. 745 (1982).

337. Santosky v. Kramer, 455 U.S. 745 (1982). After concluding that the fundamental liberty interest of natural parents in the care, custody, and management of their child does not disipate merely because they have not been model parents or have lost temporary custody, the Court determined that a parental rights termination proceeding must provide the parents with fundamentally fair procedures. *Id.* at 753-54. The Court also concluded that the state must support its allegations by at least clear and convincing evidence. *Id.* at 758-70.

338. *Id.* at 758-60.

339. 190 N.W.2d 27 (N.D. 1971). Although the court repeated the familiar phraselogy concerning the rights of natural parents, it had little difficulty under the facts of this case in affirming the district court's judgment terminating the parental rights of the appellants to their son. *In re* J.Z., 190 N.W.2d 27, 29-30, 36 (N.D. 1971).

340. *Id.* at 29-30.

341. *In re* R.D.S., 259 N.W.2d 636, 638 (N.D. 1977). The court agreed with the district court's finding that the appellant's son was a deprived child and that his placement in a foster home was necessary. *Id.* at 638. Nevertheless, the court determined that the evidence was not sufficient to terminate the parental rights of the appellant. *Id.*

342. *In re* J.V., 185 N.W.2d 487, 492 (N.D. 1971). The North Dakota Supreme Court reversed a juvenile court order terminating the parental rights of a mother who had previously petitioned the juvenile court to place her child in a licensed foster home. *Id.* The court noted that the legislature had expressed a strong preference for parental guardianship. *Id.*

343. *In re* M.M.C., 277 N.W.2d 281, 284 (N.D. 1979). The court concluded that the challenger had not established by clear and convincing evidence that a 48-year-old woman, who had a history of mental health problems, was unable to supply physical and emotional care for her daughter. *Id.* at 286.

344. 248 N.W.2d 815 (N.D. 1976). In *Waagen,* the court affirmed a juvenile court decree terminating the parental rights of an unwed mother to an infant born at the state hospital at Jamestown. Waagen v. R.J.B., 248 N.W.2d 815, 821 (N.D. 1976). Although the court noted that the mental illnes of a parent does not automatically render a child deprived, the primary consideration is the welfare of the child. *Id.* at 820-21.

345. *Id.* at 819.

proceedings under the UJCA.[346] If the parent is indigent, the court will provide counsel.[347] In addition, the North Dakota Supreme Court has determined that parental termination procedures are a part of the UJCA, codified at chapter 27-20 of the Century Code, and that the right to counsel extends to all parties involved in the proceedings.[348] In light of the United States Supreme Court cases and opinions by the North Dakota Supreme Court that declare the importance and emphasize the fundamental nature of the rights of parents to conceive and raise their children, it is doubtful that even a full guardian has the power to consent, on his ward's behalf, to the termination of his ward's parental rights.

C. VOLUNTARY TREATMENT

1. Mental Illness, Drug Addiction, and Alcoholism

Voluntary admission to the state hospital or a public treatment facility is limited to persons who are mentally ill or suffering from drug addiction or alcoholism.[349] The definition of a "mentally ill

346. N.D. CENT. CODE § 27-20-26 (1) (1974). Section 27-20-26 (1) provides:

> Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict separate counsel shall be provided for each of them.

Id.

347. *Id.* § 27-20-26 (2). Section 27-20-26 (2) provides:

> A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A child is not to be considered needy under this section if his parents or parent can, without undue financial hardship, provide full payment for legal counsel and other expenses of representation. Any parent entitled to the custody of a child involved in a proceeding under this chapter shall, unless undue financial hardship would ensue, be responsible for providing legal counsel and for paying other necessary expenses of representation for their child. The court may enforce performance of this duty by appropriate order. As used in this subsection, the word "parent" includes adoptive parents.

Id.

348. *In re* J.Z., 190 N.W.2d 27, 31 (N.D. 1971). The court stated, "Parental termination procedures are a part of the Juvenile Court Act, and the right to counsel extends to parties involved in such proceedings." *Id.*

349. N.D. CENT. CODE § 25-03.1-04 (Supp. 1983). Section 25-03.1-04 provides as follows:

> An application for admission to the state hospital or a public treatment facility for observation, diagnosis, care, or treatment as a voluntary patient may be made by any person who is mentally ill, an alcoholic, or a drug addict, or who has symptoms of such

person'' specifically excludes some mentally retarded or mentally deficient persons.[350] Although mental retardation by itself is not sufficient to support either voluntary or involuntary admission to a treatment facility such as the State Hospital, the definition of a ''person requiring treatment'' indicates that a mentally retarded person may also be suffering from mental illness, drug addiction, or alcoholism and, therefore, require treatment.[351]

The Century Code permits the parent or legal guardian of a minor who is mentally ill, alcoholic, or a drug addict to apply for the minor's admission as a voluntary patient.[352] There is no statutory language that specifically gives similar authority to a guardian of an incapacitated adult. However, North Dakota's guardianship statute gives a full guardian the same powers, rights, and duties respecting his ward that parents have respecting their unemancipated minor child.[353] Furthermore, the statute provides

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> illnesses. An application for admission as a voluntary patient may be made on behalf of a minor who is mentally ill, an alcoholic, or a drug addict, or who has symptoms of such illnesses, by his parent or legal guardian. The application may be submitted to a public treatment facility or to the state hospital, both of which shall have the authority to admit and treat the applicant. Upon admittance, the superintendent or the director shall immediately designate a physician, psychiatrist, clinical psychologist, or mental health professional to examine the patient.

Id.

350. *Id.* § 25-03.1-02 (10). '' 'Mentally ill person' does not include a mentally retarded or mentally deficient person of significantly subaverage general intellectual functioning which originates during the developmental period and is asociated with impairment in adaptive behavior.'' *Id.*

351. *Id.* § 25-03-1.02 (11) (Supp. 1983). Section 25-03.1-02 (11) defines a person requiring treatment as follows:

> ''Person requiring treatment'' means either a person:
> a. Who is suffering from severe mental illness, severe alcoholism, or severe drug addiction. ''Severe'' means that the disease or addiction is associated with gross impairment of the person's level of adaptive functioning as outlined by axis V of the diagnostic and statistical manual of mental disorders of the American Psychiatric Asociation; or
> b. Who is mentally ill, an alcoholic, or drug addict, and there is a reasonable expectation that if the person is not hospitalized there exists a serious risk of harm to himself, others, or property. ''Serious risk of harm'' means a substantial likelihood of:
> (1) Suicide as manifested by suicidal threats, attempts, or significant depression relevant to suicidal potential;
> (2) Killing or inflicting serious bodily harm on another person, inflicting significant property damage, as manifested by acts or threats; or
> (3) Substantial deterioration in physical health, or substantial injury, disease, or death resulting from poor self-control or judgment in providing one's shelter, nutrition, or personal care.

Id.

352. *Id.* § 25-03.1-04. See *supra* note 349 for the text of § 25-03.1-04.

353. N.D. CENT. CODE § 30.1-28-12 (1) (Supp. 1983). Section 30.1-28-12 (1) provides in part that:

> 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 except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian

that, except as modified by order of the court when a limited guardian is appointed, "a guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service."[354]

The language of the statute providing for voluntary admissions is clear and unequivocal; only parents or guardians of minors are empowered to consent to their ward's "voluntary admission."[355] Additionally, the guardian of an incapacitated adult may provide such "voluntary consent" on behalf of their wards.[356] The potentially coerceive effect of "voluntary admission" by guardians is a strong argument for following the procedure for involuntary admission. For instance, persons who provide their own consent for admission have a right to immediate release upon their request.[357] If the release is not granted, judicial proceedings for involuntary treatment must be initiated.[358] Yet, if a parent or guardian had provided the "voluntary consent," release could be conditioned upon the parent's or guardian's consent.[359]

If the ward is a developmentally disabled person, the impact of the Bill of Rights for Developmentally Disabled Persons must also be considered: "No developmentally disabled shall be presumed to be incompetent or shall be deprived of any constitutional, civil, or legal right solely because of admission to residence at an institution

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has the following powers and duties, except as modified by order of the court when the guardianship is limited. . . .

Id.

354. *Id.* § 30.1-28-12 (1) (c).

355. *Id.* § 25-03.1-04. See *supra* note 349 for the text of § 25-03.1-04.

356. *See* N.D. CENT. CODE § 30.1-28-12 (Supp. 1983).

357. *Id.* § 25-03.1-06. Section 25-03.1-06 requires:

> Any person voluntarily admitted for inpatient treatment to any treatment facility or the state hospital shall be orally advised of the right to release and shall be further advised in writing of his rights under this chapter. A voluntary patient who requests his release shall be immediately released. However, if the superintendent or the director determines that the patient is a person requiring treatment, the release may be postponed until judicial proceedings for involuntary treatment have been held in the county where the hospital or facility is located. The patient must be served the petition within twenty-four hours, exclusive of weekends and holidays, from the time release is requested, unless extended by the magistrate for good cause shown. The treatment hearing shall be held within five days, excluding weekends and holidays, from the time the petition is served.

Id.

358. *Id.*

359. Parham v. J.R., 442 U.S. 584 (1979). In *Parham* the Court approved a procedure whereby parents could provide the voluntary consent for their children's admission to a state psychiatric hospital. The situation in *Parham* may be distinguished from a case in which a guardian provides the consent since the Court relied on the presumption that as the natural guardians the parents of a child act in the child's best interest. *Id.* at 602-03. The bond between a legal guardian and a ward is only a legal relationship, created when the guardian is appointed.

or facility or solely because of receipt of services for developmentally disabled persons."[306] Much of the support for the limited guardianship bill came from groups concerned with programs for the developmentally disabled; certainly a limited guardianship and perhaps even plenary guardianship might be considered a service for developmentally disabled persons.[361]

Moreover, if a guardian of an incapacitated adult were able to consent to the voluntary admission of his ward, all of the procedural protections given to respondents facing involuntary commitment proceedings would be circumvented.[362] Admission, therefore, should properly be considered voluntary only when a ward himself agrees and is capable of giving effective consent.[363] Although there are no reported North Dakota cases, nonconsenting wards have successfully challenged "voluntary admission" by guardians in other states.[364] Until the legislature acts or the North Dakota Supreme Court has an opportunity to rule, it is unclear under North Dakota law whether guardians of incapacitated adults may consent to their ward's voluntary admission to the state hospital or a similar treatment facility. Yet, the United States Supreme Court has acknowledged that involuntary commitment to a hospital results in a significant curtailment of liberty, requiring due process protection.[365] The potentially coercive effect on "voluntary admission" by a legal guardian indicates that the procedure for involuntary admission should be followed.

2. *Services for Developmentally Disabled Persons*

The Century Code empowers the parents or legal guardian of a mentally deficient person to apply for admission on behalf of the child or ward to the Grafton State School or another state facility.[366] North Dakota's guardianship statute also empowers a

360. N.D. CENT. CODE § 25-01.2-03 (Supp. 1983).

361. *Limited Guardianship, 1983: Hearings on H.B. 1057 Before the Senate Comm. on Social Services and Veteran's Affairs*, 48th N.D. Leg. (1983) (statement of Tom Wallner, Director, North Dakota State Council on Developmental Disabilities; statement of Beth Wosick, Assistant Director, Mental Health Association; statement of Nancy Burns, Easter Seal Society of North Dakota).

362. *See* N.D. CENT. CODE ch. 25-03.1 (Supp. 1983).

363. P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 36-38 (1976).

364. *See, e.g.*, P.F. v. Walsh, ___ Colo. ___, ___, 648 P.2d 1067, 1071-72 (1982). The Colorado Supreme Court recently considered a challenge to Colorado's statutory scheme that authorized a minor to be involuntarily admitted to a state psychiatric hospital with the consent of a parent or legal guardian. *Id.* at ___, 648 P.2d 1071-72. The Colorado court found the statutory procedure unconstitutional and void as a violation of due process because it contained no statutory admission standard to be applied by the hospital staff when determining whether to accept a minor for treatment. *Id.* at ___, 648 P.2d at 1071.

365. Vitek v. Jones, 445 U.S. 480, 491-94 (1980).

366. N.D. CENT. CODE § 25-04-05 (1) (a) (Supp. 1983).

guardian to "give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service."[367] Admission for services for developmentally disabled persons should be considered "voluntary" only if the ward agrees to the program or placement and is capable of giving informed consent.[368]

D. PARTICIPATION IN PROGRAMS AND SERVICES FOR THE DEVELOPMENTALLY DISABLED

The North Dakota Legislature has clearly indicated that persons with developmental disabilities shall enjoy the right to appropriate treatment, services, and habilitation for those disabilities.[369] A partial listing of the rights provided by the Century Code includes: the right to a free and appropriate education, the right to an individualized habilitation plan, the right to social interaction, and the right to appropriate medical care and treatment.[370] A right to refuse services is also included in the Bill of Rights for Developmentally Disabled Persons.[371] Although this section speaks of a "recipient of services," the legislative history indicates an intent to extend these rights to all developmentally disabled persons in the state.[372]

Another consideration regarding programs and services for the developmentally disabled is their right to an education.[373] Basing its decision on both the state and federal constitutions, the North Dakota Supreme Court has concluded that handicapped children who can benefit from an education have a constitutional right to

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367. *Id.* § 30.1-28-12(1)(c).

368. See *supra* note 359 and accompanying text for a discussion on voluntary consent.

369. N.D. CENT. CODE ch. 25-01.2 (Supp. 1983) (Bill of Rights for Developmentally Disabled Persons).

370. *See id.*

371. *Id.* § 25-01.2-15. Section 25-01.2-15 provides:

> An adult recipient of services, or, if the recipient is a minor or under guardianship, the recipient's guardian or parent shall be given the opportunity to refuse generally accepted mental health or developmental disability services, including but not limited to medication, unless those services are necessary to prevent the recipient from causing serious harm to himself or to others. The facility director shall inform a recipient or guardian or parent of a minor who refuses generally accepted services of alternate services available, the risks of those alternate services, and the possible consequences to the recipient of the refusal of services.

Id.

Chapter 25-01.2 of the Century Code is known as the "Bill of Rights for Developmentally Disabled Persons." *See* N.D. CENT. CODE ch. 25-01.2 (Supp. 1983).

372. *Bill of Rights for Developmentally Disabled Persons, 1981: Hearings on S.B. 2252 Before House Comm. on Social Services and Veteran's Affairs,* 47th N.D. Leg. 1981 (statement of Judith Podoll, North Dakota Council for Developmental Disabilities).

373. N.D. CENT. CODE § 25-01.2-07 (Supp. 1983).

such education.[374] Furthermore, the statement of legislative intent for the chapter of the Century Code concerned with special education of exceptional children also recognizes the right of a handicapped student to an educational program that will enable the student to attain the maximum level of self-sufficiency and independence.[375]

North Dakota's guardianship statute permits the appointment of a guardian only when the court finds that the appointment is necessary or desirable as a means of providing continuing care and supervision of an incapacitated person.[376] The statute also mandates that the court exercise its authority to appoint a guardian "consistent with the maximum self-reliance and independence of the incapacitated person."[377] Guardians must act in the best interests of their wards when exercising authority to give or withhold any consent necessary to enable their wards to participate in educational programs or to receive other medical or professional care, counsel, treatment, or services.[378] By accepting appointment a guardian submits to the court's jurisdiction in subsequent proceedings relating to the guardianship, including removal of the guardian and the appointment of a successor guardian.[379] The test in removal proceedings is the best interests of

374. *In re* G.H., 218 N.W.2d. 441, 446 (N.D. 1974). All children in North Dakota have the right to a public school education. *Id.* Thus, a failure to provide educational opportunities for handicapped children, unless they are unable to benefit at all from an education, is violative of provisions contained in the North Dakota Constitution. *Id.*

375. *See* N.D. CENT. CODE § 15-59-02.1 (1981).

376. *Id.* § 30.1-28-04 (2) (Supp. 1983). Section 30.1-28-04 (2) provides in part:

> The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

Id.

377. *Id.* § 30.1-28-04 (1). Section 30.1-28-04 (1) provides:

> The court shall exercise the authority conferred in this chapter consistent with the maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure. The court shall determine in all cases in which a guardian is appointed whether the incapacitated person is mentally incompetent and as such is not qualified to vote.

Id.

378. *In re* Guardianship of Pescinski, 67 Wis. 2d 4, 7, 226 N.W.2d 180, 181 (1975). The court in *Pescinski* denied a petition to permit the removal of a kidney of a mentally incompetent ward because no benefit had been shown to the ward. *Id.* at 7, 226 N.W.2d at 181. After determining that there was no statutory authority giving the probate court power to authorize a kidney transplant under these circumstances, the court specifically refused to adopt the doctrine of substituted judgment. *Id.* at 8, 26 N.W.2d at 182.

379. N.D. CENT. CODE § 30.1-28-05 (1976). Section 30.1-28-05 provides:

> By accepting appointment, a guardian submits personally to the jurisdiction of

the ward.[380] It would follow, therefore, that the test of a guardian's power to withhold the consent necessary to permit his ward to participate in programs or receive services for developmentally disabled persons should also be the best interest of the ward. If a guardian were permitted unlimited discretion to give or withhold consent, the legislative mandate of the limited guardianship amendments would be defeated.[381]

The statute gives a guardian of an incapacitated person "the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child,"[382] but even a natural parent's authority is not unrestricted. For example, when a court determines parental abuse is present, it may free a child from the dominion of the parent although the parental duty of support and education may be still enforced.[383] Moreover, a court may terminate parental rights under certain conditions.[384] The Century Code also imposes a penalty on a parent, guardian, or custodian of a child who abuses or willfully neglects or refuses to provide food, education, or other necessary care for the health, morals, or well-being of their child.[385] Additional limitations on the authority of parents and guardians can be found in the section of the Century Code relating to compulsory school attendance.[386] In most instances, attendance in regular or special education programs is required.[387] In *State v. Shaver*[388] the North Dakota Supreme Court determined that the state's compelling interest in providing education for its citizens outweighed any burden imposed on the parents' free exercise of religion.[389]

> the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner.

Id.

380. *Id.* § 30.1-28-07 (1). Section 30.1-28-07 (1) provides:

> On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interest of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

Id.

381. *See id.* § 30.1-28-04 (limited guardianship amendments encourage the self-reliance and independence of the ward).

382. *Id.* § 30.1-28-04.

383. *See id.* § 14-09-19 (1981).

384. *Id.* § 27-20-44 (1974).

385. *Id.*

386. *Id.* ch. 15-34.1 (1981 & Supp. 1983) (compulsory school attendance).

387. *See id.* § 15-34.1-03.

388. 294 N.W.2d 883 (N.D. 1980). The defendants were convicted of violating North Dakota's compulsory school attendance law. State v. Shaver, 294 N.W.2d 883, 885 (N.D. 1980).

389. *Id.* at 897. The court recently reaffirmed its decision in *Shaver*. State v. Rivinius, 328

In cases involving non-life-threatening medical conditions, some courts have refused to order that a child receive medical treatment over the objection of his parents when their objections were not based upon religious grounds.[390] The trend, however, indicates a shift in emphasis from whether parental objections constitute neglect to the best interests of the child.[391] In *In re Phillip B.*[392] the court concluded that parental custody had caused serious detriment to the child and that the child's interests would be best served by granting the guardianship petition.[393] In a New York case, after a father withdrew his consent for surgery to repair his child's congenital spinal disorder, a petition was filed for appointment of a guardian authorized to consent to the surgery.[394] The New York court granted the petition and concluded that when surgery would give the child a reasonable chance to live a useful life parental inaction should not be allowed to deny that chance.[395]

The purpose of guardianship is to protect the welfare of the ward.[396] Thus, a guardian's power to consent or withhold consent must be exercised to promote the best interests of his ward.[397] If a guardian unreasonably refuses to permit his ward to participate in programs or receive services that would be beneficial to the ward, either the ward or any interested party may petition the court for the guardian's removal and the appointment of a successor or for permission from the court authorizing the ward's participation in the program.[398]

E. NON-THERAPEUTIC SURGERY

Whether North Dakota law permits a guardian to consent to his ward's participation in a non-therapeutic medical procedure to benefit another person is unclear. The statute empowers a guardian

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N.W.2d 220, 224-28 (N.D. 1982), *cert. denied,* 103 S. Ct. 1525 (1983). The defendants in *Rivinius,* like those in *Shaver,* were convicted of violating North Dakota's compulsory school attendance law. *Id.* at 221-22. The defendants sent their children to a religious school not approved by the County Superintendent of Schools and the Superintendent of Public Instruction. *Id.*

390. Annot., 97 A.L.R.3d 421, 423 (1973).

391. *In re* Warren B., 92 Cal. App. 3d 799, ____, 156 Cal. Rptr. 48, 51 (Cal.Ct.App. 1979), *cert denied sub nom.* Bothman v. Warren B., 445 U.S. 949 (1980) (state officials may interfere with parental autonomy and in family matters to protect a "child's health, educational development and emotionally well-being").

392. 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (Cal.Ct.App. 1983).

393. *In re* Phillip B., 139 Cal. App. 3d 407, ____, 188 Cal. Rptr. 781, 792 (Cal.Ct.App. 1983).

394. *In re* Cicero, 101 Misc. 2d 699, ____, 421 N.Y.S.2d 965 (N.Y. Sup. Ct. 1979).

395. *Id.* at ____, 421 N.Y.S.2d at 968.

396. *See In re* Thoreson's Guardianship, 72 N.D. 101, 105-06, 4 N.W.2d 822, 824 (1942).

397. *In re* Pescinski, 67 Wis. 2d 4, 7, 226 N.W.2d 180, 181 (1975) (removal of a kidney would not be in the ward's best interests).

398. *See* N.D. CENT. CODE § 30.1-28-07 (1) (1976). See *supra* note 380 for the text of § 30.1-28-07 (1).

to "give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service." [399] Furthermore, there are no reported North Dakota cases that detail the scope and type of medical treatment that a guardian may authorize. Nevertheless, the power of a parent or guardian to consent to surgical intrusions on the person of a minor or ward is probably limited to the power to consent to medical treatment to effect a cure of an injury or disease, including examination and diagnosis as well as administering remedies.[400]

The Bill of Rights for Developmentally Disabled Persons prohibits hazardous or intensive medical procedures or treatment that are not directly related to the specific goals of the individual's treatment program.[401] The Bill of Rights for Developmentally Disabled Persons requires a court order before a person receiving services at any institution for the developmentally disabled is subject to psychosurgery, sterilization, medical or behavioral research, or pharmacological research.[402]

In *In re Pescinski*[403] the Wisconsin Supreme Court considered a petition in a guardianship proceeding to permit the removal of a kidney of a mentally incompetent ward for the purpose of transferring it to the ward's sister, who was suffering from kidney failure.[404] The Wisconsin court concluded that the doctrine of substituted judgement[405] should not be utilized when the ward received no benefit from the surgery.[406] The court also determined

399. N.D. CENT. CODE § 30.1-28-12 (1) (c) (Supp. 1983).

400. *See In re* Moe, 385 Mass. App. 555, ____, 432 N.E.2d 712, 716-17 (1982) (parent or guardian cannot consent to the sterilization of a ward absent statutory or judicial authorization).

401. *See* N.D. CENT. CODE § 25-01.2-09 (Supp. 1983).

402. *Id.*

403. 67 Wis. 2d 4, 226 N.W.2d 180 (1975).

404. *In re* Pescinski, 67 Wis. 2d 4, 6-7, 226 N.W.2d 180, 181 (1975).

405. *In re* Roe, III, 383 Mass. 415, 421 N.E.2d 40 (1981). In *Roe III* the Massachusett's highest court considered the right of a mentally incompetent person, who was not institutionalized, to refuse treatment with antipsychotic drugs. Resting its decision on state common law and the federal constitution, the Massachusetts court held that a person has a protected liberty interest in deciding "whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." *Id.* at ____, 421 N.E.2d at 51 n.9. The court in *Roe III* determined that this liberty interest was of such importance that only an overwhelming state interest could support a decision to submit noninstitutionalized mental patients to the administration of potentially harmful antipsychotic drugs. *Id.* at ____, 421 N.E.2d at 51. The court also determined that, even though incompetent, a person does not forfeit his protected liberty interest and is thus entitled to have "substituted judgment" exercised on his behalf. *Id.* The "substituted judgment" doctrine can be defined as a judicial determination of what an incompetent person would do if he were competent. This requires an inquiry into the values and preferences of the incompetent individual. *Id.* at ____, 421 N.E.2d at 51-52. The *Roe III* court emphasized that the determination "must 'give the fullest possible expression to the character and circumstances' " of the person. *Id.* at ____, 421 N.E.2d at 56 (citation omitted). The "substituted judgment" doctrine does not require medical expertise; instead, the court dons the mantle of the incompetent person. *Id.* at ____, 421 N.E.2d at 52. The court identified six relevant, but not exclusive factors that can be used to determine whether to approve painful medical treatment for an incompetent individual for whom a

that without the valid consent of a ward or the ward's guardian ad litem the probate court did not have authority to order non-therapeutic surgery.[407]

An opposite result was reached by Kentucky's highest court in *Strunk v. Strunk*.[408] The *Strunk* court held that a court of equity had the power to permit the removal of a kidney from an incompetent ward, upon the petition of his parent-guardian, to be donated to his brother who was dying of a fatal kidney disease.[409] A significant factor in the court's decision was its finding that the operation would also benefit the incompetent ward because he was emotionally and psychologically dependent upon his brother and that the ward's well-being would be jeopardized more by the loss of his brother than by the removal of his kidney.[410] Although the *Strunk* court discussed the doctrine of substituted judgment in some detail, its decision was based upon the benefits to the incompetent ward, not on the theory that the ward would have consented to the operation if competent.[411] Nevertheless, a number of courts have, in recent years, utilized the doctrine of substituted judgment to authorize various transactions on behalf of incompetent wards.[412]

Although there are no reported North Dakota cases concerning a guardian's authority to consent to non-therapeutic surgery, the event that a guardian's statutory authority to give any consent necessary to enable his ward to receive "medical care" will be construed to allow non-therapeutic surgery without specific court authorization is unlikely.[413] Consequently, in the absence of specific statutory authority, guardians should be advised to seek prior court approval before consenting to non-therapeutic surgery on behalf of their wards.

"substituted judgment" is necessary: "(1) the ward's expressed preferences regarding the treatment; (2) his religious beliefs; (3) the impact upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment." *Id.* at ____, 421 N.E.2d at 57.

406. *In re* Pescinski, 67 Wis. 2d 4, 8, 226 N.W.2d 180, 182 (1975). The court declined to adopt the doctrine since it historically has not allowed property of the incompetent to be given away as gifts without the actual consent of the incompetent. *Id.*

407. *Id.*

408. 445 S.W.2d 145 (Ky. 1969).

409. Strunk v. Strunk, 445 S.W.2d 145, 147-49 (Ky. 1969).

410. *Id.* at 146.

411. *Id.* at 148-49.

412. *See* Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (1972) (kidney transplant); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (refusal to submit a profoundly retarded man to chemotherapy); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976) (discontinuance of life support systems); State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962) (blood transfusion over objection of child's parents); *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (Ch. Div. 1977) (amputation of a leg).

413. *See* N.D. CENT. CODE § 30.1-28-12 (1) (c) (Supp. 1983).

F. STERILIZATION AND ABORTION

1. *North Dakota Law*

In North Dakota, there is no specific statutory authority giving guardians of incapacitated persons or minors the power to consent to the sterilization of their wards.[414]

a. Institutionalized Persons

The Century Code prohibits the sterilization of any person receiving services at an institution or facility for the developmentally disabled except in conformity with a court order.[415] In addition, there are a number of procedural requirements that must be met before a court can issue an order permitting the involuntary sterilization of a developmentally disabled resident or recipient of services.[416] The application of these procedural requirements is limited to institutions or facilities that provide residential care[417] or to any institution or facility for the developmentally disabled.[418] The terms "institution or facility" include "any school, hospital, residence center, group home, or any other facility operated by any public or private agency, organization, or institution, which provides services to developmentally disabled persons."[419]

The definition of "services for developmentally disabled persons" includes a variety of services: " 'Service or services for

414. *See id.* §§ 30.1-27-09 (1976) (guardianship of minors); 30.1-28-12 (Supp. 1983) (general powers and duties of guardians).

415. *Id.* § 25-01.2-09 (4) (Supp. 1983).

416. *Id.* § 25-01.2-11. Section 25-01.2-11 provides as follows:

> A court of competent jurisdiction may issue the orders required for the procedures or treatments in subsection 4 of section 25-01.2-09 upon application of the party alleging the necessity of the procedure, the person who is receiving or is entitled to receive the treatment, or the person's guardian, following a hearing on the application.
> 1. The person receiving or entitled to treatment shall:
> a. Receive prior notice of the hearing;
> b. Have the right and the opportunity to present evidence; and
> c. Have the right to be confronted with and to cross-examine witnesses.
> 2. If the developmentally disabled person cannot afford counsel, the court shall appoint an attorney not less than ten days before the hearing.
> 3. The burden of proof shall be on the party alleging the necessity of the procedure or treatment.
> 4. An order allowing the procedure or treatment may not be granted unless the party alleging the necessity of the procedure or treatment proves by clear and convincing evidence that the procedure is in the best interest of the recipient and that no less drastic measures are feasible.
>
> This section applies only with respect to an institution or facility that provides residential care.

Id.

417. *Id.*

418. *Id.* § 25-01.2-09 (4).

419. *Id.* § 25-01.2-01 (2).

developmentally disabled persons, means services provided by any public or private agency, organization, or institution, directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of a developmentally disabled person."[420] In addition, chapter 25-16 of the Century Code defines the term "group home" to include "any community residential facility, foster home, family care facility, or other similar home for developmentally disabled persons."[421]

In 1979, the North Dakota Legislature repealed the chapter of the Century Code that permitted sterilization of residents of the Grafton State School with the consent of a parent or guardian and the unanimous approval of a five member board.[422] The sparse legislative history reveals two reasons for the repeal: the inactivity of the board and the belief that compulsory sterilization was unconstitutional under both the state and federal constitutions.[423]

b. Noninstitutionalized Persons

The North Dakota Supreme Court has not spoken on the question of whether the sterilization of a retarded person with the consent of his guardian may be regarded as voluntary. The procedural protections that were passed by the legislature as a part of a Bill of Rights for Developmentally Disabled Persons should be considered in determining the issue of voluntariness.[424] One motive for the introduction of the legislation was to ensure due process for developmentally disabled persons in institutions.[425] This legislation prohibits the presumption of incompetence or deprivation of "any constitutional, civil, or legal right solely because of admission to or residence at an institution or facility or solely because of receipt of services for developmentally disabled persons."[426]

The testimony supporting the Bill of Rights for Developmentally Disabled Persons indicates that many of the Bill's supporters believed that the residents of state institutions and those

420. *Id.* § 25-01.2-01 (4).
421. *Id.* § 25-16-14 (1) (b).
422. *See* Act of Feb. 8, 1979, ch. 93, 1979 N.D. Laws 156.
423. *Inactive Entities, 1979: Hearings on H.B. 1079 Before the Comm. on State and Federal Government,* 46th N.D. Leg. (1979) (statement of Rep. Lee).
424. *See* N.D. CENT. CODE § 25-01.2-11 (Supp. 1983).
425. *Bill of Rights for Developmentally Disabled Persons, 1981: Hearings on S.B. 2253 Before Senate Comm. on Social Services and Veteran's Affairs,* 47th N.D. Leg. (1981) (statement of Judith Podoll, North Dakota Council for Developmental Disabilities).
426. N.D. CENT. CODE § 25-01.2-03 (Supp. 1983).

receiving services were the group most in need of protection.[427] Moreover, there is no mention of a legislative decision to restrict the scope of the legislature to those developmentally disabled persons residing in institutions.[428] During the committee hearings on the Bill one speaker stated, "This bill does speak to the people in Grafton, but it also speaks to *all the developmentally disabled persons in the state of North Dakota.*"[429] This testimony and other remarks by legislators indicate that they believed the Bill of Rights should be applied to virtually all developmentally disabled persons in the state.[430] Nevertheless, neither the guardianship statute nor the Bill of Rights for Developmentally Disabled Persons specifically addresses the question of whether the sterilization of a ward with the substituted consent of his guardian is voluntary.

2. *Federal Constitutional Law*

Fifty-seven years ago the United States Supreme Court in *Buck v. Bell*[431] upheld a state sterilization statute and its application to a mentally-retarded woman, who was an inmate of a state institution for the "epileptics and feeble minded."[432] The decision in *Buck v. Bell,* however, contains numerous statements about mentally retarded persons that are now questionable.[433] Even though *Buck v. Bell* has not been explicitly overruled,[434] the Court in *Skinner v. Oklahoma*[435] did overturn a state statute providing for sterilization of felons with three or more convictions and established procreation as

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427. *Bill of Rights for Developmentally Disabled Persons, 1981: Hearings on S.B. 2253 Before Senate Comm. on Social Service and Veteran's Affairs,* 47th N.D. Leg. (1981) (statement of Judith Podoll, North Dakota Council for Developmental Disabilities).

428. *See* S.B. 2253, 47th N.D. Leg. (1981).

429. *Bill of Rights for Developmentally Disabled Persons, 1981: Hearings on S.B. 2253 Before Senate Comm. on Social Services and Veteran's Affairs,* 47th N.D. Leg. (1981) (statement of Judith Podoll, North Dakota Council for Developmental Disabilities) (emphasis added).

430 *See* S.B. 2253, 47th N.D. Leg. (1981).

431. 274 U.S. 200 (1927).

432. Buck v. Bell, 274 U.S. 200, 205 (1927).

433. *Id.* at 207-08. Some of these questionable statements are as follows:

> It would be strange if it [public welfare] could not call upon those who already sap the strength of the state for these lesser sacrifices [sterilization], often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

Id. at 207 (citation omitted).

434. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 923 (1978).

435. 316 U.S. 535 (1942).

a fundamental right.[436]

Courts today are reluctant to justify the sterilization of incompetents on the basis of the discredited eugenic theories used to buttress the Court's decision in *Buck v. Bell.*[437] Furthermore, although the Supreme Court has not considered the constitutionality of involuntary sterilization statutes since *Skinner,* a number of commentators have concluded that such laws, regardless of their rationale, are unconstitutional unless compulsory sterilization is the only means to further a compelling state interest.[438]

Other recent Supreme Court decisions imply a more general right to reproductive autonomy, including the opportunity to prevent procreation through noncompulsory sterilization. In *Griswold v. Connecticut*[439] the Court identified a right of privacy in marriage that prevented the state from intruding into decisions involving contraception.[440] Later in *Eisenstadt v. Baird*[441] the Court declared that the right to privacy included the fundamental right to choose whether to beget a child free from unwarranted government intrusion.[442] Other cases have invalidated substantial restrictions on abortion not justified by a compelling state interest based on a constituional right of personal control over procreative decisions.[443] These cases, along with *Skinner,* point to complimentary fundamental rights of procreation and sterilization, including the right to choose between alternatives.[444]

3. Substituted Judgment

Some courts have indicated that a person's inability to make a

436. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation are fundamental to the very existence and survival of the race).

437. *See, e.g., In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981) (right to choose among procreation, sterilization, and other methods of contraception is an important privacy right of all individuals including incompetents). *But see* Sterilization of Moore, 289 N.C. 95, 221 S.E.2d 307 (1976) (objective of statute is to prevent procreation of children by mentally retarded persons who would probably procreate children with serious physical, mental, or nervous disorders); Cook v. State, 9 Or. App. 224, 495 P.2d 768 (1972) (court cited *Buck v. Bell,* noting that sterilization was considered beneficial to the patient and society because it permitted the patient to be discharged, return to the community, and become self-supporting).

438. *See, e.g.,* Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and Sterilization of Handicapped Persons,* 50 TEMP. L.Q. 995, 1030-33 (1977); Note, *Developments in the Law: The Constitution and the Family,* 93 HARV. L. REV. 1159, 1296-1308 (1980).

439. 381 U.S. 479 (1965).

440. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

441. 405 U.S. 438 (1972).

442. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

443. *See, e.g.,* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

444. *See In re* Grady, 85 N.J. 235, ___, 426 A.2d 467, 473-76 (1981) (individual's constitutional right of privacy includes right to refuse to undergo sterilization); *In re* Eberhardy, 102 Wis. 2d 539, 562, 307 N.W.2d 881, 891-92 (1973) (sterilization involves a personal procreative decision).

choice between procreation and sterilization or other methods of contraception should not result in a loss of those constitutional interests.[445] Accordingly, these courts have authorized a procedure by which the judgment of a court can be substituted for the incompetent's consent.[446]

In *In re Moe*[447] a mother, as guardian for her mentally retarded adult daughter, filed a petition seeking an order permitting a sterilization operation for her daughter.[448] After finding that a court of general jurisdiction in Massachusetts had the power to hear and adjudicate a petition for sterilization, the court determined that the doctrine of substituted judgment could be utilized.[449] In *In re A. W.*[450] the Colorado Supreme Court reviewed the petition of the parents of a mentally retarded minor, and after determining that Colorado's general parental consent statute did not govern, concluded that a full judicial hearing was necessary and that the interests of the minor should be represented by a guardian ad litem.[451] In *In re Eberhardy*[452] the Wisconsin Supreme Court considered a petition for sterilization from the parents and guardians of an adult mentally retarded woman. Although the Wisconsin court found that the Wisconsin circuit court had jurisdiction to consider the sterilization petition, it concluded that the grant of such a petition was not appropriate since the legislature, not the court, is the preferred branch of government to determine public policy.[453] This court specifically refused to permit the use of the doctrine of substituted judgment to authorize the sterilization of a person not capable of giving consent.[454]

a. Substantive Standards

In *In re Moe*[455] the court identified several factors that courts utilize to assist in the determination of a substituted judgment permitting sterilization:

(1) Whether the ward is able to make an informed choice;[456]

445. *See, e.g. In re* Grady, 85 N.J. 235, ____, 426 A.2d 467, 474-75 (1981).
446. *See In re* Moe, 385 Mass. App. 555, ____, 432 N.E.2d 712, 719-20 (1982); *In re* Grady, 85 N.J. 235, ____, 426 A.2d 467, 474-76 (1981). *But see In re* Eberhardy, 102 Wis. 2d 539, 566-67, 307 N.W.2d 881, 893-94 (1981).
447. 385 Mass. App. 555, 432 N.E.2d 712 (1982).
448. *In re* Moe, 385 Mass. App. 555, ____, 432 N.E.2d 712, 715 (1982).
449. *Id.* at ____, 432 N.E.2d at 719.
450. ____ Colo. ____, 637 P.2d 366 (1981).
451. *In re* A.W., ____ Colo. ____, ____, 637 P.2d 366, 370-75 (1981).
452. 102 Wis. 2d 539, 307 N.W.2d 881 (1981).
453. *In re* Eberhardy, 102 Wis. 2d 539, 570-71, 307 N.W.2d 881, 895 (1981).
454. *Id.*
455. 385 Mass. App. 555, 432 N.E.2d 712 (1982).
456. *In re* Moe, 385 Mass. App. 555, ____, 432 N.E.2d 712, 721 (1982)

(2) The physical ability of the ward to procreate;[457]

(3) The possibility and effectiveness of less intrusive means of birth control, including supervision, education, and training;[458]

(4) The medical necessity for the procedure; evidence that the possibility of a pregnancy would threaten the physical and mental health of the ward;[459]

(5) The nature and extent of the person's disability, the ability to care for a child, including the possibility that the individual may at some future time marry and, with a spouse, be capable of caring for a child;[460]

(6) The possibility that the ward will engage in sexual activity likely to result in pregnancy;[461]

(7) The likelihood of physical or mental harm from the sterilization procedure, as well as from pregnancy or childbirth.[462] Additionally, when considering the best interests of the ward, the welfare of society or convenience or peace of mind of the ward's parents or guardian should play no part.[463]

b. Procedural Standards

Procedural protection requires a court order for the sterilization of individuals who are themselves incapable of giving consent.[464] In addition, the appointment of a guardian ad litem or counsel may be necessary.[465] Most often a clear and convincing standard of proof is required in a case when fundamental rights are at stake.[466] Furthermore, the United States Supreme Court has mandated the utilization of at least a standard of clear and convincing evidence in the analogous area of civil commitment proceedings.[467] North Dakota's statutes also require the use of a clear and convincing standard for authorization of the sterilization of a developmentally disabled person who is the resident of a state institution.[468]

While the Century Code does not specifically authorize or deny guardians' power to consent to the sterilization of their wards,

457. *Id.* at ____, 432 N.E.2d at 721-22.
458. *Id.*
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. Wentzel v. Montgomery Gen. Hosp., Inc., 447 A.2d 1244, 1254 (Md. 1982), *cert. denied,* 103 S. Ct. 790 (1983).
464. *See In re* Moe 385 Mass. App. 555, ____, 432 N.E.2d 712, 721 (1982).
465. *Id.* at ____, 432 N.E.2d at 721 n.6.
466. *In re* Grady, 85 N.J. 235, ____, 426 A.2d 467, 483 (1981).
467. Addington v. Texas, 441 U.S. 418, 431-33 (1979).
468. N.D. CENT. CODE § 25-01.2-11 (4) (Supp. 1983).

section 25-01.2-11 of the Century Code specifically requires a hearing on the application before the issuance of a court order.[469] Even though the language of the section limits its application to developmentally disabled persons who are residents of state institutions or recipients of services for developmentally disabled persons, it may have a wider application since the definition of "services for developmentally disabled persons" is broad enough to encompass most developmentally disabled persons.[470] In addition, the legislative history of the Bill of Rights for Developmentally Disabled Persons reveals no intent to exclude disabled persons who do not reside in state institutions or receive services, but rather suggests that it was intended to apply to all developmentally disabled persons.[471] Finally, the fundamental nature of the complimentary rights of procreation and sterilization indicate that the procedural protection of the statute should be extended to any application by a guardian for permission to consent to the sterilization of his ward.[472]

4. *Abortion*

Abortion, like sterilization, implicates the fundamental right to reproductive autonomy.[473] A woman's decision to obtain an abortion is a fundamental right based upon the right of privacy implicit in the Constitution.[474] The United States Supreme Court has also indicated that a state cannot condition a pregnant minor's right to an abortion on the consent of her parents.[475] Moreover, there is an increasing awareness that the interests of parents or guardians and their mentally retarded children or wards are not necessarily identical.[476] The potential for abuse in sterilization or abortion operations for mentally retarded persons is illustrated in *Stump v. Sparkman*.[477] In *Stump* the sterilization operation ordered by the judge upon the mother's petition was performed without notice to the minor.[478] In a similar case, brought under the Civil Rights Act by a handicapped plaintiff alleging a conspiracy to sterilize her

469. *Id.*
470. *Id.*
471. *See* S.B. 2253, 47th N.D. Leg. (1981).
472. N.D. CENT. CODE § 25-01.2-11 (Supp. 1983).
473. Roe v. Wade, 410 U.S. 113, 153-55 (1973).
474. *Id.* at 153.
475. *See* Bellotti v. Baird, 443 U.S. 622, 643-44 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976).
476. P. FRIEDMAN, *supra* note 363, at 121.
477. 435 U.S. 349 (1978).
478. Stump v. Sparkman, 435 U.S. 349, 352-53 (1978). In *Stump* the ward was told the operation was for the removal of her appendix. *Id.*

against her will, the First Circuit Court of Appeals said, "irrevocably terminating a patient's ability to bear children without her consent is a deprivation of a fundamental constitutional right."[479]

Unauthorized abortions might violate North Dakota's Abortion Control Act[480] and also constitute assault and battery.[481] Whether a guardian has the power to consent to an abortion on behalf of his ward is unclear in North Dakota. In other jurisdictions, however, the issue is well settled that a guardian's power to consent to medical treatment for a ward does not encompass the power to consent to the administering or withholding of extraordinary medical treatment.[482] Since abortion is an extraordinary and highly intrusive medical procedure a guardian must obtain a proper judicial order before the guardian can validly consent to the operation. Given the absence of clarity in the statute setting out the general powers of a guardian,[483] an appointing court should specify that a guardian does not have the power to consent to either the administering or withholding of extraordinary medical treatment, including sterilization and abortion, without prior court authorization.

V. CONCLUSION

By providing for limited guardianship and mandating the least restrictive alternative in guardianship appointments, the 1983 Limited Guardianship Act remedied major flaws in North Dakota's guardianship statute. Nevertheless, major deficiencies still remain.

First, the Uniform Probate Code utilizes a vague standard of incapacity. Procedural protections are of little value when the statutory definition of incapacity rests upon a court's interpretation of a phrase as vague as "responsible decisions." In addition, the utility of the list of suspect categories of incapacity requires evaluation. The fundamental rights at stake in guardianship proceedings mandate a higher standard of proof than the traditional civil standard of a preponderance of the evidence. Since the justification of a guardianship proceeding is the alleged

479. Downs v. Sowtelle, 574 F.2d 1, 11 (1st Cir. 1978).

480. *See* N.D. CENT. CODE § 14-02.1-03 (1981) (Abortion Control Act).

481. *Id.* § 12.1-17-01 (1976) (assault and battery).

482. *See, e.g.*, Superintendent of Belcher Town v. Saikewicz, 373 Mass. 658, ____, 370 N.E.2d 417, 432-34 (1977). The Model Guardianship and Conservatorship Act, § 16 (5) specifically prohibits a guardian from consenting on behalf of a disabled or partially disabled person to an abortion, sterilization, or other extraordinary medical procedures. 3 MENTAL DISAB. L. REP. 264, 274 (1979) (reprint of the Model Guardianship and Conservatorship Act).

483. *See* N.D. CENT. CODE § 30.1-28-12 (Supp. 1983).

diminished capacity of the respondent, the minimal notice requirements should be strengthened to require that the contents of notice alert the proposed ward of the nature and consequences of the proceeding.

In addition, the potentiality of stripping an individual of basic rights indicates the need for a right to court appointed counsel. Except for developmentally disabled persons, the current statute contains no mechanism for review and oversight of guardianships. Furthermore, no reporting requirement exists. Thus, there is a need for additional reform.

Although technically the statutes concerning county public administrators are not a part of the guardianship statute, they designate the county public administrator as the ex officio guardian and conservator in and for his county. In addition, section 11-21-06 of the North Dakota Century Code provides that he can be appointed guardian and conservator. This is a potential problem area that needs investigation.

The limited guardianship amendments may reduce the social stigma and legal disability of guardianship, but even limited guardianship has its problems. Limited guardianship may increase the use of guardianship proceedings by relatives and providers of various services by providing an alternative to the harshness of the all-or-nothing traditional model of guardianship. Guardianship should require an exhaustion of other alternatives. The most effective safeguard against inappropriate appointments of guardians or conservators is a zealous advocate for the allegedly incapacitated person. The need for continued reform still exists if guardianship is to become a legal device that will truly promote and protect the well-being of the ward.

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