GUARDIANSHIP OF THE MENTALLY RETARDED

A SUBCOMMITTEE REPORT ON HOUSE BILL 1516 TO THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES / SEPTEMBER 1974

GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA

LETTER OF TRANSMITTAL

TO THE MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

This report of the subcommittee appointed by Chairman Warren H. Spencer was prepared utilizing the staff services of the Joint State Government Commission. The recommendations of the subcommittee are contained in companion bills, prefiled by Representative Charlotte D. Fawcett as House Bill 2576 and House Bill 2577, set forth at pp. 8 and 22. Comments where appropriate are included.

The Committee wishes to express its sincere appreciation to George J. Hauptfuhrer, Jr., Esquire, chairman of the Subcommittee on Persons under Disability of the Joint State Government Commission's Task Force and Advisory Committee on Decedents' Estates Laws, and his associate Ann Fox, Esquire, who prepared several drafts of the proposed bills. Appreciation is also expressed to Ms. Marliene A. Smoker, assistant director for Administration and Governmental Affairs of the Pennsylvania Association for Retarded Citizens, Inc., who furnished expertise relating to the problems and needs of the mentally retarded.

Respectfully submitted,

ANTHONY J. SCIRICA, Chairman
Subcommittee on Guardianship
of the Mentally Retarded
September 9, 1974

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REPORT OF THE SUBCOMMITTEE ON GUARDIANSHIP OF THE MENTALLY RETARDED

Introduction

The legislative proposals of the House Judiciary Committee's Subcommittee on Guardianship of the Mentally Retarded, presented later in this report in the form of two bills, stem from the subcommittee's deliberations concerning House Bill 1516. This bill, introduced on October 23, 1973, with Representative Charlotte D. Fawcett as prime sponsor,[1] proposes for adoption by the General Assembly the following findings and intent:

> (1) There are varying degrees of mental retardation and that although a person may be mentally retarded he may have sufficient ability to attend to himself and his affairs. For such persons the institution of guardianship must not be invoked.
>
> (2) Like other citizens, the mentally retarded must be assumed to have full human and legal rights and privileges. The mere fact of retardation must not be in and of itself sufficient to remove their rights, by appointment of a guardian or otherwise.
>
> (3) Merely because a mentally retarded person is in need of various forms of assistance does not mean that he needs a guardian. In addition to the institution of formal guardianship, parallel services are required, such as personal counseling, to be available to retarded persons who, with appropriate guidance and advice on a continuing basis, may not require formal guardianship.

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1 Co-sponsors were Representatives Irvis, Yohn, Crawford, A. Kelly, Toll, Hammock, Blackwell, Vann, Wise, Wells, J. Kelly, Taddonio, McClatchy, Whittlesey, Vipond, Salvatore, Gekas, Dager, Halverson and M. E. Miller, Jr.

(4) Mere intellectual ability or disability is an inadequate determinant as to the necessity for guardianship as it does not necessarily correspond to social adaptation. Determination of the need for guardianship must be a process considering intelligence but persuaded by functioning ability. Thus it is behavior which is the crucial determinant.

(5) An adult is presumed legally capable of directing his own life unless and until the court determines in guardianship proceedings that he is unable to manage himself or his affairs.

(6) In those instances where the retarded person is unable to manage himself or his affairs, a suitably designed guardianship program must be arranged.

(7) Guardianship of the mentally retarded should be viewed positively as a means of implementing rights and opportunities, with as much participation by the retarded ward as is practical in all decisions affecting him. The underlying goal of a guardian should be to do everything possible to help his retarded ward stand on his own feet in all respects.

(8) The guardianship program must be flexible, permitting adaptation to the specific needs of the particular retarded person. A guardianship relationship must be subject to revision as the needs of the person change.

(9) Public guardianship services should be available to every mentally retarded person who needs them. Any such service should provide, in addition to legal and fiscal protection of property, a continuing concern for the person as an individual. Public guardianship is a necessary alternative for those for whom private guardianship is unavailable, inappropriate or not desired.

(10) Mentally retarded persons must be allowed freedom, the maximum freedom consistent with their abilities, even freedom to make their own mistakes. Guardianship must be designed to fully utilize the retarded person's abilities and capabilities. Limited guardianship, with the scope of the guardianship specified in the judicial order, is to be preferred.

(11) The guardian's role as adviser and personal advocate of his mentally retarded ward must transcend his role as manager of the estate. The welfare of the retarded person and not of his estate must determine the legal and social provisions made for him. (Section 5522)

Representative Fawcett introduced the legislation as a result of her concern for the lack of adequate statutory protection for the mentally retarded in Pennsylvania. She was also aware of the growing national concern in this area which evidenced itself in the past decade in the formation of various national panels and committees to study the needs for legislation protecting the rights of mentally retarded persons.[2] Two states, Florida and New York, have enacted legislation specifying procedures for obtaining and utilizing guardianships for the mentally retarded.[3] In California, the legislature combined procedural matters and substantive service-rendering provisions in its more comprehensive program for the mentally retarded.[4] The basic research of the statutes of other states and the recommendations that have been made by the various national committees have been summarized by the draftsman of House Bill 1516, Paul Sugarman, a student associated with the Yale Legislative Services.[5]

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2 See for example: President's Panel on Mental Retardation, A Proposed Program for National Action to Combat Mental Retardation, (1962); President's Committee on Mental Retardation, Residential Services for the Mentally Retarded: An Action Policy Proposal (1970).

3 Fla. Statutes Ann., Domestic Relations, "Guardianship," Section 744.69 et seq.; McKinney's Consolidated Laws of N. Y., Surrogate's Court Procedure Act Supplement, "Guardians of Mentally Retarded Persons," Article 17-A.

4 West's Calif. Ann. Health and Safety Code, "Conservatorship and Guardianship for Mentally Retarded Persons," Article 7.5.

5 "Guardianships of the Mentally Retarded," Yale Legislative Services, New Haven, Conn., September 1973; this report is on file with the House Judiciary Committee.

Subcommittee Deliberations and Conclusions

Following its introduction, House Bill 1516 was referred to the House Judiciary Committee. At a meeting of the committee held April 12, 1974, the chairman, Representative Warren H. Spencer, appointed the Subcommittee on Guardianship of the Mentally Retarded--consisting of Representatives Anthony J. Scirica, chairman, Norman S. Berson and William D. Hutchinson--to review the proposed legislation and report back its recommendations. In addition, the chairman requested the assistance of the staff of the Joint State Government Commission and, in particular, of the Subcommittee on Persons under Disability of the Commission's Task Force and Advisory Committee on Decedents' Estates Laws.

At the April 12 meeting, Commission staff members reported that the task force and advisory committee had in January discussed the provisions of House Bill 1516 at length and the advisory committee chairman, William H. Eckert, Esquire, had directed the Subcommittee on Persons under Disability, chaired by George J. Hauptfuhrer, Jr., Esquire, to review the bill in light of that discussion. Specifically, the task force and advisory committee concluded that although the "Fawcett bill" addressed several serious deficiencies and omissions in Pennsylvania statutory procedures and authority applicable to the appointment of guardians for the mentally retarded, the bill would impair the unification of statutory provisions accomplished by the 1972 codification of decedents' estates laws by establishing a substantially different set of conditions and procedures than exists for the appointment

of guardians of other types of incompetents. Further, the bill's social welfare agency provisions detailing services should be provided in legislation other than the Probate, Estates and Fiduciaries Code.[6] These views as reported by the Commission's staff were generally concurred in by the members of the House Judiciary Committee in attendance at the April meeting, as well as Representative Fawcett.

Subsequently, the House subcommittee met with the Commission's subcommittee, Representative Fawcett, the original drafter of the legislation and a representative of the Pennsylvania Association for Retarded Citizens to review the bill and implement the policy consensus referred to above. The conferees determined that the "Fawcett bill" should be revised as:

--Amendments to the Probate, Estates and Fiduciaries Code, conforming the procedures for the appointment of guardians of the mentally retarded to those procedures existing for the appointment of guardians of other types of incompetents insofar as feasible and supplying the additional authority necessary due to the unusual circumstances surrounding the appointment of guardians of the mentally retarded.

--Amendments to the Mental Health and Mental Retardation Act of 1966,[7] implementing the social welfare agency provisions contemplated by the "Fawcett bill."

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6 20 Pa. S. Sec. 1 et seq., added June 30, 1972; P. L. 508, No. 164.

7 Act of October 20, 1966 (3d Sp. Sess.) P. L. 96, Act No. 6; 50 P.S. 4101 et seq.

The conferees also concluded that rather than create a new unspecified agency,[8] a staff position--administrator for the mentally retarded--should be created for each County Mental Health and Mental Retardation Board. This position could be filled by existing staff, if qualified, and within existing budgets.

These recommendations are contained in House Bill 2576 and House Bill 2577, prefiled by Representative Fawcett on August 24 and presented with appropriate comments in the following section of this report.

The substantive provisions of the companion bills if enacted would provide the following:

--Statutory recognition of rights of the mentally retarded.

--Integration of court procedures for obtaining guardians of the mentally retarded with existing provisions.

--Creation of a limited guardianship program to refine judicial supervision over the personal affairs and estates of the mentally retarded.

--Expansion of social services for the mentally retarded through the establishment of the position of county administrator for the mentally retarded.

The proposed legislation would provide significant statutory protection and services not presently available without incurring substantial additional Commonwealth or county expenditures.

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8 See Section 5554 of House Bill 1516.

The impact of this legislation was pointed out to the subcommittee by the Pennsylvania Association of Retarded Citizens, Inc.:[9]

> Based on a 3 percent national average, it is estimated that there are 350,000 mentally retarded persons in the Commonwealth of Pennsylvania. The majority of these persons are mildly retarded and have been absorbed into the mainstream of society and are not receiving services provided under the Mental Health and Mental Retardation Act of 1966. There are approximately 60,000 young retarded persons in special education classes, most of whom will require some degree of adult support services after reaching majority.
>
> Of the 10,000 retarded persons residing in State Schools and Hospitals and the 2,000 being cared for in private licensed facilities, nearly 60 percent, or 7,200 persons have no parent or interested relative.
>
> Based on an identified population of 78,000 persons presently receiving mental retardation services, it is conservatively estimated that 62,000 individuals will at some time during their lifetime benefit from the provisions of House Bill 1516, the Guardianship Bill under the sponsorship of Representative Charlotte Fawcett.
>
> The approximately 270,000 that are fully integrated into "Mainstream" society are a highly speculative group and while there is, at present, no statistical evidence upon which to base a conclusion, it is expected that no less than 1/3 of this group upon death of a parent or other crisis situation, could benefit under the provisions of this Bill.

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9 Letter to staff dated August 27, 1974.

HOUSE BILL 2576: PROPOSED AMENDMENTS TO THE PROBATE, ESTATES AND FIDUCIARIES CODE AND COMMENTS

AN ACT

Amending Title 20 (Probate, Estates and Fiduciaries Code) of the Consolidated Pennsylvania Statutes, further defining incompetent; adding and changing provisions relating to guardians of incompetents.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 5501 of Title 20, act of November 25, 1970 (P.L.707, No.230), known as the Consolidated Pennsylvania Statutes, added June 30, 1972 (P.L.508, No.164), is amended to read:

§ 5501. Meaning of incompetent.

"Incompetent" means a person who, because of [mental] infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety:

(1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; or

(2) lacks sufficient capacity to make or communicate responsible decisions concerning his person.

Comment: This amendment broadens the definition of an incompetent and is similar to a previous recommendation of the Joint State Government Commission contained in Senate Bill 782, Printer's No. 852. In the report of the Commission, Proposed Amendments, Probate, Estates and Fiduciaries Code, Phase II, 1973, at p. 15, it was noted that:

"The definition of an 'incompetent' over whom the court can exercise jurisdiction is broadened by removing the restrictive 'mental' qualification to the test of 'infirmities of old age,' and adding new clause (2) to include as an incompetent one 'who lacks sufficient capacity to make or communicate responsible decisions concerning his person.'

"Comment: This section is amended to enlarge the meaning of incompetency, thereby reducing the supposed stigma attached to the designation and also to include those who are mentally sound but nevertheless lack capacity to take care of their person, regardless of the reason "

The proposed definition differs from Senate Bill 782 in that it relegates the alternative test of capacity to the general condition that the "infirmities" be of "old age, mental illness, mental deficiency, drug addiction or inebriety. . . ." This more restrictive definition was determined necessary because of the specific inclusion of retardation, which is physically unlike the other criteria, i.e., old age, mental illness, etc., in that it originates in the development period, is chronic and has no voluntary aspect.

Section 2. Section 5511 of Title 20 is amended and subsections are added to read:

§ 5511. Petition and hearing.

(a) Resident.--The court, upon petition and a hearing at which good cause is shown, may find a person resident or domiciled in the Commonwealth to be incompetent and appoint a guardian or guardians of his person or estate or both. The petitioner may be the alleged incompetent's spouse, a relative, a creditor, a debtor, or any person interested in the alleged incompetent's welfare including, in the case of a petition alleging mental retardation, the county administrator for the mentally retarded or his nominee. Notice of the petition and hearing shall be given in such manner as the court shall direct to the alleged incompetent, to all persons residing within the

Commonwealth who are sui juris and would be entitled to share in the estate of the alleged incompetent if he died intestate at that time, and to such other parties as the court may direct. In the case of a petition alleging mental retardation, the county administrator for the mentally retarded, if not the petitioner, shall be a party to the proceeding and receive notice of it. The administrator, after receipt of notice may petition the court to represent the alleged retarded incompetent as a guardian ad litem. The alleged incompetent shall be present at the hearing unless:

(i) the court is satisfied, upon the presentation of positive testimony, that because of his physical or mental condition his welfare would not be promoted by his presence; or

(ii) it is impossible for him to be present because of his absence from the Commonwealth. It shall not be necessary for the alleged incompetent to be represented by a guardian ad litem in the proceeding.

(b) Nonresident.--The court may find a person not domiciled in the Commonwealth, having property in the Commonwealth, to be incompetent and may appoint a guardian of his estate. The appointment may be made after petition, hearing and notice, as in the case of a person domiciled in the Commonwealth, or upon the submission of an exemplified copy of a decree establishing his incompetency in another jurisdiction. The court shall give preference in its appointment to the foreign guardian of the

nonresident incompetent, unless it finds that such appointment will not be for the best interests of the incompetent.

(c) Contents of petition.--The petition shall be executed under oath and set forth the following:

(1) Name and residence of the person initiating the petition.

(2) Name, birthdate, sex and residence of the alleged incompetent.

(3) Names and residences of the alleged incompetent's spouse, parents and children, if any.

(4) A concise statement of facts rendering the appointment of a guardian appropriate.

(5) A concise statement of the alleged incompetent's property and its approximate value.

(6) A concise statement of whether the guardianship sought is to be of the incompetent's estate, his person, or both, and whether it is to be plenary or limited, and, if the latter, a suggestion of the limitations to be placed upon the guardian.

(7) Such other information as the court by rule may deem appropriate.

(d) Rights of an alleged incompetent.--If the alleged incompetent is not represented by counsel, the court may appoint counsel to represent him. No inference that a guardian is unnecessary shall be derived from the fact that the alleged incompetent has been admitted or committed to the care of an institution.

(e) Dismissal of petition.--When it is found that it is not in the best interests of the alleged incompetent to appoint a guardian, the court shall dismiss the petition requesting the appointment. If the court believes that appointment of a guardian may not be necessary, it may condition a dismissal of the petition upon the alleged incompetent voluntarily seeking consultation and advice from those agencies, public and private, offering appropriate services.

Comment: In subsection (a) the jurisdiction of the court over an incompetent has been expanded to include a resident of the district. The county administrator for the mentally retarded, a position created under Section 306 of the companion bill (infra), has been specifically recognized as an appropriate party to institute guardianship proceedings, and further, is made a party to all guardianship proceedings for an alleged mental retardate. As a party to the judicial proceedings, the administrator for the mentally retarded will add his expertise in aiding the court on the question of incompetency as well as assisting the incompetent and his counsel in any defense which might be available.

Subsection (c) details the information to be set forth in petitions for the appointment of guardians.

Subection (d) recognizes the right of an incompetent to have the court in a proper case appoint counsel to represent him; further, it specifies that institutionalization shall not deter the court from the appointment of a guardian.

In subsection (e) the court is authorized to dismiss a petition for the appointment of a guardian when it determines that it is not in the best interests of the alleged incompetent. It further provides that the court may dismiss the petition if the alleged incompetent agrees to seek consultation and advice from a public or private agency. The provisions of this subsection, as well as those of the preceding two subsections, are not limited to the appointment of guardians of the mentally retarded.

Section 3. Subsection (a) of section 5512 and sections 5515 and 5517 of Title 20 are amended to read:

§ 5512. County of appointment.

(a) Resident incompetent.--A guardian of the person or estate of an incompetent may be appointed by the court of the county in which the incompetent resides or is domiciled.

* * *

§ 5515. Provisions similar to other estates.

The [grounds and the procedure for the removal or discharge of] provisions relating to a guardian of an incompetent and his surety [and the effect of such removal or discharge] shall be the same as are set forth in this code relating to [the removal and discharge of] a personal representative or a guardian of a minor and their sureties, with regard to the following:

(1) Service of process on nonresident guardian, as in section 5114 (relating to service of process on nonresident guardian).

(2) Appointment of guardian in conveyance, as in section 5115 (relating to appointment of guardian in conveyance).

(3) Necessity of bond; form and amount, as in section 5121 (relating to necessity, form and amount).

(4) When bond not required, as in section 5122 (relating to when bond not required).

(5) Requiring or changing amount of bond, as in section 5123 (relating to requiring or changing amount of bond).

(6) Grounds for removal, as in section 3182 (relating to grounds for removal), and in addition thereto, the court may

remove or discharge a guardian when for any reason the interests of the incompetent are likely to be promoted by such action.

(7) Procedure for and effect of removal, as in section 3183 (relating to procedure for and effect of removal), for which purpose the incompetent shall be deemed a party in interest.

(8) Discharge of guardian and surety, as in section 3184 (relating to discharge of personal representative and surety).

§ 5517. Adjudication of competency; review.

(a) Adjudication of competence.--The court, upon petition and after such notice as it shall direct, may find, after a hearing at which good cause is shown, that a person previously adjudged incompetent has become competent.

(b) Review of guardianship.--The order appointing a guardian may specify a date on which the incompetent's need for guardianship shall be reviewed. Such review shall include a reevaluation of a mentally retarded incompetent by the county administrator for the mentally retarded.

(c) Request for review.--The guardian of an incompetent's person or estate, an agency or the incompetent himself may petition the court to review any issue involving the guardianship at any time.

Comment: New subsections (b) and (c) authorize a court to specify a date for reviewing the need for the guardianship, and in the case of a mentally retarded incompetent require a reevaluation by the county administrator for the mentally retarded. See Section 5526(c), which supplements this provision by requiring a guardian of a mentally retarded person to file a report at least annually.

Subsection (c) codifies the right of the incompetent, the guardian or an agency to petition the court to review any issue involving the guardianship at any time.

Section 4. Title 20 is amended by adding sections to read:

§ 5519. Scope of decree; extent of guardian's powers and duties.

(a) In general.--The court shall set forth in its decree appointing a guardian:

(1) Whether the guardianship is of the person or of the estate, or both.

(2) Whether the guardianship is plenary or limited.

(3) If limited, the specific nature and extent of the guardian's powers and duties; restrictions placed upon the rights of the incompetent; and the unrestricted rights to be retained by the incompetent.

(b) Limited guardianship of the person.--The decree may also include in the case of a limited guardianship of the person, whether the incompetent may exercise, without the approval of the guardian, such rights as the right to apply for a license to marry, to change his residence, to register to vote, to obtain medical treatment, to obtain educational or vocational development and to apply for a license to operate a motor vehicle.

(c) Standards.--In framing its decree, the court shall impose thereby the least restrictions on the freedom and activities of the incompetent, and may consider the following:

(1) Plenary guardianship. In general, plenary guardianship of the person and estate shall be utilized for those incompetent persons:

(i) who are unable to make adequate routine day-to-day decisions and are incapable of basic management of themselves and their affairs; and

(ii) whose best interests would be served by such plenary guardianship.

(2) Limited guardianship of the person. In general, limited guardianship of the person shall be utilized for those incompetent persons who are over the age of 18 years and substantially capable of caring for themselves, but whose best interests require guardianship with regard to one or more specific activities which they are incapable of managing for themselves.

(3) Limited guardianship of the estate. In general, limited guardianship of the estate shall be utilized for those incompetents who are over the age of 18 years and who are self-supporting through employment or other income sources. In such cases the limited guardian of the estate shall receive, manage, disburse and account for only such property of the incompetent as the court shall direct, and the incompetent shall have the right to receive and expend

either all or such portion of his earnings from employment or income from other sources as the court shall direct, and shall have the power to contract or legally bind himself to whatever extent the court may not have expressly disqualified him. Except as the decree otherwise provides, a limited guardian of the estate shall have the same duties and responsibilities as are provided in this chapter for guardians of the estate.

Comment: This section establishes the concept of a limited guardianship of the person, a limited guardianship of his estate, or both, as additional judicial alternatives to plenary guardianships. Limited guardianship enables the court to consider incompetents on an individual basis in order to formulate a guardianship program that takes account of the incompetent's powers and disabilities. This recognizes that, as stated in the report of the Yale Legislative Services, "Guardianship of the Mentally Retarded":

> . . . no diminution of human rights and human dignity can be countenanced by the law for any person--let alone any class of persons--except for a good reason, following due process, and then to the minimum degree necessary and for the shortest period possible. (at 4)

The new range of alternatives will aid the court in designing ". . . a program of guardianship for a mentally retarded person which offers him the protection and support he needs consistent with the least possible restriction of his personal rights and freedom." (at 4)

Thus, in formulating a judicial decree of limited guardianship of the estate, the court will, for example, be able to confirm an incompetent's ability to deal with his wages, while requiring, if necessary, supervision of other income sources.

Plenary guardianship, available under present law, will remain as a judicial alternative, but only those who ". . . are unable to make adequate routine day-to-day decisions . . ." and ". . . are incapable of basic management of themselves . . ." should have a plenary guardian appointed. Even if these criteria are met, the "best interests" of the incompetent must still be considered. The limited guardianship options are not available to those under eighteen in light of the additional legal disability of minority.

§ 5519.1. Selection of guardians.

In appointing a guardian of an incompetent's person or estate or both, the court shall be guided by the best interests of the incompetent, and may consider the following persons for appointment:

(1) A nominee of the incompetent if he has sufficient capacity to make an intelligent choice.

(2) His parents, subject to the provisions of Subchapter B of Chapter 51 (relating to appointment of guardian).

(3) A nominee in the probated will of the last surviving parent or adopting parent.

(4) His spouse and other members of his family.

(5) Individuals, not associated with the facility caring for the incompetent, who because of circumstances are specifically qualified.

(6) The county administrator for the mentally retarded or his nominee.

(7) In the case of a guardian of the estate, a corporation having the corporate powers to act as guardian.

Comment: This section emphasizes that the best interests of the incompetent should control the choice of guardian and suggests possible appointments available to the court without indicating a statutory preference. The county administrator for the mentally retarded or his nominee are included to provide an alternative as a last resort if the court does not have available a more suitable appointment.

§ 5526. Powers and duties of a guardian of the person.

(a) In general.--Except as otherwise provided in this code, a guardian of the person of an incompetent shall have the powers and duties of a guardian of the person of a minor.

(b) Care and protection of incompetent.--A guardian of the person shall exercise reasonable care to insure that in so far as resources available permit, the incompetent is given the care and protection that his physical, mental and social well-being requires and the maximum opportunity to develop physically, mentally and socially.

(c) Report.--When directed by the court a guardian of the person shall prepare and file a report. A guardian of a mentally retarded person shall file a report at least annually. The guardian shall serve a copy of the report on such persons or agencies as the court shall have designated in the decree appointing him guardian. The report shall describe the activities of the incompetent and the care given to him and shall include:

(1) The name and address of all places where the incompetent resided during the preceding year.

(2) His length of stay at each place.

(3) A resume of the incompetent's educational, vocational and employment activities.

(4) A resume of professional treatment, if any, given the incompetent.

(5) A resume of the guardian's activities and visits with the incompetent.

(6) A statement by the guardian regarding whether or not the competency of the incompetent should be readjudicated and his guardianship program redesigned.

(7) Any other similar information that the guardian may deem pertinent.

(d) Authority of court.--Nothing in this subchapter shall limit the authority of the court to require a report on the status and condition of the incompetent from the guardian at any time, or to otherwise supervise the conduct or activities of any guardian.

(e) Abortion or sterilization.--A guardian of the person of an incompetent shall not consent to abortion or sterilization to be performed upon the incompetent without court approval, which approval, except in the case of risk to the incompetent's life, may be given only after a hearing at which the incompetent is represented by counsel and, if the court so directs, a guardian ad litem.

Comment: This section confirms that the powers and duties of a guardian of the person of an incompetent parallel existing provisions relating to the powers, duties and liabilities of guardians of incompetents' estates and the guardians of minors' estates. Except in the case of a guardian of the person of a mental retardate where a report is required annually, the court may direct that a report be filed and that appropriate agencies or persons receive a copy. The court retains its recourse to initiate its own inquires.

Because of the gravity of any decision concerning abortion or sterilization of an incompetent, subsection (e) has been added to provide additional safeguards: a court hearing with representation by counsel and, in some cases, the appointment of a guardian ad litem are mandated.

§ 5527. Compensation of guardians.

The court shall allow such compensation to the guardian of the person or of the estate from the estate of the incompetent as shall in the circumstances be reasonable and just, and in the case of a guardian of the estate may calculate such compensation on a graduated percentage.

Comment: A general guide for remuneration of guardians of the estate and person of incompetents has been given in this section. No rule could adequately cover all situations, and the court must determine what is appropriate. Guardians of the estate of incompetents may receive compensation on a graduated percentage basis.

Section 5. Section 5531 of Title 20 is amended to read:

§ 5531. When accounting filed.

A guardian of an incompetent's estate shall file an account of his administration promptly at the termination of his guardianship, or at such earlier time or times as shall be directed or authorized by the court.

Comment: This section is amended to retain existing law relating to the time for filing the account of the estate of an incompetent.

HOUSE BILL 2577: PROPOSED AMENDMENTS TO THE MENTAL HEALTH AND MENTAL RETARDATION ACT OF 1966 AND COMMENTS

AN ACT

Amending the act of October 20, 1966 (3rd Sp. Sess., P.L.96, No.6), entitled "An act relating to mental health and mental retardation; authorizing county programs and amending, revising and changing the laws relating thereto and making an appropriation," creating the office of county administrator for the mentally retarded and defining his powers and duties; and establishing a program of guardianships and services for the mentally retarded.

It is the finding and intent of the General Assembly that:

(1) There are varying degrees of mental retardation and that although a person may be mentally retarded he may have sufficient ability to attend to himself and his affairs. For such persons the institution of guardianship must not be invoked.

(2) Like other citizens, the mentally retarded must be assumed to have full human and legal rights and privileges. The mere fact of retardation must not be in and of itself sufficient to remove their rights, by appointment of a guardian or otherwise.

(3) Merely because a mentally retarded person is in need of various forms of assistance does not mean that he needs a guardian. In addition to the institution of formal guardianship, parallel services are required, such as personal counseling, to be available to retarded persons who, with appropriate guidance and advice on a continuing basis, may not require formal guardianship.

(4) Mere intellectual ability or disability is an inadequate determinant as to the necessity for guardianship as it does not necessarily correspond to social adaptation. Determination of the need for guardianship must be a process considering intelligence but persuaded by functioning ability. Thus it is behavior which is the crucial determinant.

(5) An adult is presumed legally capable of directing his own life unless and until the court determines in guardianship proceedings that he is unable to manage himself or his affairs.

(6) In those instances where the retarded person is unable to manage himself or his affairs, a suitably designed guardianship program must be arranged.

(7) Guardianship of the mentally retarded should be viewed positively as a means of implementing rights and opportunities, with as much participation by the retarded ward as is practical in all decisions affecting him. The underlying goal of a guardian should be to do everything possible to help his retarded ward stand on his own feet in all respects.

(8) The guardianship program must be flexible, permitting adaptation to the specific needs of the particular retarded person. A guardianship relationship must be subject to revision as the needs of the person change.

(9) Public guardianship services should be available to every mentally retarded person who needs them. Any such service should provide, in addition to legal and fiscal protection of property, a continuing concern for the person as an individual. Public guardianship is a necessary alternative for those for whom private guardianship is unavailable, inappropriate or not desired.

(10) Mentally retarded persons must be allowed freedom, the maximum freedom consistent with their abilities, even freedom to make their own mistakes. Guardianship must be designed to fully utilize the retarded person's abilities and capabilities. Limited guardianship, with the scope of the guardianship specified in the judicial order, is to be preferred.

(11) The guardian's role as adviser and personal advocate of his mentally retarded ward must transcend his role as manager of the estate. The welfare of the retarded person and not of his estate must determine the legal and social provisions made for him.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 102, act of October 20, 1966 (3rd Sp. Sess., P.L.96, No.6), known as the "Mental Health and Mental Retardation Act of 1966," is amended by adding a definition to read:

Section 102. Definitions.--As used in this act:

* * *

"Administrator for the mentally retarded" means the person appointed to carry out the duties specified in section 306 of this act.

* * *

Section 2. The act is amended by adding a section to read:

Section 306. County Administrator for the Mentally Retarded; Appointment; Powers and Duties.--(a) Except in cities of the

first class, where the administrator for the mentally retarded shall be appointed under the merit system, the local authorities shall appoint a county administrator for the mentally retarded from a list of not less than two names of persons, qualified by study, training and experience in the field of mental retardation, submitted by the County Mental Health and Mental Retardation Board after receiving the recommendations of volunteer citizen organizations located within the county organized to promote the welfare of the mentally retarded. If, thirty days after the list has been submitted to the local authorities, an appointment has not been made, the secretary after consultation with the local authorities, the County Mental Health and Mental Retardation Board and the volunteer citizen organizations shall appoint an administrator for the mentally retarded. The administrator for the mentally retarded may be removed from office by the local authorities but no appointee of the secretary shall be removed without the approval of the majority of the County Mental Health and Mental Retardation Board.

(b) The administrator for the mentally retarded shall have the power and duty to:

(1) Recommend to the administrator a county mental retardation program, which program shall insure that mental retardation services required by this act are available.

(2) Provide staff services to the County Mental Health and Mental Retardation Board.

(3) Assist the administrator in carrying out his duties under this act, specifically with regard to the mental retardation plan, programs and their estimated costs, facilities, reports and evaluations of the community's needs for mental retardation services.

(4) Assure within the county the availability and equitable provision of an effective guardianship program for all mentally retarded persons in need of such a program.

(5) Consult with mentally retarded persons, their families, guardians, limited guardians, and other interested individuals with respect to the alternative advisory and protective arrangements available to mentally retarded persons; and to recommend the type of guardianship program, if any, that is best adapted to serve the needs of a particular mentally retarded person.

(6) Assist and coordinate the efforts of private guardians of mentally retarded persons appointed by the court, and to that end to:

(i) Review any reports prepared and submitted by the guardians to the court.

(ii) Investigate individual cases, either in response to complaints or on his own initiative, including but not limited to direct contact with wards on a random sampling basis.

(7) Notify volunteer citizens' organizations located within the county, organized to promote the welfare of the mentally retarded, of all judicial proceedings involving mentally retarded persons residing or domiciled within the county.

(8) Assist the court in guardianship proceedings by:

(i) Providing the court at its request with an evaluation report of the alleged mentally retarded person who is the subject of such proceeding; in addition to a current diagnosis of the physical condition of the subject, prepared under the direction of a physician, and the status of the subject's current mental condition and social adjustment, prepared jointly by a psychologist and a social worker, the report may include the recommendations of a certified teacher in the field of special education or other qualified observer of social behavior, as the administrator shall determine.

(ii) Recommending to the court competent persons who are able and willing to accept appointment as guardians of a mentally retarded person who has been adjudged in need of such guardian.

(iii) Initiating guardianship proceedings on behalf of persons who the administrator for the mentally retarded believes are in need of a guardian and who have not themselves initiated or on whose behalf others have not initiated such proceedings.

(iv) Bringing to the attention of the court guardians who the administrator for the mentally retarded believes should be removed and replaced, or removed and not replaced, or whose powers of guardianship should be increased or decreased.

(v) Providing other such services as the court may request.

(9) Make all regulations necessary and appropriate to the proper accomplishment of the guardianship program established by this section.

(10) Establish and maintain working relationships with other governmental bodies and public and private agencies, institutions, and organizations so as to assure the most effective program for the mentally retarded.

(11) Gather information on the guardianship program established by this amendatory act for the purpose of evaluating its effectiveness and proposing necessary changes.

(12) Carry out such other duties as are necessary to further the intent of this amendatory act.

(13) Accept appointment as guardian of the person, estate, or person and estate of those mentally retarded persons who need his assistance and protection.

(14) Exercise the powers of guardian of a mentally retarded person, or his estate, or his person and estate, on an emergency basis.

(15) Take such steps and adopt such measures as are necessary for the proper discharge of his duties.

Comment: The position of administrator for the mentally retarded is established at the community (county) level to serve as a responsible agency to deal with the problems of the mentally retarded. This administrator provides the necessary services detailed as the basis of the legislative proposal in the report of the Yale Legislative Services: "The guardianship needs of the mentally retarded and the legal and social consequences attendant upon the appointment of a guardian are too important to be left to an array of loosely coordinated offices." (at 9)

This administrator has the duty of establishing a program to ". . . insure the mental retardation services required by this act are available." The programs can thus be adopted to the needs of individual communities, allowing for appropriate diversification. The establishment of this office at the community level ensures the direct responsibility of the administrator to provide for its needs.

The effectiveness of the administrator will be developed through maintenance of close rapport with the mentally retarded persons of the county, the voluntary associations concerned with the mentally retarded, the court and the other service-rendering agencies. The Mental Health and Mental Retardation Act as amended herein, specifies this involvement by providing for participation in the appointment process similar to that required for the executive administrator of the County Mental Health and Mental Retardation Board.