

Tailoring Guardianship to the Needs of Mentally Handicapped Citizens

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In Maryland a guardian may be appointed for a disabled individual who is unable to manage his property and affairs effectively.¹ The law views the disabled adult who becomes a ward in much the same way as it views the child. According to Maryland law, parents are the natural guardians of their children. The parent has the duty of providing the support, care, nurture, welfare, and education of the child.² Implicit in this mandate is the State's policy that "a child is not capable of protecting himself."³ Consequently, until he reaches his majority, a child does not have full legal capacity.⁴ He may not choose his domicile,⁵ consent to medical treatment,⁶ keep his earnings,⁷ or marry without his parent's consent.⁸

The ward also lacks full legal capacity. Guardianship laws set up a "legal relationship whose essential purpose is to replace the disabled individual's legal authority to make personal decisions in his or her own self-interest . . ."⁹ Under present guardianship laws in Maryland,¹⁰ if an individual is found to be disabled and if a guardian of the person is appointed, the disabled individual automatically loses his right to vote,¹¹ to contract,¹² to drive,¹³ and to marry.¹⁴ If a guardian of the property is appointed, the guardian automatically takes title to all property owned by the disabled individual, including earnings.¹⁵ Thus, the disabled person loses the ability to buy or sell any property, as well as the ability to write valid checks. And, as a practical matter, once an individual loses the right to manage his own finances, he loses the authority to make independent decisions which affect his everyday life.

This approach to the authority of disabled persons makes more sense in its historical context than it does in light of what we now know about disabled persons. Retarded people, for example, must be permitted to participate as fully as possible in all decisions which affect them.¹⁶ They can learn and become productive members of society.¹⁷ Consequently, the denial of authority to perform specific acts is appropriate only with regard to those specific acts which a court has found the disabled person to be incapable of performing.

In the past, changes in guardianship law have been intended primarily to simplify the procedures for the appointment of a guardian. The main intention has not been to protect the interests of the disabled person. The purpose of this article is to analyze whether the Maryland guardianship laws effectively fulfill the needs of disabled individuals, and to propose improvements in the law which would make it more responsive to disabled persons. The article will trace the historical basis and development of guardianship laws, describe the operation of guardianship laws in Maryland, and propose alternatives to those laws.

THE HISTORICAL BASIS AND DEVELOPMENT OF GUARDIANSHIP LAWS

In ancient Rome in 449 B.C., references were made to the mentally disabled in the Twelve Tables of Rome.¹⁸ The mere fact that an individual did not act like other people served as justification for relatives assuming full control of his person and his goods.¹⁹ No judicial decree was required.²⁰

By the time of Justinian, the courts had become involved in guardianship to a limited extent. Upon the death of the person who exercised control over a disabled person, the magistrate designated a "curator." The curator was usually a relative appointed in the will of the person who had previously exercised control over the disabled person.²¹ Guardianship was suspended during lucid moments of the ward. However, no new proceedings were required when the disability reappeared; the former guardianship became automatically operative.²² Testaments made by the disabled person during lucid moments were valid.²³

The guardians' control over the ward's goods was much more limited than it is today. The guardian was unable to sell or transfer the real property of the ward, to make a gift in his name, or to liberate his slaves.²⁴ To insure honesty, the law required the guardian to account to either the former ward or his heirs when guardianship ended.²⁵ Roman law placed greater stress on protection of the property of the ward than on protection of his person.

Although the ward's property has always been well cared for, his body, depending upon the temper of the times, has at worst been subjected to tortures designed to exorcise the spirits possessing it, and at best been cared for privately by friends and relatives.²⁶

In medieval England, it was the duty of the lord of the manor to protect the person and property of the "insane."²⁷ Although he was required to protect their personal interests, the main reason for guardianship was to prevent the mentally disabled from becoming public burdens and from spending all of their assets to the detriment of their heirs.²⁸

In the late thirteenth century, the king was given the rights and duties of wardship by the statute of *De Praerogativa Regis*.²⁹

The King . . . as the political father and guardian of his kingdom, has the protection of all his subjects, and of their lands and goods, and he is bound, in a more peculiar manner, to take care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves.³⁰

The mentally disabled, or "insane," were divided into two categories, the "idiot" and the "lunatic."³¹ All right and title to property of the "idiot" or mentally retarded went to the king,³² who could retain the profits from the land after providing the "idiot" with necessities.³³ Upon the "idiot's" death, title to the land was returned to the "idiot's" heirs.³⁴ Guardianship of the "lunatic" or the mentally ill person was not so profitable for the king.³⁵ The ward's property was to be used only for his support, and was to be returned to him upon his recovery or to his heirs upon his death.³⁶

By the early seventeenth century, the king's authority

as guardian of the mentally handicapped was designated in a "sign manual" to the Chancellor.³⁷ The designation afforded the mentally handicapped procedural safeguards. Before the court of chancery obtained jurisdiction over the person or estate of an "idiot" or a "lunatic," an inquisition by a jury of twelve men must have found the person to be *non compos mentis*. Four types of individuals were included in this term: 1) the idiot or natural fool; 2) he who was of good and sound memory, but who by the visitation of God has lost it; 3) the lunatic, who was sometimes lucid and sometimes *non compos mentis*; and 4) he who by his own acts deprived himself of reason, such as the drunkard.³⁸ If an inquisition was held and

. . . if an incompetent was determined by the jury to be a lunatic, the chancellor committed him to the care of some friend, who received an allowance with which to care for him. The incompetent's heir was generally made the manager of the estate, although, according to Blackstone, "to prevent sinister practices," he was not given the custody of the incompetent. For the custody of the estate the heir was responsible to the court of chancery, to the recovered lunatic, or to his administrator.³⁹

However, the safeguard of the inquisition by jury had only limited application because only those with sufficient funds could afford such a proceeding.⁴⁰

The Chancellor was given custody of the person of the disabled as well as of his land, but there is no indication that public money was used for this purpose.⁴¹ Rather, the protection of the person consisted of caring for his needs out of the proceeds from his lands.⁴²

In colonial America, responsibility for the care of incompetents was originally given to the family.⁴³ Those without families were subjected to the same fate as the itinerant poor: they wandered from town to town, begging.⁴⁴ Gradually, the community became involved in the welfare of the incompetents and towns paid relatives and, later, other interested parties to care for the disabled.⁴⁵ However, the institution of support payments reflected concern for the plight of the family rather than for that of the disabled person.⁴⁶

Ironically, American law concerning the guardianship of the mentally handicapped became more like English law after the Revolutionary War.

[C]ourts of equity, applying English common law, or acting under constitutional provisions or statutes, exercised a modified form of *parens patriae* jurisdiction over the persons and property of the mentally incompetent to assure that those unable to care for themselves were protected from harm.⁴⁷

As in England, an elaborate set of customs, rules, and standards developed for the protection of the ward's property, whereas protection of the person remained secondary.⁴⁸ Many of these rules were necessitated by the disabled person's inability to contract. However,

statutes of several states provide that the contract of an incompetent is void and cannot be enforced by the "incompetent" against the "healthy" party.⁴⁹ In some states, such protection is denied if it injures the other party to the contract.⁵⁰ Thus, guardians protect both the incompetent person's property interest as well as society's interest in certainty and finality in commercial transactions.

While the guardian of the property has many duties such as conserving the estate, managing assets, and protecting society by keeping the ward from becoming a public charge, "a strong motivation for the use of a guardian is the resolution of the legal plight posed by the incompetent's inability to act in a legal sense and the imperative necessity that such action should be taken."⁵¹ The appointment of a guardian of the property serves to protect the ward from wasting his assets, to protect the ward from the imposition of unscrupulous persons, and to allow commercial activities to proceed unhindered.

With this background, it is understandable that the development of the law was primarily in terms of protection of property, and that few guidelines were developed with respect to the guardian's duties toward the ward as a person. It was evidently assumed that the guardian would have his ward's welfare at heart and would see to it that he was adequately cared for.⁵²

THE GUARDIANSHIP LAWS OF MARYLAND

Maryland statutory law reflects the common law's concern for the property of the disabled person.⁵³ The law defines a disabled person as one who is unable to manage his property and affairs effectively because of physical or mental disability, senility or other mental weakness, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance.⁵⁴

A brief description of the stages of guardianship proceedings and indications of how they are actually used in Maryland is crucial to an understanding of Maryland law in the guardianship area.

The Petition

A hearing concerning guardianship over the person or the property is initiated by filing, with the Circuit Court sitting in the county where the allegedly disabled person resides,⁵⁵ a verified petition requesting the appointment of a guardian and giving the reasons for the request.⁵⁶ The reasons generally allege the person's incompetence, his need for hospitalization, or his present inability to manage his property. Thus, instead of stating facts which describe how the allegedly disabled person is unable to function or how he is unable to manage his property effectively, the petitions merely state in conclusory terms the ultimate finding of the court. The petition also

must specify the petitioner's relationship to the disabled individual, explain the petitioner's interests in the property or person, provide a detailed accounting of the proposed ward's estate, and list the names and addresses of any interested persons.⁵⁷ Interested parties have the right to invoke the jurisdiction of the court at any time to resolve questions concerning the administration of the estate by the guardian.⁵⁸

The Statement of Disability

Accompanying the petition for guardianship must be a statement of the individual's disability in the form of certificates of two doctors, one of whom must have seen the individual within the previous ten days. Each certificate must contain the qualifications of the physician; the date of his last examination of the individual; and his opinion as to the cause, nature, extent, and probable duration of the individual's alleged disability, as well as to whether the individual has sufficient mental capacity to consent to the appointment of a guardian.⁵⁹ The statement also must specify that the doctor is certified to practice in Maryland, but need not indicate the doctor's specialty or the frequency with which he has seen the patient.

In practice, these certificates are form letters which contain blanks for the date of examination and the diagnosis. The diagnoses are usually labels, one or two phrases such as "CBS" (chronic brain syndrome, which is medical terminology for senility), arteriosclerosis, mental retardation, and functional illiteracy. Generally there is no further explanation of the diagnosis. (An exception among the petitions studied did explain its diagnosis "functionally illiterate": the alleged disabled "did not know the name of the Vice President of the United States or the Mayor of Baltimore."⁶⁰) It is rare for either doctor to appear at the hearing; consequently, there is no opportunity for the court to inquire about the meaning of the terms, or about the extent to which the diagnosed condition affects the individual's ability to function and to manage his money and affairs.

Although the medical judgment is relevant to this issue, the medical labels are in practice, determinative of the legal issues as well.⁶¹ Therefore, in practice both the definition and certification of disability are reduced to purely medical labels, which leaves the court to function by default without any legal standards of disability,⁶² and less able to answer the question of whether the allegedly disabled person has certain functional limitations which really prevent him from managing his property and/or from caring for his own person.

Emergency Provisions

The court is empowered to order the apprehension of an allegedly disabled person after the petition for guardianship has been filed if the court is notified that the allegedly disabled person may need emergency care or retention.⁶³ The allegedly disabled person may be placed in protective custody for up to seventy-two hours

pending a hearing,⁶⁴ at which time the court will move to appoint a guardian over his person.

There is a similar emergency provision concerning guardianship over the property. The court may act to preserve the property in question if substantial irreparable damage might occur to the property. Any order of the court concerning the property takes effect immediately.⁶⁵

Notice Requirements

The service of notice is the same for both types of guardianship⁶⁶ and consists of a show cause order, a copy of the petition, and a summons. Notice is served on the allegedly disabled person, as well as on the parent, guardian, or other person having the care or custody of the person or estate.⁶⁷ Personal delivery is made by the sheriff. However, service by registered mail suffices if personal service fails.

The show cause order is a standard show cause order which requires the allegedly disabled person to file an answer within a stated time to be fixed by the court.⁶⁸ The answer should contain reasons why guardianship should not be granted and/or why the person petitioning for guardianship should not be appointed. If the allegedly disabled person does not file an answer, he will not receive any notice that there will be a hearing at which his competency will be adjudicated. Consequently, in the majority of cases, the allegedly disabled person is ignorant of his right to be present at the hearing and to be represented by counsel.

No right to appointed counsel is explicitly conferred by the Code upon the allegedly disabled person in either type of guardianship proceeding. In proceedings concerning guardianship over the person, the court may appoint an attorney to investigate the facts of the case and report his findings to the court.⁶⁹ However, the attorney does not act on behalf of the allegedly disabled person and is not an attorney *ad litem*.⁷⁰ The court also has the power to appoint an attorney to represent the party,⁷¹ but there are no provisions for state payment to attorneys in guardianship cases.

Laws concerning guardianship of the property contain no discussion of the right to be represented by an attorney. Presumably, where there is property, there is also money available in the estate to hire an attorney. However, given the nature of the proceedings and their serious consequences (the deprivation of the individual's property), it seems lax not to require that the allegedly disabled individual be appraised of his right to counsel and, in some cases, to appointed counsel.⁷²

The Hearing

Maryland law does not require that the allegedly disabled individual be present at the hearing.⁷³ If the allegedly disabled individual does not answer the show cause order, he will not receive notice of the date and time of the hearing, and consequently will not be present.⁷⁴

Even if the alleged ward is present, it is questionable whether he can represent his interests effectively without the aid of an attorney. Furthermore, in most cases the attorney for the petitioner informs the court that it is not in the best interest of the proposed ward to be present. Thus, the majority of hearings are held without the allegedly disabled individual.

Hearings concerning guardianship over the person require a jury trial unless the alleged ward waives this right.⁷⁵ The judge makes the determination as to whether the person has the capacity to waive this right based on the facts of each case.⁷⁶ It is the function of the jury to return a special verdict as to whether the alleged ward is disabled.⁷⁷ If the jury finds that the alleged ward is disabled, the judge determines whether the petitioner should be made the guardian, and what type of treatment and confinement are appropriate for the ward.⁷⁸ (The type of confinement most often sought is entry into a nursing home.)

In guardianship over the property, there is no jury trial.⁷⁹ The hearing is called a protective proceeding, a term of art referring to the protection of the property from dissolution by the acts of the allegedly disabled person. In the actual hearing, the determination of inability to manage property and affairs effectively is based on the medical evidence.

Although any person may petition the court for guardianship over the person, the court is directed to choose a guardian of the property from among those persons listed in order of priority in the Code.⁸⁰ The priority runs first to the guardian previously appointed, second to a person who has the consent of the ward, third to the ward's near relatives, spouse, parent, testamentary guardian, children, and, last, to a public agency which may be caring for him.⁸¹

The Power and Duties of the Guardian Over Property and Person

The guardian of the property receives letters of guardianship which are recorded in the land records of the county of residence of the ward and in the county in which the real property lies. These letters have the same legal effect as a conveyance from the disabled person to the guardian.⁸² The powers of the guardian with respect to the property are the same as those of a fiduciary.⁸³ The guardian has a duty to provide money out of the estate for the care, protection, welfare, and rehabilitation of the disabled person. The court has continuing jurisdiction over the property of the ward after the appointment of the guardian, and can remove the guardian in cases of malfeasance or neglect of duty.⁸⁴ However, the only communication the court has with the guardian is the annual audit which is reviewed by the trust clerk. Although the annual reports may be carefully audited by the courthouse staff, there is little chance that a breach of the guardian's duty to support the ward will be detected thereby. No one on the courthouse staff is available to visit the ward to see if the expenditures listed are

actually used for the care of the ward. Only when one of the interested parties brings a complaint to the court is the plight of the ward likely to come to the court's attention. Then the court will authorize an investigative report and order money to be spent from the estate on behalf of the ward.

In contrast to the powers of the guardian of the property, much uncertainty exists as to the functions and responsibilities of guardian of the person. The statute merely states that, "[t]he court may superintend and direct the care of a disabled person, appoint a guardian of the person, and pass orders and decrees respecting them as seems proper, including an order directing the disabled person to be sent to a hospital."⁸⁵ No annual audits or reports from the guardian are required.⁸⁶ Thus, the court has no way of determining whether the guardian is adequately caring for the ward. Because guardianship of the person results in total control of the ward and because the purpose of the statute is to insure that an individual is being cared for, it certainly is remiss for the law not to provide any provision for periodic review to insure that the ward is actually receiving this care.

Specific Transaction

Without appointing a guardian, the court may authorize a specific transaction with respect to the property, care, or service arrangement for disabled persons.⁸⁷ This provision for a limited transaction is rarely used in Maryland, probably because the proof required to obtain authorization for a specific transaction is the same as that required to obtain full guardianship over the property, namely, medical evidence of the person's disability. The specific transaction, however, has several advantages. The fact that the petitioner need not be bonded or file annual audits makes this a much less expensive procedure for the petitioner. The ward also benefits from the specific transaction because it can be tailored to his specific needs and only restricts his rights with regard to the transaction in question.⁸⁸

Termination of Guardianship

Upon petition by "any person," a guardianship may be terminated on the grounds that the disability has ceased.⁸⁹ The court in these cases requires affidavits and certificates from physicians demonstrating that the ward is now capable of managing his affairs effectively. Thereafter a hearing is held where the physicians may be present to testify as to the present status of the ward. Even though the court may decide to return the property to the ward, it will often retain jurisdiction over the estate for a limited time to allow the former disabled person to demonstrate his ability to manage his affairs effectively.

The guardian may be changed even though the guardianship remains in force.⁹⁰ In the event of death,⁹¹ legal disability,⁹² or resignation of the guardian,⁹³ the court may appoint a temporary guardian, usually an attorney, who has the duty of finding someone to petition the court to become the permanent guardian. When the

court is petitioned, the ward and all interested parties are issued show cause notices of the new petition for a guardian, but there are no new findings on the ward's disabilities or on his continuing inability to manage his property or care for his person.

Alternatives to Maryland Guardianship Laws

An examination of the present Maryland guardianship laws as they relate to the needs of mentally retarded citizens reveals the striking fact that guardianship is very rarely used in the case of retarded citizens. For example, in Baltimore City the majority of guardianship petitions are filed on behalf of minors.⁹⁴ In Montgomery County, the greatest number of petitions are filed on behalf of elderly citizens who are almost always in nursing homes or hospitals, and the guardians appointed are generally relatives who seek control over their property.

One reason why guardianship is rarely used in the case of retarded citizens is that it does not adequately fulfill the needs of the retarded citizen. Although it was once thought that retarded individuals could not be educated, we now know that retarded citizens can learn, and do benefit from programs of education and training. However, guardianship laws have not been changed to reflect this knowledge. (Although the Maryland statutes on guardianship were completely revised in 1969, the purpose of those changes was to make the proceeding less expensive and cumbersome for the party petitioning to become the guardian.) Guardianship laws now deprive the mentally retarded citizen of his right to make decisions. The laws should instead provide for services to strengthen the mentally retarded person's abilities, and should aim at making him as independent as possible.

New knowledge in the field of retardation presents radically changed circumstances to which our courts and laws must respond. Guardianship law must be rewritten, not merely revised. One possibility would be to create by statute a system of substituted consent whereby an administrative hearing officer would approve contracts for services between mentally retarded citizens and service providers. The following hypothetical case illustrates how this proceeding would operate:

John Doe is an eighteen-year-old individual who lacks the ability to consent to services but who needs services. He presently lives with his mother and works at a sheltered workshop. He cannot manage his own money.

John's mother files a petition with the hearing officer, alleging that John is eighteen years old, unable to consent to services, and in need of someone to manage the \$10,000 which he inherited from his grandmother. The filing of this petition triggers the appointment of an attorney to represent John, as well as the hearing officer's order that John undergo a comprehensive evaluation.

The comprehensive evaluation confirms the mother's allegation that John now lacks the ability to give consent or to manage money, and concludes that John should be

enrolled in a socialization class where he will be taught the skills involved in managing money. When this report is completed, John's mother submits a proposal to the hearing officer which provides that: 1) John's mother will manage John's money for one year; 2) during this year, John will be enrolled in a socialization class where he will be taught the necessary skills so that he can learn to manage his money; and 3) each month, John's mother will give him a set amount of money so that he can gradually learn to manage his own money.

At the conclusion of the hearing, the hearing officer determines that there is clear and convincing evidence that: 1) John is eighteen years of age or older; 2) John lacks the ability to consent to services and is in need of services; and 3) the proposed plan for delivering services is the least restrictive method. The hearing officer then orders that all parties sign the agreement, that the agreement shall have the effect of a contract, and that a citizen advocate be appointed to monitor the contract and insure that the parties adhere to it.

The advantages of this contract system are several. First, it recognizes that handicapped individuals, like everyone else, have different individual needs and capabilities which must be met. It therefore rejects the present Maryland guardianship concept which either grants or denies all of a person's rights and responsibilities of citizenship. Recognizing that the present guardianship law is a very ineffective tool in dealing with the highly individual needs of handicapped individuals, the contract system provides services tailored to the needs of the individuals while restricting only those rights which the handicapped individual has shown he does not have the ability to exercise.

Another advantage of the contract system is that it provides a mechanism for coordinating services to handicapped individuals. For many years, the history of the handicapped in America has been a history of searching from agency to agency to receive services in order to live a more normal existence. Because of the fragmented nature of our state service structure, many handicapped people are passed from one agency to another. Consequently, many handicapped individuals are either left unserved or forced to negotiate with numerous agencies, never receiving a coordinated program. The implementation of a contract system would enable both the state agencies and handicapped individuals to know their respective rights and obligations while assuring the handicapped individuals that they would be receiving the services they need in order to live as independently as possible.

Below is a proposed statute which incorporates the system of substituted consent discussed above.

PROPOSED SUBSTITUTED CONSENT – CONTRACTS FOR SERVICES

SECTION ONE: PURPOSE OF THE ACT

It is the policy of the State of Maryland to encourage the development of the ability and potential of each mentally handicapped person in the State to the fullest extent possible. The State of Maryland also recognizes that some mentally handicapped citizens do not have the ability to consent to services and are in need of services. Therefore, the legislature hereby establishes a system of substituted consent to insure that mentally handicapped citizens receive services in the least restrictive manner.

SECTION TWO: DEFINITIONS

For purposes of this act, the following terms have the meanings indicated:

A. "Informed consent" means the competent, knowing and voluntary assent of the person.

B. "Individual" means a person 18 years of age or older who is alleged to be in need of services and unable to give informed consent to these services.

C. "Service provider" means a person, or public or private entity providing services which include but are not limited to finding residential placement, managing money, and procuring or offering daytime activity or employment. However, a service provider *does not* include a person or entity providing medical services or treatment, or a public residential facility such as Henryton Center, Rosewood Center, Great Oaks Center, Holly Center, Victor Cullen Center, or Highland Health Facility.

SECTION THREE: JURISDICTION

An administrative hearing officer shall have jurisdiction over petitions and actions filed by:

A. (1) A service provider, who wants to provide services to the individual;

(2) An individual; and

(3) An interested party who is the parent, guardian or relative of the individual.

B. The petitions filed must be verified and set forth specific facts which demonstrate that:

(1) The individual does not have the ability to give informed consent to services; and

(2) The individual is in need of services.

SECTION FOUR: COMPREHENSIVE EVALUATION

A. Once a petition has been filed with the administrative hearing officer, the hearing officer shall:

(1) Appoint an attorney to represent the individual. If the individual is indigent, the hearing officer shall appoint the attorney at public expense;

(2) Order that the individual be given a comprehensive evaluation, which shall consist of medical, sociological, and psychological examinations. The evaluation shall include, but is not limited to, the

following information:

- (a) Name and address of the individual and of his service provider, if any;
- (b) Description of any treatment and services presently being provided to the individual;
- (c) Evaluations of the individual's present physical, mental, and social conditions, and of the effect of these conditions on the individual's functional abilities; and
- (d) Recommendations concerning the least restrictive course of services consistent with the person's needs, including a listing of public and private entities capable of providing the service in the area where the individual resides.

B. If the individual refuses to voluntarily submit to the comprehensive evaluation, a hearing shall be held to determine whether there is probable cause to believe that the individual is:

- (1) Unable to consent to services, and
- (2) In need of services.

At that hearing, the individual shall be represented by counsel and shall be given the right to confront and cross-examine the witnesses and to introduce evidence.

If at the end of the hearing the hearing officer determines that there is probable cause to believe that the individual is unable to consent to services and is in need of services, the hearing officer shall order that the individual undergo the comprehensive evaluation. If the hearing officer determines that there is not probable cause to believe that the individual is unable to consent to services and/or that he is in need of services, then he shall dismiss the petition.

C. A copy of the comprehensive evaluation shall be sent, within 30 days from the date by which it was ordered to be performed, to:

- (1) The hearing officer;
- (2) The individual;
- (3) The individual's attorney;
- (4) Interested parties; and
- (5) The proposed service providers.

SECTION FIVE: INDEPENDENT EVALUATION

The individual and his attorney have the right to petition the hearing officer for an order granting an alternative independent comprehensive evaluation. The independent comprehensive evaluation shall be paid for at public expense, and shall be completed and sent to all parties listed in Section 4.C within 30 days from the date by which it was ordered to be performed.

SECTION SIX: PROPOSED METHOD OF PROVIDING SERVICE

The hearing officer shall set the date for the hearing, which shall be within 30 days from the date that all comprehensive evaluations have been filed with the hearing officer. Fourteen days prior to the date set for the hearing, the proposed service provider shall submit a

plan detailing the proposed method of providing services to all parties listed in Section 4.C. The plan shall include an explanation of:

- A. The abilities which the individual has and the skills he seeks to acquire;
- B. The procedures to be followed and the services to be offered by the service provider in its program to help the individual acquire these skills; and
- C. The rights which the individual must relinquish to the service provider in order to receive these services.

SECTION SEVEN: CONDUCT OF HEARINGS

All hearings held pursuant to this Act shall be conducted in accordance with the following rules and procedures:

- A. All parties shall be present at the hearing.
- B. All parties shall have the right to confront and cross-examine witnesses, the right to introduce evidence, the right to counsel and, if indigent, the right to appointed counsel.
- C. The hearing officer shall have the power to subpoena witnesses and evidence.
- D. A record of the proceeding and all evidence considered by the hearing officer shall be preserved for purposes of appeal.
- E. All findings of the hearing officer shall be in writing and shall be based only on evidence introduced at the hearings.

SECTION EIGHT: HEARING

A. At the hearing, the proposed service provider has the burden of proving by clear and convincing evidence that:

- (1) The individual is:
 - (a) 18 years of age or older and is unable to give informed consent to services, and is
 - (b) in need of services; and
- (2) The proposed plan for delivering services:
 - (a) includes all the factors listed in Section Six and
 - (b) is the least restrictive method of delivering these services.

B. If the hearing officer finds that the proposed service provider has not met his burden of proving that the individual is unable to give informed consent to services and is in need of services, the hearing officer shall dismiss the petition. If the hearing officer finds that the individual lacks the ability to give informed consent to services but that the proposed plan for delivering services does not set forth the factors required in Section Six or is not the least restrictive method of delivering these services, he shall:

- (1) Dismiss the proposed plan of the service provider;
- (2) Order the attorney for the individual to submit to the hearing officer within a specified time period an alternative plan for delivering services

which complies with Section Six;

(3) Order any person or agency with a statutory duty to provide services to this individual to submit plans for delivering these needed services in accordance with Section Six; and

(4) Set a date for the next hearing; however, the date shall not be later than 60 days from the date of this hearing.

C. If the hearing officer finds that the proposed service provider has proved by clear and convincing evidence that the individual is unable to give informed consent to services and is in need of services, and that the proposed plan for delivering services sets forth the factors required in Section Six and is the least restrictive method of delivering these services, he shall order that:

(1) All parties or their legal representatives sign the agreement;

(2) The agreement has the effect of a contract and shall be governed by principles of contract law; and

(3) A citizen advocate be appointed to monitor the contract and insure that the parties adhere to it.

SECTION NINE: RIGHT OF APPEAL

If the hearing officer orders the parties to sign an agreement and one of the parties refuses, the hearing officer shall order that the agreement be instituted. The party refusing to sign the agreement has a right of judicial appeal pursuant to the Maryland Administrative Procedure Act.

SECTION TEN: CITIZEN ADVOCATE

The citizen advocate assigned to monitor the contract and insure that the parties adhere to it shall visit the individual and the service provider at least once a month. If at any time the citizen advocate has reasonable cause to believe that the terms of the contract are not being followed, he shall file a petition with the hearing officer requesting specific performance of the contract. The hearing officer shall conduct a hearing within ten days of receipt of the petition. The hearing shall be conducted in accordance with Section Seven of this Act.

At the hearing, the hearing officer shall determine whether the parties are in substantial compliance with the contract. If he determines that they are not in substantial compliance, the hearing officer shall order specific performance of the contract. Thereafter, if the party refuses to obey the hearing officer's order of specific performance, the citizen advocate or the hearing officer may petition the court for appropriate relief.

SECTION ELEVEN: PERIODIC REVIEW

A. The contracts shall remain in effect for one year. Thirty days prior to the expiration of the contract, the citizen advocate shall send a notice to the hearing officer informing him of the impending expiration. The hearing officer shall then order a report from the service pro-

vider. The report shall be due within ten days of the entry of the hearing date of the hearing officer's order, and shall set forth:

(1) The terms of the present contract;

(2) The progress of the individual; and

(3) Whether the individual is still in need of services which can be provided by this or another service provider.

B. Once the hearing officer receives the report from the service provider, he shall proceed pursuant to Sections Three through Ten of this Act.

SECTION TWELVE: CONFIDENTIALITY OF PROCEEDINGS AND RECORDS

A. The proceedings shall be confidential and closed to the public unless otherwise requested by the individual or his legal counsel.

B. The record of the hearing, including findings and supporting documentation, shall be confidential and may not be disclosed to any person except:

(1) The parties to the proceeding;

(2) Other persons, provided that the individual or his attorney has consented to such disclosure;

(3) The Court; and

(4) The parties performing the evaluations pursuant to this statute.

FOOTNOTES

¹ MD. ANN. CODE, Est. & Tr. Art., §§13-201 and 13-704 (1974).

² MD. ANN. CODE art. 72A, §1 (1975 Cum. Supp.).

³ MD. ANN. CODE art. 88A, §19 (1969 Rep. Vol.).

⁴ MD. ANN. CODE art. 1, §24 (1976 Rep. Vol.).

⁵ *Sudler v. Sudler*, 121 Md. 46, 88 A. 26 (1913); 42 Op. Atty. Gen. 158 (1957).

⁶ As a general rule, individuals under the age of eighteen may not consent to medical treatment. The exceptions to this rule operate if: (1) the minor is married or is the parent of a child; (2) the minor seeks treatment or advice concerning venereal disease, pregnancy, or contraception not amounting to sterilization; (3) in the judgment of a physician treating a minor, the obtaining of consent would result in such delay of treatment as would adversely affect the life or health of the minor; or (4) the minor seeks treatment or advice concerning drug abuse. MD. ANN. CODE art. 43, §135 (1975 Cum. Supp.). Another exception is that a minor sixteen years of age or older may consent to diagnosis and consultation with regard to an emotional or mental disorder. MD. ANN. CODE art. 43, §135A (1975 Cum. Supp.).

⁷ MD. ANN. CODE art. 72A §2 (1975 Cum. Supp.).

⁸ Minors over the age of sixteen but under the age of eighteen may marry only with the consent of their parent or guardian unless they present a certificate from a licensed physician stating that the female is pregnant or has given birth to a child. MD. ANN. CODE art. 62, §9 (1975 Cum. Supp.).

⁹ "Guardianship for Mentally Retarded Persons: An AAMD Policy Statement," 1975, C-4 (on file at the Developmental Disabilities Law Project, University of Maryland School of Law, 500 W. Baltimore Street, Baltimore, Maryland 21201).

¹⁰ See notes 1-8, *supra*.

¹¹ MD. ANN. CODE art. 33 §3-4(d) (1975 Cum. Supp.). The Code provides that no person shall be registered as a voter if he is under guardianship. Even though MD. ANN. CODE, Est. & Tr. Art., §13-205 (1974) provides that an adjudication that a guardian of the property shall be appointed has no bearing on the issue of capacity of the individual to care for his own person, it seems that the disabled person in these cases also would lose his right to vote.

¹² The Maryland Court of Appeals has adopted the rule that the law presumes every person to be sane and to possess the requisite mental capacity to make a valid will or contract. *Brown v. Ward*, 53 Md. 376, 387 (1880). Testimony, in order to be legally sufficient to overthrow the presumption in favor of a person's sanity and capacity, must be directed to the date of the execution of the person's will or contract, and must tend to show that he was incompetent at that particular time.

Gesell v. Baugher, 100 Md. 677, 682, 60 A. 481 (1905). However, equity courts will intervene in cases of fraud or imposition. Thus, if there is any unfairness in a transaction, such as gross inadequacy of consideration, the court will consider the stupidity of the party in determining whether there was such imposition as will vitiate the transaction. Colgate D. Owings' Case, 1 Bland 370, 391, 17 Am. Dec. 311 (1826). See also Lym v. Magness, 191 Md. 674, 62 A.2d 604 (1948).

¹³ MD. ANN. CODE art. 66-1/2, §6-103(4) (1970 Rep. Vol.).

¹⁴ According to the unreported case of Ewing v. Moore (1836), discussed in 2 Alexander's British Statutes 1014-15 (Coe's Ed. 1912), the English statute of 15 George II, Ch. 30 (1724) is a part of the common law of Maryland. This apparently means that a marriage is void if at the time of the ceremony one of the parties was insane and there was a "judicial commitment of both person and property to trustees." Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment*, 2 MD. L. REV. 211, 243 (1938). In all other cases where insanity existed at the time of the ceremony, the marriage is merely voidable. See Elfont v. Elfont, 161 Md. 458, 157 A. 741 (1931); MD. ANN. CODE art. 62, §12 (1972 Repl. Vol.).

¹⁵ MD. ANN. CODE, Est. & Tr. Art., §§13-206(b) and (c), and 13-217(a) (1974).

¹⁶ *Supra* note 9 at C-5.

¹⁷ It is estimated that nine out of ten mentally retarded persons could work if given proper training and opportunities. 118 Cong. Rec. 3320 (1972). In the area of education, "(t)he major factual consideration underlying the successful lawsuits seeking education for handicapped children was the development of a comprehensive body of professional expertise supporting the premise that all handicapped persons can learn, develop, and benefit from appropriate educational programs. Burgdorf and Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAWYER 855, 876 (1975).

¹⁸ R. Allen, E. Ferster, and H. Weihofen, *Mental Impairment and Legal Incompetency, Report of the Mental Competency Study, an Empirical Research Project Conducted by the George Washington University Institute of Law, Psychiatry and Criminology under the Sponsorship of the National Institute of Mental Health, Department of Health, Education and Welfare 2(1968)* [hereinafter cited as *George Washington University Mental Competence Study*].

¹⁹ American Bar Foundation, *The Mentally Disabled and the Law 1* (rev. ed. 1971).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 219-20 (1975).

²⁷ *Supra* note 19 at 250.

²⁸ *Id.*

²⁹ See *In re Easton*, 214 Md. 176, 181, 133 A.2d 441 (1957).

³⁰ N. Kittrie, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 59* (1971).

³¹ *Supra* note 19 at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Supra* note 29.

³⁸ Lord Coke, *Beverley's Case*, 4 Co. 123b, 76 Eng. Rep. 1118 (K.B. 1603). *Supra* note 19 at 2-3.

³⁹ *Supra* note 19 at 3-4.

⁴⁰ *Supra* note 38.

⁴¹ *Id.* at 3.

⁴² *Id.*

⁴³ *Id.* at 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Supra* note 26 at 219.

⁴⁸ *Id.*

⁴⁹ Weihofen, *Mental Incompetency to Contract or Convey*, 39 S. CAL. L. REV. 211, 230 (1966).

⁵⁰ *Id.*

⁵¹ *Supra* note 18 at 71.

⁵² *Id.* at 3. See, MD. ANN. CODE, Est. & Tr. Art., §§ 13-101-222

(1974). Compare MD. ANN. CODE, Est. & Tr. Art., §13-704 (1974).

⁵³ MD. ANN. CODE, Md. Rules, Subtitle R: Minors and Persons under Disability (1971 Repl. Vol. and 1976 Cum. Supp.). MD. ANN. CODE, Est. & Tr. Art., §§13-101-222 and 13-704 (1974). This is former Article 93A of the Maryland Code, as revised in 1969.

⁵⁴ MD. ANN. CODE, Md. Rules, Rule R70b (1976 Cum. Supp.). Disabled person means, in connection with guardianship of the person, a person who is unable to manage his personal affairs and property effectively because of physical or mental disability, senility or other mental weakness, disease, habitual drunkenness, or addiction to drugs.

⁵⁵ MD. ANN. CODE, Md. Rules, Rule R72 (1976 Cum. Supp.).

⁵⁶ *Id.*, Rule R73 (1976 Cum. Supp.).

⁵⁷ *Id.* MD. ANN. CODE, Est. & Tr. Art., §13-101(g) (1974) defines an "interested person" as the guardian, heirs of the disabled person, the disabled person, or any governmental agency paying benefits to the disabled person.

⁵⁸ MD. ANN. CODE, Est. & Tr. Art., §13-203(d) (1974).

⁵⁹ MD. ANN. CODE, Md. Rules, Rule R73b (1971 Repl. Vol.).

⁶⁰ *In the Matter of* _____, No. 45326A/83A/141 (Cir. Ct. No. 2, Baltimore City, Md., 1975).

⁶¹ *Supra* note 26 at 227.

⁶² *Id.*

⁶³ MD. ANN. CODE, Md. Rules, Rule R75 (1971 Repl. Vol.).

⁶⁴ *Id.*

⁶⁵ MD. ANN. CODE, Est. & Tr. Art., §13-203 (1974).

⁶⁶ MD. ANN. CODE, Md. Rules, Rule R74 (1971 Repl. Vol.). See also MD. ANN. CODE, Est. & Tr. Art., § 13-104 (1974).

⁶⁷ MD. ANN. CODE, Md. Rules, Rule 119 (1976 Cum. Supp.).

⁶⁸ *Id.*, Rule R74 (1971 Repl. Vol.).

⁶⁹ *Id.*, Rule R76 (1971 Repl. Vol.).

⁷⁰ *Id.*

⁷¹ *Id.*, Rule 205e(2) (1971 Repl. Vol.).

⁷² See *supra* note 26 at 240 for a discussion of how such lack of adequate notice and failure to secure an attorney for an allegedly disabled individual falls short of due process requirements.

⁷³ The Developmental Disabilities Law Clinic conducted a review of guardianship petitions filed in Baltimore City Circuit Court, Baltimore City Circuit Court No. 2, Baltimore County Circuit Court, and Montgomery County Circuit Court. From a review of these files and from speaking with the court personnel, it was discovered that in the majority of cases the only people at the guardianship hearing are the judge, the petitioner, and the petitioner's attorney.

⁷⁴ MD. ANN. CODE, Md. Rules, Rule R77(b)(2) (1971 Repl. Vol.).

⁷⁵ *Id.*, Rule R77(b) (1971 Repl. Vol. and 1976 Cum. Supp.).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*, Rule R78.

⁷⁹ MD. ANN. CODE, Est. & Tr. Art., §13-211 (1974); *In re Easton*, 214 Md. 126, 133 A.2d 441 (1957).

⁸⁰ MD. ANN. CODE, Est. & Tr. Art., §13-207 (1974).

⁸¹ *Id.* What is more revealing is the lack of general qualification for those persons wishing to become guardians. For example, there is no age limit listed, nor is there a provision for a co-guardian to be given in the event of the death of a guardian. There is no requirement as to ability of the guardian to handle an estate, and where a guardian has been previously selected or appointed out of state, the court is directed to give great weight to him regardless of the nature of the previous appointment.

⁸² MD. ANN. CODE, Est. & Tr. Art., §§13-206(b) and 13-217 (1974).

⁸³ *Id.* at §§ 13-213 and 15-201(c) (1974).

⁸⁴ MD. ANN. CODE, Md. Rules, Rule R84(a) and (b) (1971 Repl. Vol.).

⁸⁵ MD. ANN. CODE, Est. & Tr. Art., §13-704 (1974).

⁸⁶ MD. ANN. CODE, Md. Rules, Rule R74 (1971 Repl. Vol.) requires inventories and accounting by guardians of the property, but there are no provisions in Maryland statutes for such reports by guardians of the person.

⁸⁷ MD. ANN. CODE, Est. & Tr. Art., §13-204 (1974).

⁸⁸ *Id.*

⁸⁹ *Id.* at §13-221; MD. ANN. CODE, *accord*, Md. Rules, Rule R80 (1976 Cum. Supp.).

⁹⁰ MD. ANN. CODE, Est. & Tr. Art., §13-220 (1974).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The Developmental Disabilities Law Clinic conducted a review of guardianship petitions filed in Baltimore City Circuit Court where, during the 1974 year, sixty-nine petitions were filed on behalf of minors while twenty-one petitions were filed on behalf of disabled adults.

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