rXLI LIM, A.E.K. Property guardianship of Adults.

Albert Eng Kiong Lim

Property Guardianship of Adults: A Proposed Scheme for New Zealand

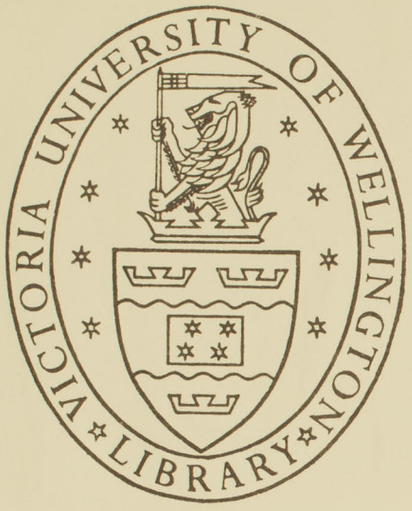
Research Paper for Medico-Legal Studies

LL.M. (LAWS 537)

Law Faculty

Victoria University of Wellington

Wellington 1983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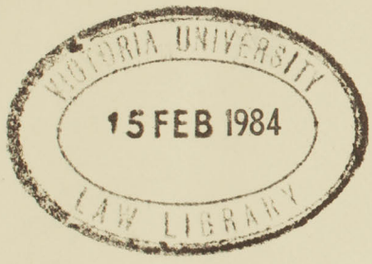
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I INTRODUCTION

Historically, the King as parens patriae was the supreme guardian and superintendent of the "goods and chattels, lands and tenements" of "idiots and lunatics" and infants, "as persons who are unable to take care of themselves".[1] The English crown had claimed this peculiar form of guardianship since the reign of Edward I (1272-1307).[2] This claim was legally entrenched by the Statute Prerogative Regis enacted in 1324[3] which made the King Guardian over those persons whom a jury of twelve determined to be idiots or lunatics.[4] As guardian , the King had to protect the person and properties of such incapacitated persons from exploitation. He also had the responsibility to maintain them and their households out of the proceeds from the properties. The profits generated from the management of such properties of the idiots accrued to the King, while those from the lunatics' were kept in trust and returned to them when they came "to right mind".[5] The actual care of the person and the estate of the disabled were, however, delegated to their friends and nearest relatives.[6]

This ancient prerogative of the Crown which was exercised by the ad hoc reliance on the King's governors was subsequently transferred in 1540 to the Court of Wards and Liveries[7] which acted as a central administrative unit.[8] However, the Court together with other feudal institutions and their incidents faltered under the political climate during the English Civil war and in 1660 it was finally

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abolished. The parens patriae jurisdiction over fools and lunatics was then transferred to the Court of Chancery.[9] The subsequent period witnessed the inactivity of the law in attempting to cure or to treat the unsound in mind except for the establishment of homes under the Poor Laws in which some of the mentally abnormal together with the paupers and vagrants were incarcerated.[10]

By the end of the eighteenth century, the parens patriae jurisdiction of the Court of Chancery were modified by new statutory provisions which gave protection to the estates and provided care and treatment of those suffering from mental disorder. This series of enactment culminated in England in the passing of the Lunacy Act 1890.[11] Like the rest of the British Commonwealth countries, the dominion of New Zealand had been incorporating English statute and common law into its own statutes.[12] One prime example of such a borrowing from the English law is the Lunacy Act 1908 (New Zealand) which consolidated and re-enacted earlier Acts. This Act was replaced by the Mental Health Act 1911 and this in turn, was modified and updated as the existing Mental Health Act 1969. The ancient jurisdiction of the Court of Chancery in respect of those who were incapacitated which New Zealand inherited in 1908[13] was therefore replaced by statutory provisions under the Mental Health Act 1969 as far as the care and protection of the person and property of the mentally disordered are concerned. This ancient jurisdiction was further diminished by the Aged and Infirm Persons Protection Act 1912 which now provides for the management of the property of the aged and the infirm.

It has been acknowledged that the present legislation dealing with disabled persons and their property, the Aged and Infirm Persons Protection Act 1912 and the Mental Health Act 1969 "represent an unnecessary duplication of statutory provisions".[14] It would have been better if the two Acts were incorporated under one common statutory scheme which covers all disabled persons. Under the Mental Health Act 1969, the incapacity to manage property is linked to any diagnosis of mental disorder. The Public Trustee therefore, automatically takes control of all the property of persons committed to a psychiatric hospital regardless of their ability to manage them. There is no separate hearing to determine their capability to deal with property because they are presumed incapable of managing their affairs upon their admission to a mental hospital. This presumption of incompetence is unfounded:

> "[t]he clinical well-being of a patient should be distinguished from his 'commercial' competence because the two conditions are not synonymous".[15]

The present legislation can also be criticised for failing to recognise the fact that there are different degrees of incapacity and that some persons may be quite capable of performing simple transactions (for example, operating a bank account) although they may not be competent in more complicated dealings (for example, selling a house).[16] Everyone subject to the provisions of the present Acts are deemed to be totally incapable of managing their assets and need to rely on the person appointed to look after their

property in making any transaction. This has the unnecessary effect of depriving disabled persons of their rights to manage their own property in those instances when they are quite capable of exercising such rights. Another undesirable feature of the present legislation is the statutory preference in favour of the Public Trustee as the person appointed to control the property of incapacitated persons.[17] The Public Trustee is a bureaucratic office which assumes control over the property of a large number of people and as such cannot maintain constant personal communication with all its clients. There is a need to appoint an individual person who can communicate freely with the disabled person and who can therefore exercise his or her managerial functions in accordance with the needs and desires of the disabled. The existing law in this area is further criticised for being unduly concerned with the traditional emphasis on the need to preserve property for future generations[18] rather than allowing disabled persons the maximum rights to control their own property. For these and many other reasons which will be stated in the later part of the discussion, it is clear that the New Zealand law in respect of the property of disabled persons is quickly joining the queue signposted "historical relics".

In order to meet current needs and expectations arising out of a better understanding of the nature of mental incapacity, it is proposed that New Zealand should adopt a guardianship scheme for the disabled adults.[19] Such a scheme will emphasise

the need to give the disabled maximum control in the management of their affairs so as to allow them to exercise their rights to property as all "normal" citizens are entitled to (the "rights" principles). The need to protect the property of the disabled (the "protection" principles) is often nothing more than a mask for society's paternalism and the unnecessary deprivation of the rights of people to manage their own affairs. Although the scheme must afford enough protection to the property of disabled persons, it must not do so in such a way as to allow the "protection" principles triumph over the "rights" principles. The answer, it is suggested, is to be found in the appointment of substitute decision-makers whose powers are restricted to those areas in which the disabled persons are found to be incapable of making decisions. Such decision-makers who are referred to as "guardians" shall be legally appointed and be answerable to the appointing body for the performance of all guardianship functions. The appointment of an individual person as a guardian for each disabled person will ensure that the latter will benefit from a personalised service. Under this model of guardianship, the guardians' primary duty is to ensure that the disabled persons are maximising their own capacities in all matters affecting them. Where it is feasible, guardians are expected to consult and to involve the disabled in all decision-making processses so that they can actually learn how to make these decisions independently.

This paper proposes a guardianship model which is based primarily on the submissions of the New Zealand Institute Mental Retardation,[20] the Victoria proposal[21] and the American

Bar Association Model Statute.[22] The writer will first expound the underlying principles with which the proposed guardianship model is supposed to conform with. This will be followed by an examination of the class of persons who can be put under guardianship. The paper will then discuss why individual personal guardians are preferred to institutional guardians. Following that, the powers and duties of a guardian will be examined in the light of the "rights" principle. It is also proposed to explore other forms of protection apart from guardianship, such as, citizens advocacy. Under the heading "Administration of a Guardianship Scheme" the writer will consider how a determination of the need for guardianship is made and which adjudicating body shall make such decisions. It is then proposed to consider the role of the Public Advocate in the general oversight and coordination of all forms of service deliveries within the scheme. In view of the fact that guardianship involves a serious limitation on the rights of the incapacitated person to manage their own affairs, a section of this paper will be devoted to the formulation of a procedural framework which will ensure that guardianship is not unnecessarily imposed on any person. The procedural safeguards suggested will include the right of the disabled person to have adequate notice of any hearing to determine the need for guardianship, the right to be represented in such a hearing and the right to have any order imposing guardianship reviewed periodically. Finally, it is decided to consider a number of miscellaneous features of the guardianship scheme which have so far not been

dealt with in the paper. By way of contrast, the present New Zealand legislation will be referred to and its inadequacies highlighted throughout the discussion.

In this paper a distinction is made between the two categories of guardianship which are "personal guardianship" and "property guardianship". "Personal guardianship" refers to the appointment of a guardian to look after the person of the disabled and make decisions in all matters which affect the personal integrity of the disabled, for example, the guardian will have the right to consent to or refuse medical treatment to be carried out on the disabled. Such a guardian will be called a "guardian of the person" or a "personal guardian". On the other hand, "property guardianship" refers to the appointment of a guardian to manage the property of the disabled and to make decisions in all transactions affecting the property. The terms "conservatorship", "estate administration" and "estate management" are also used to refer to "property guardianship". The guardian appointed in this area of guardianship will be referred to as the "property guardian", the "conservator", the "estate administrator" or the "estate manager". A further distinction is made between the two scopes of guardianship which are "plenary guardianship" and "limited guardianship". "Plenary guardianship" refers to a form of guardianship in which all decision making rights in the area of personal or property guardianship or both, are vested in the guardian. The guardian appointed with such global powers is called a "plenary guardian". "Limited guardianship" refers to a form of guardianship in which the guardian is only vested with the rights to perform those functions which the disabled person is unable to perform.

The guardian appointed with such restricted powers is called a "limited guardian". The disabled person who is subject to guardianship shall be referred to as the "ward" or "conservatee" (this term is restricted to property guardianship).

It must be noted that although the main thrust of this paper is on the property aspect of guardianship, the same principles and arguments are equally applicable to the guardianship of the person. Very often, the exercise of a property right is inextricably linked to the exercise of a personal right:

> Making a decision to change residences is not necessarily just an exercise of a personal right, a right to decide where to live; it might also be an exercise of a property right, a right to decide how to spend money. Similarly, an incapacity to exercise a right to property might result in an incapacity to purchase the facilities and services needed to exercise fully a personal right. Thus an incapacity to manage income might result in an incapacity to use the income to purchase a necessary aid to personal safety, such as handrails for the home. This is not to say that the exercise of personal rights always depend on the exercise of property rights, just that they are often so very interdependent.[23]

The United States Supreme Court has demolished the artificial dichotomy between property and other civil rights:[24]

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare cheque, a home or a savings account. In

> fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.

It is therefore, essential to have a single scheme which provides for both property and personal guardianship. The lack of such a unified scheme for both aspects of guardianship highlights one of the major deficiences of the present New Zealand law which only deals with property administration. Unfortunately, the proposed new legislation[25] makes no attempt to integrate the property administration proposals with the personal guardianship proposals.[26]

II PRINCIPLES ON WHICH GUARDIANSHIP LEGISLATION SHOULD BE BASED

> Some paradox in our nature leads us, once we have made our fellow men [or women] the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion.[27]

In framing any guardianship laws, it is important, first to identify and clarify the principles which these laws must reflect. For the guardianship scheme proposed by the writer, these principles are as follows: the need to protect the disabled, normalisation and integration, presumption of competence, least restrictive alternative and procedural due process. The first principle is referred to generally as the "protection" principle and the rest are collectively labelled as the "rights" principles.[28] The "protection" principle embodies the protective instincts of society to provide care for its members who, because of mental disability, are unable to look after themselves of their property. In the context of a guardianship scheme, the extreme form of such protection manifests itself in the concept of plenary guardianship. The "rights" principles, on the other hand, seek to maximize the development of disabled persons in the independent exercise of their rights. The dilemma, then, is between "protecting" and "liberating" the disabled person.[29] To resolve the dilemma, it is submitted that a balance be struck in favour of the "rights" principle.[30] The concept of limited guardianship achieves such a balance by giving protection in those areas of incapacity while, at the same

time, allowing the disabled the maximum rights consistent with their abilities.

A. The Need to Protect the Disabled

The state in its role as parens patriae not only has an interest but also a duty to protect those of its citizens who are incapacitated against neglect, exploitation or abuse by their fellow citizens. Where the general laws applicable to all citizens are inadequate, society must seek to provide special protective services to insure the disabled against their vulnerability and dependency. Traditionally, the response of the state to the mentally abnormal has been the provision of institutional protection for their person and property by way of civil commitment. The recent movement away from institutionalisation has led to development of the concept of guardianship as an alternative form of providing protective services. This protective function of guardianship is evidenced by Article 5 of the United Nations Declaration on the Rights of the Mentally Retarded which provides as follows: "The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests".[31]

At present, there is no statute in New Zealand providing for the personal guardianship of adults and therefore, any protection offered to the disabled is either through civil commitment,[32] the use of laws designed to protect the ordinary person or by informal means through concerned relatives and friends. However, there are some occasions when such means are inadequate or inappropriate, for example, a disabled person who is in need of a major operation may be unable to

understand the implications of such a procedure and therefore cannot give a valid consent. In such a case, the only lawful solution would be to appoint a legal guardian who will have the power and the responsibility to give such consent.[33]

The Mental Health Act 1969 and the Aged and Infirm Persons Protection Act 1912 can be said to provide a form of property guardianship but as pointed out earlier,[34] the emphasis of these Acts on protecting and preserving property has resulted in the loss of the rights of the disabled to control their property.

In summary the law in New Zealand in respect of the protection of the disabled can be described in the following way: there is a lack of protection for the person of the disabled and an overprotection for the property of those who come under the Mental Health Act 1969 and the Aged and Infirm Persons Protection Act 1912.

B. Normalisation and Integration

The principle of normalisation has received increasing attention in the area of human services throughout North America as a philosophical basis of their service delivery. The origin of the concept of normalisation stems from a belief that societies do reject some members on the basis of their perceived deviance and that this rejection often leads to the relegation of disabled persons to low-quality and harmful forms of services - for example, segregation in custodial settings.[35] Normalisation counteracts this negative perception by challenging human services to enhance both the skills and

the societal image of their clients. It is a misconception to visualise normalisation as a process of making retarded people normal; in truth, it has a far more modest role - to enable them to live under conditions as normal as their handicaps will allow.[36] The United Nations has declared and affirmed "the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life".[37]

The Alberta Act has encapsulated the concept of normalisation in the guardianship area by providing that a guardian shall act "in such a way as to encourage the dependent adult to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person".[38] A faithful adherence to the concept of normalisation entails the right of the disabled to make mistakes as all normal people do. It may be common knowledge that "one learns from one's mistakes"; however, that experience can only be enriched if one bears the responsibilities of such actions.

> So under the principle of normalisation, guardianship would not be used merely to protect the mentally retarded from their own mistakes just as no measure restricting rights would be used merely to protect the "normal" from their own mistakes.[39]

The law must therefore make provisions for attaching legal responsibilities for the exercise of legal rights. For example, in the area of contracts, a disabled person must bear the consequences of onerous contracts. The amount of responsibility

to be imposed must take into account the abilities and limitations of each individual person. To legislate for a blanket immunity from all contractual obligations would impede progress towards normalisation.[40] This may result in persons refusing to enter into any contract with intellectually handicapped persons[41] and therefore making it difficult for such person to engage in the normal day-to-day transactions essential for full community living.

In New Zealand persons whose property are administered under the Mental Health Act 1969[42] can nullify any contract which they have entered into except where the contract is for necessaries.[43] For those persons who come under the Aged and Infirm Persons Act 1912[44] any contact entered by them except for necessaries is automatically nullified.[45] This almost complete immunity from contractual obligations given to protected patients and protected persons is clearly contrary to the principle of normalisation. The only reflection of the normalisation principle in the New Zealand legislation is found in the consultation provision of the Mental Health Act 1969 where it is provided that the person appointed to look after the estate of the disabled[46] shall consult the latter "so far as it is practicable and expedient" and "may" follow or act on the advice given by the protected patient.[47] In comparison with the Aged and Infirm Persons Protection Act 1912 where no such provision is made, the consultation provision seems commendable. However, it must be noted that it is entirely discretionary for the manager to consult the protected patient. One wonders how often, in actual practice, the discretion to

consult is exercised. It is submitted that in any guardianship scheme that holds true to the principle of normalisation, a duty must be imposed on guardians to consult their wards in all major decisions.

In conclusion it must be noted although the objectives of normalisation and integration cannot be easily translated into narrow and precise rules of law, the very process of legislating such general principles, will serve a valuable educative function.[48] The writer suggests that any proposed guardianship scheme in New Zealand must delcare in its long title, the value of normalisation as one of its objectives.

C. Presumption of Competence

In order to safeguard the personal dignity and individuality of disabled persons, there must remain a presumption of competence to enjoy all rights until it can be clearly shown by due process procedures that they are incapable of effectively exercising them.

The movement away from the rights principles in favour of the protection principle may result in less concern for the development of the individual and for the rights of the mentally disabled.

A question arises as to what extent we should presume competency and allow disabled persons the right to make choices and decisions which may be "bad" for them?[49] We cannot simply abandon them to their rights nor can we over-emphasise on protection. To achieve the maximisation of rights may be difficult in practice; guardians, parents and

advocates have to balance their protective instincts towards the disabled but at the same time allowing them the greatest freedom consistent with their abilities.[50]

A presumption of competency complements the idea of normalisation. It reduces the vision of the mentally disabled as helpless and incapable of exercising rights. This perception is untenable because current medical knowledge has revealed that mental health is not a black or white situation in which a person has either extremely limited capabilities or, he or she has full capacity.[51] On the contrary, capacity must be viewed as a continuum.[52] Every mentally retarded person has "unique abilities and competencies with varying disability".[53]

Before a proper assessment of the capacities of disabled persons is made, such persons must always be presumed competent. To put it in another way - the protection principle must give way to the rights principles. It is unfortunate to note that professionals including lawyers should feel that "it was merely a play on words to say that a mentally disabled person should not be presumed incompetent".[54] This attitude is clearly reflected by the present New Zealand Legislation on property guardianship. Under the Mental Health Act 1969, all persons committed into psychiatric hospitals are automatically presumed to be incompetent in managing their property.[55] Like most guardianship statutes, the Aged and Infirm Persons Protection Act 1912 focuses on the general disabling condition of the subject of the proceedings, for example old age, physical or

mental infirmities.[56] Upon the proof of such disability, the finding that the subject cannot care for his or her property and therefore needs guardianship follows almost automatically.[57] There is, therefore, in New Zealand a presumption of incompetence in both the law and practice.

D. The Least Restrictive Alternative Form of Protection

In order to resolve the tension between the rights principles and the protection principle in favour of the former, the principle of the least restrictive alternative has been applied in the area of mental disability.

> Under this principle, a preference must be given to that means of accomplishing an end that least restricts individual rights. In the context of guardianship law, following this principle would mean two things. First, that guardianship would not be ordered for an individual unless no measure which would restrict that person's rights less than guardianship would is sufficient to protect that person. Second, that, if guardianship is deemed to be the least restrictive alternative available, then that type or form of guardianship would be ordered that accomplishes the purpose of protection with the least possible restriction of individual rights. In other words, no guardianship is to be preferred over limited guardianship and limited guardianship is to be preferred over plenary guardianship whenever possible.[58]

The form of protection offered or rather, imposed by the New Zealand legislation cannot be said to be consonant with the least restrictive alternative principle. Under the

Mental Health Act 1969 all persons committed to psychiatric hospitals are automatically given guardianship protection over their property without any consideration of other forms of protection which may be less restrictive of the rights of the protected patient. Similarly, protected persons under the Aged and Infirm Persons Protection Act 1912 only receive one form of protection - guardianship. There are clearly, other less restrictive forms of protection which may be applicable to protected patients and persons, for example, the use of a power of attorney. This legal device allows a person to delegate his or her rights for only one specific transaction or a number of such transactions to another person.[59]

Even if guardianship is the most appropriate form of protection for some persons who fall within the New Zealand Acts, it may still be a highly restrictive form of protection because these Acts generally provide guardianship in the plenary form. Under the Mental Health Act 1969, the Public Trustee as manager of a protected patient's estate automatically assumes global powers although a manager may only be needed to conduct one single transaction.[60] The Aged and Infirm Persons Protection Act 1912 confers identical powers to the Public Trustee[61] except that the Court may exempt part of the estate of the protected person from the guardianship of the Public Trustee.[62] There is no provision in either Act for limited guardianship in those cases where the person is only incapable of making a few decisions but is otherwise quite competent. In this respect, the law in New Zealand does not reflect the principle of least restrictive alternative form of

protection. Any future guardianship legislation should provide for limited guardianship which tailor-suits a guardian's powers to the needs of the ward. This would avoid over-protection and any unnecessary restriction of rights.

E. Due Process of Law

The due process of law proclaims that any exercise of the powers of the state in restricting the rights of the individual to life, liberty and property must be achieved by means of a fair procedure.[63] The primary concern of due process is to ensure that no-one is wrongly deprived of his or her rights. This concern is perhaps, best illustrated by the common law "maxim" that it is better to have nine guilty persons go free than to have one innocent person convicted. The elements of a fair procedure include the existence of a competent tribunal of adjudication, the service of adequate notice to the person whose rights are affected, the right to be present at the hearing the right to be legally represented and the right to defend.[64]

Since a determination to put a person under guardianship involves a restriction of rights, the guardianship hearing procedures must conform with the due process principle. In terms of the elements of due process as enumerated above, New Zealand law seems lacking in due process. Under the Mental Health Act 1969, property guardianship is automatically imposed on every patient who is committed to a psychiatric hospital. It seems illogical that the need for commitment should amount to a finding of incompetence to manage property.

The due process of law would require a separate hearing for determining an incapacity to manage property before a person can be put under property guardianship. Although the Aged and Infirm Persons Protection Act 1912 requires initially, a finding of a particular class of incapacity, for example, old age or physical and mental infirmity, as well as an inability to manage property; in practice, a finding of the first requirement is almost automatically followed by the finding of the second requirement.[65] Apart from the lack of due process in the determination of a person's incapacity to manage property, there are also a number of other significant procedural safeguards missing in the New Zealand Law.[66]

III WHO CAN BE PUT UNDER GUARDIANSHIP

Since guardianship can be a highly restrictive form of protection,[67] it is important that the criteria for imposing guardianship be specifically defined so that people are not unnecessarily deprived of their rights to the management of their own property. Before explaining such criteria which will best ensure that the rights principles are adequately reflected in preference to the protection principle, it is proposed first, to examine the present standards under the New Zealand Acts.

A. Mental Health Act 1969

> In the eighteenth century, madmen were locked up in madhouses: in the nineteenth century, lunatics were sent to asylums; and in the twentieth century, the mentally ill receive treatment in hospitals.[68]

Under the Mental Health Act 1969 the persons who can be hospitalised are divided into three classes namely, informal patients, committed patients and special patients.[69] Informal patients are those who voluntarily arrange to be admitted in a psychiatric hospital and who may have themselves discharged at their own will.[70] Committed patients are those who are compulsorily detained under a reception order[71] until they are discharged at the discretion of the superintendent of the hospital.[72] Special patients are -

> those charged with a criminal offence but due to a mental incapacity are unable to be tried; or those who are convicted, and either at sentencing or later, require hospitalisation rather than penal detention due to a mental disorder.[73]

The care and protection of the person of a patient is provided by the superintendent and the staff within the hospital.[74]

The property of a patient is automatically protected and administered under Part VII of the Mental Health Act provided the patient comes within the definition of a "protected patient". Every committed patient who is subject to a reception order is a protected patient and so are a few other patients.[75]

B. Aged and Infirm Persons Protection Act 1912

The Act provides for the property guardianship of the aged and the infirm by way of a protection order granted by the High Court. A person who is subject to such an order is called a protected person. Unlike the Mental Health Act 1969 where a committed patient automatically becomes a protected patient, the Aged and Infirm Persons Protection Act 1912 requires someone to make an application to the Court to have a person made a protected person. The Court will only exercise its discretion to make a protection order upon the fulfilment of a two-step requirement.[76] First, the person must fall within a diagnostic category of disability such as advanced age, disease, physical or mental illness or infirmity or mental subnormality.[77] Second, that by reason of such a category of disability, the person is a) unable, wholly or partially to manage his or her own affairs; or b) is subject to, or liable to be subjected to undue influence; or c) otherwise is in a position which the Court thinks should

be protected.[78] Similarly, those persons who consume alcohol or drugs to such an excessive extent that they are unable, wholly or partially to manage their own affairs may also be subject to a protection order.[79] The requirement of the existence of a particular class of disabling condition under the Aged and Infirm Persons Protection Act 1912 is emphasised in the case of Re M[80] where it was held :

> ...[P]rodigality, improvidence, business incompetence, facility of will or excessive generosity, unless due to age, disease, illness, physical or mental infirmity (s 4) or taking or using in excess alcoholic liquors, or any intoxicating, stimulating, narcotic, or sedative drugs (s 5), can never give jurisdiction to make a protection order under this Act. The Welfare State still permits a man to waste or give away his substance unless one or other of those conditions is fulfilled.

C. Assessment of the New Zealand Acts

The two New Zealand Acts can be criticised on a number of grounds for emphasising the protection principle at the expense of the rights principles. First, by automatically depriving mentally disordered persons of their rights to administer their own property, the Mental Health Act 1969 is working on the false premise that all those who are committed to mental institutions are incapable of managing property.[80] The issue of the capacity of disabled persons to manage their affairs and need for guardianship must be separated from the issue of their need for hospitalisation. Moreover, in view of the recent trends in psychiatric treatment

which indicate that a person may frequently be discharged after a short-period of intensive therapy,[81] guardianship may be a highly restrictive form of protection. There may only be a few transactions needed during the short stay in hospital and these could have been carried out by a less restrictive alternative form of protection, for example, getting the Court to ratify these transactions.

At first sight, the two-tiered requirements of the Aged and Infirm Persons Protection Act 1912 may appear to be stringent standards of imposing guardianship. However, the finding of the first step requirement of a diagnostic category of incapacity such as age, infirmity, alcoholism or drug addition has, in practice meant that the second step requirement of an inability to manage peroperty is taken automatically.[82] Moreover, the catch-all provision of section 4(c) of the Aged and Infirm Persons Protection Act 1912 which states that any person who -

> is by reason of age, disease, physical or mental illness or infirmity or mental sub-normality, ... in a position which in the opinion of the Court renders it necessary in the interest of such person or of those dependent upon him that his property should be protected ....

has resulted in

> creating the most open-ended standard imaginable. Such a provision certainly ensures that no-one needing protection is excluded from the law's reach, but, at the same time, it gives unlimited scope for violation of such rights principles as maxim-isation of self-determination, normalisation,

> presumption of competence, and minimisation of stigma.[82A]

D. Proposed Alternatives

The State of Victoria proposes a generic approach based on the criterion of "need" alone; replacing the traditional approach of focusing on the causative origins of disability such as age and physical or mental infirmity which, arguably, are responsible for generating those needs for guardianship.[83] By shifting the focus away from the disabling condition, such a provision which concentrates solely on need will help to counteract the presumption of incompetence, which tends to surface whenever a disabling condition is proved.[84] In addition, it will reduce stigma which arises out of the use of labels such as senility, mental illness or alcoholism:

> [T]he shift in focus lessens the stigma attached to being put under guardianship, because it discourages, to some extent, the use of labels, labels being the primary means by which negative experiences with one individual become generalised into negative attitudes about all other individuals with the same label.[85]

Under the Victoria proposal the category of persons in need of guardianship would be those who are "incapable of making reasonable judgments for themselves".[86] The comments made against Alberta's Dependent Adults Act 1976 (Section 6) which states the inability to make reasonable judgments, as one of its criteria, applies equally to the Victoria proposal:

> Every one of the four criteria making up the standard embodied in this provision (unable to make reasonable judgments, unable to care for self, in need of a guardian, best interests) permits the uncontrollable exercise of value judgments, pure and simple. To concentrate on the strictest of the requirements, what is a "reasonable" judgment? It could be said that a judgment is reasonable only if it is the one most likely to bring about a result which is in the best interests of the person involved. One problem with this definition is that it sets a standard which even most "normal" persons could not meet. It is not uncommon for people to pick highly risky ways to accomplish results in their best interests. By requiring the mentally retarded to be better decisionmakers than nonretarded persons, this definition violates the principle of normalisation.[86A]

The proposed law in New Zealand is rather vague in stating the criterion for imposing guardianship. It basically follows the Victoria proposal in making the cause of a person's incapacity immaterial:

> The new legislation is proposed to apply to all incapacited persons who can no longer manage their own affairs .... If his incapacity from whatever cause precludes him from managing his affairs, wholly or partially, then the new legislation should apply.[87]

As can be seen above, the proposed criterion makes no attempt to spell out how to judge when incapacitated persons "can no longer manage their affairs". Applied strictly, the only occasions when people can no longer manage their own affairs

are when they are dead, missing or in a coma. Otherwise, everyone can generally manage their property; whether they manage them properly or not is another matter. Clearly, this approach is not intended by the authors of the proposals. The other possible intention of the proposals would be to simply delete the words "by reason of age, disease, physical or mental illness or infirmity or mental subnormality" from Section 4 of the Aged and Infirm Persons Protection Act 1912 and then reenacting Section 4 without these words. This would expand the scope of Section 4 and "leave wide open the possibility of removing the rights of persons who are fully capable of making decisions but happen to make decisions others do not approve of".[88]

Instead of having a value-laden standard based on an inability to make reasonable decisions or a vague and open-ended standard based on the inability to manage property, the writer proposes a criterion which concentrates on the quality of the thought-process in decision making. This involves the examination of the person's ability to understand and evaluate information pertaining to the specific decision to be made. Hence, the focus is on the ability to perform the process of making decisions rather than on the wisdom or reasonableness of the final decision.

> Focusing on this process avoids the logical fallacy of assuming that because a decision seems inexplicable, disturbing, or irrational in a given instance or series of instances, it must be true that the decision-maker is incapable of rational decision-making.[89]

Therefore, guardianship would not be imposed on those who are capable of receiving and weighing data but still make what appears to be unreasonable or bad decisions. Such persons who should not be protected would include the unsuccessful investor, spendthrifts or those with excessive generosity. A lot of "normal" people fall within these categories and yet do not need any State intervention in their lives because they can weigh up the pros and cons in their decision making process. A businessman who takes unnecessary risks and is losing a lot of money may appear to be in need of guardianship protection. However, that person may fully appreciate the risks involved and decide to take a "gamble" because of the chances of earning huge profit returns. On the other hand, there are those who may make exactly the same decisions as the unsuccessful investor or the spendthrift but will be in need of guardianship because of an absence of the process of understanding and evaluation in reaching those decisions.

Any future legislation in New Zealand should therefore, adopt a standard which avoids looking at the existence of a disabling condition and which focuses solely on the quality of the thought process in decision making. This will ensure that guardianship protection is applied to those who really "need" protection and not simply applied as a blanket form of legal paternalism.

IV THE IDEAL GUARDIAN

A. A person preferred to an office

Apart from being a substitute decision maker, the guardian also has a role in assisting and training the ward so that he or she can assume more decision making responsibilities in the process of normalisation and integration. This requires the guardian to be a person who can and is willing to be in regular contact with the disabled person in order to make decisions which are sensitive to the true extent of his strengths and weaknesses. An office like the Public Trustee cannot achieve that personal interaction between a guardian and a ward which is necessary in a limited guardianship scheme. Moreover, it is unlikely that the Public Trustee or its staff has the time to keep in regular communication with disabled persons, let alone monitor their daily progress in decision making and encourage or train them. More likely than not, the Public Trustee like all bureaucratic structures will develop standardised approaches to estate administration to streamline its workload - all to the detriment of the disabled person. Apart from the lack of a personal one-to-one relationship between the guardian and the ward, the South Australian Public Trust office has been criticised for delays in payments, administrative charges on small estates and inflexibility.[90] On the contrary, the Victorian Public Trustee[91] sees its merits as a guardian as follows : It is government guaranteed against loss of capital, it is subject to audit by the Auditor-General, it is impartial and therefore resolves actual and potential family conflicts, it offers a complete service through its specialised legal, accounting, tax

and investment officers, it does not operate for the benefit of private shareholders or partners as other professional trustee companies do, its modest profits go to treasury for administration of the Office. Another reason why the Public Trustee should be preferred is because as an already existing office, it avoids the cost of having to set up a new structure.

Rather than express a preference for an individual or the Public Trustee,[92] the ideal solution would be to express no such preference and allow flexibility for the guardianship tribunal who would be likely to appoint the Public Trustee in many cases.

B. Which persons?

In the event that a person is preferred, the next problem is to appoint which particular person. The American Bar Association proposes the following descending order of priority :[93]

a) the individual nominated by the disabled person;

b) the current conservator;

c) a spouse of the person;

d) an adult child of the person;

e) a parent of the person;

f) the individual nominated by the will of a deceased parent;

g) any individual with whom the person has living for more than six months;

h) a sibling of the person;

i) a volunteer public guardian.

The top priority given for the nominated individual (a) is a recognition of the concept that the express wishes of disabled persons should always be taken into account in order to preserve their autonomy. Moreover, it is best that a guardian be someone that the person has the fullest confidence in so that the result can be a fruitful relationship.

The preference for the current legal guardianship (b), or failing that, the de facto guardian ensures that a guardian who has done a good job is allowed to continue.

The choice of relations reflects the desirability of preserving existing family relationships. While it may appear that members of the same family may have the special care and concern that arises out of a blood relationship, it could well be a mask for potential conflicts of interests. Close relatives and expectant heirs who apply for guardianship to prevent dissipation of assets may in fact achieve the result of benefitting the family and heirs more than the disabled person.[94] This conclusion is supported by empirical studies which show that it is often his or her family from which the patient most needs protection.[95] By requiring relatives who want to serve as estate administrators to renounce all future interest in the ward's estate may be unduly harsh. To avoid this problem, it may be wise to appoint a volunteer public guardian (i) who has nothing to gain from the estate and expects no monetary benefits. This

is also useful for those whose meagre estate cannot afford professional guardianship. The New Zealand Institute of Mental Retardation (Inc.)[96] has advocated for the establishment of a volunteer guardianship scheme. Volunteers will be recruited from among ordinary citizens and trained by some public agency independent of service providers. Where it may be difficult for one single individual to administer a big estate, the Public Trustee or a professional trust agency should be appointed as joint property administrators. However, it would be best if one person could serve as both personal and property guardian. These two areas of guardianship are so intimately connected that the exercise of one ultimately involves a consideration of the other. For example, a decision to change residence (personal guardianship) is pointless if the finance to effect the move is not available.

C. Institutional Guardians as a Last Resort

It has been pointed out by numerous critics that an institution or provider of mental disability services, for example, the Department of Health, should not serve as a guardian for a client.[97] The obvious reason for this view was that there would be an inherent conflict of interest between the provider's interest in having clients available to serve and the personal needs of the disabled. Moreover, there would be no-one to ensure that the service provider was providing services. To ensure public acceptance of public guardianship some American states have separated guardianship functions

from other service delivery roles by creating independent guardianship agencies severed from service delivery bodies or their sister organisations.[98]

To enhance public confidence in the guardianship scheme, it has also been pointed out that an advocacy (watch dog) agency which would investigate complaints against guardians and generally protect the interest of wards in guardianship proceedings should not also act as a guardian in any case.[99] Despite the concern for preventing this apparent conflict of interest between the functions of an ombudsman and a guardian, some states have decided to amalgamate the two functions into one body.[100]

Public guardianship, except in the form of the Public Trustee should remain a matter of last resort when all other forms of guardianship, individual, corporate or agency is unavailable.[101]

Rather than making a priority list for the possible estate administrators as the American Bar Association has done[102] it may be more advisable to have a system which recruits a guardian by identifying the requisite qualities that a good administrator should possess, namely someone who will -

"a) act in the best interests of the represented person;

b) not be in a position where his interests conflict or potentially conflict with those of the represented person;

and

c) be a suitable person to act as the administrator

of the estate of the represented person."[103]

The Tribunal is further required to take into account -

"a) the compatability of the proposed administrator with the represented person;

b) the compatability of the proposed administrator with any guardian which the represented person might have;

and

c) the wishes of the represented person."[104]

This method will ensure that only the estate manager who can best perform the task is chosen instead of someone who, by reason of status as a relative, is appointed regardless of management abilities.

V THE POWERS AND DUTIES OF A GUARDIAN: LIMITED VS. PLENARY GUARDIANSHIP

In this Section it is proposed first to examine the concepts of plenary guardianship in comparison with limited guardianship. The desirability of limited guardianship powers for the guardian will be highlighted in the course of the discussion; and in addition, the principles on which a guardian's powers and duties should be based will be examined.

A. Plenary Guardianship

Plenary Guardianship, a form of guardianship in which all decision-making rights, in the area of property management or personal management or both, are vested in the guardian, in an institutionalised form represents a less restrictive alternative form of protection. It has been favoured, in part because of its familiarity and predominantly because it holds a fatal attraction of offering the flexibility of unlimited power which provides the guardian with sufficient authority to deal with every problem that arises.[105] The form of property guardianship offered by the New Zealand legislation is essentially plenary in nature. By virtue of Sections 93(1), 95(1) and 106(2) of the Mental Health Act 1969, and Section 10 of the Aged and Infirm Persons Protection Act 1912, the Public Trustee acting as manager is given all the powers laid down in the Third

Schedule of the Mental Health Act 1969. The plenary nature of these powers are such that the protected patient or person is left with no rights to their property. The Public Trustee has the rights to take possession of all the property of the ward,[106] apply and expend in its discretion any money of the ward for a number of purposes,[107] sell, lease or otherwise dispose of the property of the ward in its discretion.[108] These are just some of the powers that a Public Trustee or a manager has in relation to a ward. The plenary form of guardianship protection given by the New Zealand Acts can hardly be said to be conducive to the process of normalisation and integration into community life.

The concern about the potential of abuse and unnecessary deprivation of rights has prompted a writer[109] to suggest the complete abolition of planary guardianship. However, there may well be cases where a mentally disabled person may be so severely disabled as to be totally incapable of making any financial decision, for example a comatose or a severely retarded person.

B. Limited Guardianship

Under plenary guardianship, a person legally became an "eternal child", deprived of all the rights which adulthood bestows,[110] regardless of his ability to exercise financial skills in some aspects of estate administration. However, it has been recognised that many disabled persons do not need such extensive protection; they may be competent

in making decisions in some aspects, and in others, they may need a little encouragement or supervision. The increasing understanding that mental incapacity is situational and not necessarily a yes-no status, has led to the development of the concept of limited guardianship.

With this limited form of guardianship, a person's incapacity (and consequent need for guardianship) is determined for those functions he or she is unable to perform because of a disabling factor. A refined model of limited guardianship arrangement would only allow a guardian to facilitate (provide guidance and assistance) rather than merely substituting his own judgment.[111] A limited guardianship order must therefore specify exactly what areas of decision-making capacity is lacking and the corresponding provision for guardianship which is tailor-suited to meet such needs arising out of the incapacity. There must also be a durational limit for the need of assistance and periodic reviews to ensure that guardianship is to be terminated once it is shown that the person's training in those aspects formerly lacking has improved his ability to the point where he is capable of independent choice rather than until there is a "restoration of competence".[112]

In comparison with plenary guardianship, limited guardianship offers a number of attractions.[113] First and foremost, it is a less restrictive form of protection in that it only gives those powers of decision-making which the ward is incapable of exercising. The exercise of

paternalistic guardianship resulting in "protective overkill" may not be in the best interest of the ward, no matter how genuine motives may be.[114] By allowing participation in the decision-making process under the guidance and supervision of a guardian, the disabled person can live under conditions which will encourage normalisation and integration. These people will be assisted with the goal of helping themselves attain the position where they will no longer need guardianship. This would "promote" the value of autonomy, self-determination and individual dignity, and discourage societal interference and manipulation.[115] Since a limited guardianship order can only be made after a due process determination of specific limitations in handling particular financial matters, a person enjoys the benefit of a presumption of competence. The use of limited guardianship will reduce the stigma of total incompetency as the disabled will be deprived of fewer decision-making responsibilities. While limited guardianship has many praiseworthy and commendable objectives, it also has its fair share of criticisms. In a survey carried out in fourteen American States on members of the legal profession, comments were elicited on this particular formulation of limited guardianship:[116]

> Limited guardianship ... shall be designed to encourage the development of maximum self-reliance and independence in the individual, and shall be ordered only to the extent necessitated by the individual's actual mental and adaptive limitations. [Such an individual]

> shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities ....

Although a majority supported this particular phraseology of limited guardianship, those who criticised it[117] emphasised that it would be a more costly kind of guardianship procedure as well as confusing and vague. This may very well be so in comparison with the estate administration schemes established under the Mental Health Act 1969 and the Aged and Infirm Persons Protection Act 1912. In response to that it has been suggested that "the simplicity and lack of financial expense involved in the procedures of those statutes tend to mask schemes whose costs are incalculably high in human terms, for such schemes often result in the unwarranted deprivation of personal rights".[118]

Another criticism highlights the tremendous burden for judges or tribunals in tailor-suiting a guardianship order to the precise incapabilities of the disabled person. The result of this difficulty may lead to the tribunal to be restrictive in providing authority to the guardian and that guardians would be forced to come back to the tribunal intermittently to widen their authority.[119]

> Any tailor-made guardianship must not be a "straight jacket" as otherwise the time it will take to have the "jacket" altered may be too late. Also the intellectually handicapped person and his family should not be required to go through many hearings.

Third parties may not risk entering into transactions with guardians or persons under limited guardianship where they do not know the exact distribution of powers between the guardian and the disabled person. Even if they were given a copy of the guardianship order, there may still be problems with interpreting the exact scope of powers if the order is fraught with ambiguities. Third parties and guardians need to know exactly where they stand if the guardianship arrangement is to be of any use. A contracting party need to know whom they must deal with - the guardian or the ward. They need to know the exact spending limit of the ward and for what purposes without the guardian's consent, when a guardian's concurrent consent is needed or when only a guardian's consent will do.[120] A scheme based on limited guardianship would be unworkable if parties have to go to and fro the guardianship tribunal to seek clarification of the original order. Apart from getting the tribunal to list right from the outset, the powers of the guardian,[121] it may be equally useful to define those powers that are not available to the guardian.[122] Moreover, with the passage of time, one can expect litigation or adjudication to define and clarify the language used in guardianship orders.[123]

A possible negative effect of limited guardianship is that "the notion of 'a little incompetency' poses a danger to all citizens in that there would be an increased chance of being eligible for guardianship".[124] This fear is unfounded unless one assumes that the standard of disability

required for imposing plenary guardianship is any higher. Under the Mental Health Act 1969 and the Aged and Infirm Persons Protection Act 1912 which imposed a form of plenary guardianship, the requisite standard of disability is in fact not higher than a limited guardianship standard that the writer has espoused. On the contrary, the New Zealand statutes by basing eligibility on labeling and categorisation, has a wider scope than a limited guardianship scheme based on the quality of thought process of the ward.[125]

The only feature of limited guardianship that one can identify in the New Zealand legislation is the provision for the possibility of appointing a manager of the estate with the exception of such part or parts remaining in the uncontrolled possession of the protected person, or of the spouse or children of such person.[126] Whether in practice this discretion is seriously considered and exercised by the courts is a matter for speculation. Given the time and difficulty it takes to decide what portion of the estate could be safely left to the uncontrolled management of the disabled person, the Court is more likely to err on the side of over-protection by entrusting the whole estate into the hands of the manager.

Having explained why the guardian should be given limited powers in accordance with the concept of limited guardianship, it is now proposed to examine the underlying principles of limited guardianship by which such powers and duties of guardians should be framed.

First and foremost, the best interests of the dependent adult must be promoted.[127] Guardians would have acted in the best interests of dependent persons if their guardianship powers and duties are framed in such a way as to:

1. encourage the normalisation and integration of disabled persons into the community by letting them act for themselves in areas where they are capable and allowing them to participate to the maximum extent in all decisions affecting their property.[128]

2. make the guardian act as an advocate of the disabled by ensuring that he gets all the benefits and services and is given all the rights he is entitled to. This may include bringing contract, tort or other actions in relation to financial matters.[129]

3. training and assisting the disabled person to become capable of coping with the difficulties he has in handling his financial affairs to a point where, the guardian becomes redundant.[130]

4. taking into consideration the opinions and wishes of the disabled person as much as possible.[131]

5. safe-guarding the physical health and personal integrity of the disabled. An estate manager's primary function is not to conserve (as the American term "conservator" suggests) property. The health and wellbeing of the person must come first, even if means exhausting the estate to get the best medical treatment.

A guardian's powers and duties must be framed by weighing the need to protect the disabled person's property and the conflicting value of preserving his or her individual rights whereby a position is reached, giving maximum weight to the rights principles. Perhaps the greatest attribute a guardianship tribunal should possess is the ability to fine-tune the guardian's managerial responsibility and authority to such a degree that the ward retains most of his or her rights and at the same time is adequately protected.

VI GUARDIANSHIP AND OTHER ALTERNATIVE FORMS OF PROTECTION

The ultimate truth that one must come to terms with, is that guardianship can lead to a deprivation of legal rights and is therefore a highly restrictive alternative of looking after a person's needs.

> Consequently, if the guardian is to make possible the degree of autonomy, dignity and personal integrity necessary for successful reintegration into the community, his role must have clearly set limits.[132]

To that extent, guardianship is not a substitute for less restrictive forms of providing services and financial assistance to persons who cannot care for themselves. Guardianship only comes into play when there is a need to clearly establish legal authority and responsibility to ensure that adequate care and protection are provided.[133]

1. Citizen Advocacy

> All guardians should be advocates but not all advocates are or should be guardians.[134]

> [P]eople sometimes speak in terms of a programme being either citizen advocacy or guardianship; the correct phrasing would distinguish between advocates in informal roles in comparison to advocates in formal (i.e. legal) roles.[135]

Citizen advocacy is based on a one-to-one relationship

between a capable volunteer (the advocate) and a disabled person (the protege or client), in which the advocate defends the rights and interests of the protege and provides practical or emotional reinforcement. The advocate in the informal role speaks for the protege when he is unable to speak for himself, assists and advises him in order that he is assured of all rights, whether legal or moral, and helps him discover avenues for self-expression. The advocate's involvement is such that he feels his own rights as a human being are violated if the rights of the protege are denied - even to the extent of initiating Court proceedings on his behalf.[136] In the context of estate administration, an advocate would ensure that a protege receives all social welfare benefits he or she is entitled to, help in budgeting, debt collecting, making a will, contacting a lawyer or Public Trustee and generally giving advice and emotional support. It must be borne in mind that true advocacy is concerned primarily with individual rights, nor service and, to be effective, it must avoid the conflict of interest which attach to protection, service or policy making.[137]

The advantage of a volunteer advocacy scheme over a remunerative one is that it reduces the possibility of a conflict of interest and has saving advantages to the government. Potential advocates will have to go through a screening procedure and be given special training by an advocacy agent. Advocates will need to learn the background and culture of their proteges and to effect the maximisation of normalisation, advocates should preferably

have a similar background.

Although advocacy schemes have flourished in the United States and have attracted considerable attention in other countries, it has the possibility of subordinating the rights principle to the protection principle.

> It is easy for a volunteer advocate with the best of intentions, to become overly directive or to take advantage of the passivity or ignorance of the protege, to move into a dominant position to the point where unauthorised decisions are being made by the advocate, or conversely, are being made by default.[138]

Although it is true that a limited guardianship scheme is equally vulnerable to protective over-kill, the safeguards under a guardianship scheme which consist of reviews by and accountability to the tribunal will keep the guardian under control.

Moreover, like all non-legal forms of assistance, citizen advocacy has no solution to the lack of legal authority to make and enforce the decisions that are sometimes necessary in the best interest of the disabled person.[139]

2. Power of Attorney

This is a formal instrument by which an authority is given by one person to another to act for him, whether for specific transactions, or to manage his affairs

generally, for example, to receive debts, transfer land or sue.[140]

However, there are limitations to the use of such powers;[141] a person cannot authorise to do what he may not legally do himself. Therefore a power of attorney given by a person who is of unsound mind at the time when he executes it is absolutely void.[142] A power of attorney which is validly created will also become void on the principal becoming insane.[143] The Instruments (Enduring Powers of Attorney) Act (Victoria) 1981 has remedied the former situation by making is possible to create a power of attorney for someone who is already a patient in a mental institution or otherwise incapable.[144] The power is probably available to those with a mild degree of retardation.

Apart from such limitations, a power of attorney would have been a less restrictive alternative to render assistance to a mentally disabled person. It allows the person to delegate his rights for only one specific transaction or a number of such transactions. Since the power is drafted in the privacy of a lawyer's office and does not involve judicial proceedings, there is no implication that the grantor is incompetent and therefore no stigma attached to it.

3. Trusts

As a less restrictive alternative, the use of a trust

provides an effective device for estate management of mentall disabled persons without involving an adjudication of legal incapacity. This is particularly useful for those who, especially parents, are concerned with the needs of their handicapped charge after their deaths. Jeffries J.[145] strongly recommends the Trust for the Intellectually Handicapped People (Inc.) which was specially designed to cater for such a need. For a contribution of one thousand five hundred dollars or more, the disabled person becomes a beneficiary and the Trustees in terms of the Trust Deed are under an obligation to secure services needed by the beneficiary after the death of the parents. The scheme allows for flexibility as it can be used alone or jointly with any other arrangement. Upon the death of the handicapped person, his individual trust fund can be applied to benefit others directly or become part of the general trust funds. The limitation of a trust device is that it does not take care of assets acquired by the disabled person himself which are not gifts from others.

4. Other Alternatives

As far as the day-to-day managerial needs of a disabled person are concerned, society seems adequately equipped without having to resort to formal guardianship.[146] A friend or relative of a disabled person can obtain a bank authority to assist with banking, become a representative payee for collecting social welfare benefits. The use of Court orders for single ratifications of specific

matters, for example, to enter into a contract, or for ordering the provisions of services can be equally less restrictive.

Guardianship has a useful role in the whole range of alternatives only if it is limited to actual incapacities and seen as a supportive rather than a controlling mechanism. An expansion of community-oriented services would help to limit the use of guardianship, but in the meantime, guardianship is indispensable to promote normalisation in our society.[147]

VII ADMINISTRATION OF A GUARDIANSHIP SCHEME

A. Who Decides Whether a Person is in Need of Guardianship?

The right to have control of one's property is a fundamental civil right and therefore any decision to restrict such right by way of property guardianship must be made by a competent adjudicating body. In New Zealand mental patients are automatically deprived of their rights to control property as soon as they are committed to mental hospitals.[148] There is, therefore, no hearing before an adjudicating body to determine the incapacity of the mental patient to manage property. The condition of needing hospitalisation is conveniently, although wrongly presumed to be synonymous with the condition of "commercial" incompetence. This automatic form of guardianship represents a serious violation of the civil rights of many committed patients in New Zealand. It has been noted by the Victoria Report that:[149]

> [a]ny other method of determining incapacity which falls short of a proper judicial or quasi-judicial inquiry is unacceptable. The majority believe that there is no short hand method of determining incapacity. It is not correct for instance, to conclude that all persons who are patients are in need of estate administration. Some persons who are patients are clearly capable of managing their financial affairs, while a great many who are patients are in need of estate administration.

Having established the need for a determination of incapacity

to be made before a competent body of hearing it is now proposed to examine what form such adjudicating body should take.

1. An administrative tribunal or a Court

The Victoria Report favours the South Australian style of adjudication by an administrative tribunal rather than a court, although it acknowledged that in most jurisdictions the court is the body which decides on guardianship.[150] Three advantages of a tribunal model are advanced in support of the proposal.[151]

First, a tribunal need not be bound by rigid courtroom procedures required in a court hearing. This will be a cost-saving as it is likely to be a lot less expensive than a court hearing. Moreover, the flexibility of the tribunal hearing will eliminate the excessive delays that a court system would produce, even in relatively clear cut cases.

Secondly, a tribunal is likely to be more accessible than a court. This is not only due to the less expensive procedure of a tribunal hearing but also because of its informal "coffee table" atmosphere. A mentally disabled person would feel more at ease here than in the court room where many would relate to the court procedure and authority figures in such a way that makes them look more handicapped than they actually are. Moreover, members of the disabled

person's family and those involved in guardianship matters feel more inclined to participate in the informal tribunal hearings.

Thirdly, a tribunal places the decision making power in the hands of persons with the relevant expertise, for example, a registered psychologist, an accountant or person with experience in looking after mentally disabled persons. There would not be many judges who have much experience in dealing with mental disability.

The arguments in favour of the Court as the adjudicating body run as follows:

First, a court hearing system need not necessarily be more costly than that of an administrative tribunal. This is because the court system is an already existing structure, unlike the administrative tribunal which would require resources and funds to bring it into existence.

Secondly, a court hearing can be just as accessible as a tribunal hearing. To minimise procedural rigidity the court can always be given the discretion to dispense with rules of evidence and be allowed to receive any evidence it thinks fit.[152] Also, going to court need not be an intimidating experience for the disabled person who is usually not familiar with the formality of a judicial proceeding. Such hearings could always be held in the Family Court where the informal atmosphere

will put the parties at ease. The Family Courts Act 1980 specifically provides that all proceedings in the Family Court shall be conducted in a way as to avoid unnecessary informality and that neither Judges nor counsel appearing in that court shall wear wigs or gowns.[153]

Thirdly, although an administrative tribunal consisting of mental health experts may appear to be better than judges in deciding issues of mental incapacity, the Family Court is, in fact, a better forum for such matters. The issue of guardianship cannot be viewed in isolation; rather, it should be seen in the context of the family because it would nearly always involve issues of family relationships.[154] The Family Court with its excellent reputation and accessible nature would be "ideally suited" for handling guardianship matters.[155] Moreover, the mental health expertise provided by the administrative tribunal could always be incorporated into the Family Court system by way of a multi-disciplinary team of experts appointed by the Family Court[155A] to carry out a prehearing examination of the proposed ward. It is common for almost all limited guardianship proposals or laws to have a multidisciplinary team consisting of mental health professionals.[156] The team assesses the nature and severity of the person's disability and reports to the court. However, such an assessment is only a

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prehearing evaluation so that the court itself will have to determine whether the person is in fact incompetent and in need of guardianship, taking into account the evaluation report. The function of the court in conducting its own judicial findings of fact must not be totally dependent on the team's evaluation as to make the whole exercise a rubber-stamping of expert opinion. Alternatively, the Family Court could build up its own expertise by creating a mental health division within itself.[157]

2. An adversarial or inquiry model?

Having decided that the Family Court is preferred to an administrative tribunal in determining guardianship issues, the question now is whether the Court should conduct proceedings in an adversarial or inquiry (fact finding) style.

The adversary system is discredited by the Victoria Report for the following reasons.[158] The difficult issue of guardianship necessitates the gathering of information by a body with an active fact finding ability. The adversarial model is inappropriate as the adjudicating body cannot call witnesses or weigh up evidence which is not put before it by either party. It must be noted, however, that the Family Court which hears proceedings of an adversarial nature can still be empowered to receive any evidence it thinks

fit.[159]

The adversary procedure has also been criticised for tending to suggest that the person who initiates the guardianship hearing is in conflict with the subject of the guardianship hearing. This is undesirable as it can only serve to polarise the parties and exacerbate the situation. Also, those who appear before a court hearing have to speak through their lawyers. Mentally disabled persons are likely to encounter great difficulty in instructing their representatives. It seems that all these problems can be easily solved by an active fact finding tribunal.

The proponents of a judicial hearing in an adversarial setting based their arguments on the premise that because a determination to impose guardianship automatically entails a restriction of rights, the subject of the guardianship hearing must be given the right to challenge it. Traditionally, guardianship has been viewed in terms of a parent-child model.[160] A guardian's duty is to look after the person or property of the ward until he has regained his capacity like a child attains his majority. Since it was protective and thought to work in the best interest of the ward, informality became the hallmark of guardianship proceedings. Procedural safeguards were dispensed with, and the hearing became non-adversarial with the judge's role converted from one of an adjudicator between conflicting parties to a fact finding inquisitor in

search of the "truth". There was no need to have two opposing parties confronting each other in court because there was only one person's interest to be served - the potential subject of a guardianship order.

> The petitioner who filed for the guardianship could not"win" because he had nothing to gain (in the sense that litigants "win" a trial). Even if the alleged incompetent "lost" the hearing, he in reality "won" by gaining the protection of a guardian.[161]

These traditional views of guardianship based on the parent-child model which have been built into the inquiry procedure of the Victoria Report[162] can be criticised on several grounds. First, it is important to recognise that although it is said that there is only one interest to be served: that of the alleged incomptent's; in reality, other competing interests exist. The state has an interest in protecting the welfare of its citizens and this clashes with the disabled person's interest in preserving his rights and independence. Service providers have their own bureaucratic interests; a guardianship order may well be used to serve their own ends. For example, hospitals and nursing homes may initiate property guardianship in order to facilitate debt collection rather than to fulfil the individual needs of the proposed ward.[163] Relatives who apply for guardianship usually have expectancies of a vested interest in the disabled person's estate and they are

usually given priority in being appointed as guardians. To have a hearing that is non-adversarial would be to ignore the applicant's ulterior motives.[164]

Therefore, it is important to realise that there are conflicting interests involved in a guardianship matter. The welfare of the disabled person is not the sole consideration; not everyone is concerned about protecting the rights of the disabled. The disabled's basic civil rights are at risk while the applicant has little to lose. In such a conflict situation the safeguards of an adversary system are the only protection a disabled person has against the powerful hand of the state.

It is submitted that if New Zealand were to introduce new guardianship laws, the adversary system should be part and parcel of the new scheme. The inquiry model is inadequate in protecting the rights of the subject of a guardianship hearing from being unnecessarily restricted.

B. Who May Initiate Guardianship Proceedings?

There are two considerations in the area of accessibility of guardianship services. On one hand, there has been a constant warning that open-ended guardianship laws will be subverted and abused by relatives and others in promoting their own self-interests.[165] On the other hand, it can be argued that by restricting the class of applicants, there may be a danger that many disabled persons are never

brought to the attention of the Court and consequently, never receive the benefits of an estate administrator. In practise, the problem is not so clear-cut. A survey of the law of North Carolina illustrates that an open-ended law may also reduce accessibility:

> One of the great strengths of the North Carolina law is that anyone can be a petitioner. However, this great strength is also a major weakness. Most people see the role of petitioner belonging to someone else. If no one petitions, there'll obviously be no limited guardianships. Although everyone should consider the option of petitioning as the law allows, it would be advantageous if one group could be encouraged to view this as their primary responsibility.[166]

To prevent the inaccessibility of the benefits of guardianship to those who are in need, it is suggested that the class of eligible applicants should consist of the disabled person, the personal guardian, the existing property guardian of "an adult interested in the welfare of a partially disabled or disabled person".[167] The flood-gates argument against such a liberal criterion cannot be sustained in practice as the formality of the procedures and the requirement of the applicant in discussing the application with an administrative officer of the guardianship scheme[168] will discourage frivolous filings. More importantly, applications motivated by malice or for purposes of harassment can be reduced by requiring that applications cannot be made by individuals, unless it can be shown that they may be "adversely

affected by [the] lack of effective management of ... [the disabled person's] property or affairs".[169] The application has to be made on oath, must include all facts and information explaining why guardianship is needed, and explain the applicant's relationship with the disabled person.

In New Zealand the Aged and Infirm Persons Protection Act 1912, allows relations, the Public Trustee and "any other person who shall adduce proof of circumstances which in the opinion of the Court make it proper that such other person should make the application" to apply for a protection order.[170] Such a fairly liberal criterion will ensure accessibility and should be retained in any future guardianship scheme provided that such a new scheme also incorporate the procedural safeguards proposed by the writer.[171]

C. Role of the Public Advocate

A vital function in any guardianship scheme is that of general oversight and coordination of all forms of service deliveries within the guardianship framework. This essentially "watchdog" or ombudsman role is best performed by an agency which is independent of the service deliveries which the guardianship scheme provides. The potential dangers in having a watchdog agency which is merely an extension of the functions of a main service delivery body, for example, the Health Department, must be stressed. Such an extended agency would be more than likely to perform its functions to

suit the objectives of its parent organisation rather than in the best interest of the disabled person who is subject to guardianship. Even if it wanted to promote the best interests of the disabled, it can only do so to the extent that the parental body which controls all resource allocation, allows it to. Under such conditions, the watchdog agency would be more concerned about its bureaucratic survival rather than the safeguard of the disabled person's rights.

Not only must a watchdog agency be independent of other service delivery bodies, it must not also act as a guardian in any case. A guardian cannot be expected to be an effective watchdog of itself. The Dependent Adult Act 1976 which combined the ombudsman function with the function of a guardian of last resort into one body,[172] is adopted by the Victoria Report. The reason for such an amalgamation being an expressed concern about the proliferation of government bureaucracies if the two functions are to be divided between two bodies.[173]

The approach proposed by the American Bar Association is by far the best in ensuring the proper administration and supervision of the guardianship scheme.[174] It suggested an agency called the Guardianship/Conservatorship Oversight Commission which is independent of all government bodies. To save the cost of creating another state social service agency, an organisation of a network of private citizens to form the Oversight Commission and render the required services on an as-needed basis is to be set up. The added advantage of such an agency is that it can offer more individualised

service than can be provided by a government employee who has to go through a substantial caseload. On top of that, it does not assume the role of a guardian.[175] The broad functions of the Oversight Commission are two-fold:

First, identifying individuals who are qualified to serve on multidisciplinary evaluation teams which provide expert testimony to the Court and preparing a list of such individuals.

Second, creating a pool of individuals and entities to provide guardianship and conservatorship services, monitoring the appointment process to prevent any form of political patronage, providing training programmes for guardians and conservators, conducting investigations and hearings where there are complaints about multidisciplinary evaluation teams or corruption in the appointment of volunteers.[176]

The educative function of the Public Advocate in the Victoria Report in promoting community involvement in decision making is commendable.[177] The Public Guardian of Alberta explained such a task in the following words :[178]

> To be effective, guardianship must become part of the fabric of life of the community. It must be viewed as the last resort of the continuous protective services available to dependent persons. Guardianship must also be seen as a family and community responsibility before being perceived as a responsibility of the state. The role of the state in this model, is to provide the enabling legislation and the backup resources required to encourage the suitable family and community

persons to become guardians.

The Public Advocate will have to keep a high public profile and play an active outreach or proactive as opposed to a passive or reactive role. The latter approach as taken by the North Carolina legislation is doomed to failure if clients are apprehensive.[179] The Public Advocate will give advice and information, and make referrals to other community service alternatives. In particular, it should publicise and encourage the development of Citizen Advocacy which is a less restrictive alternative to guardianship.[180]

The other important function of the Public Advocate is to provide independent advice to the appropriate Minister regarding the effectiveness of existing services and the need for legislative reform. The unique position of the Public Advocate in being able to perceive the overall picture of community services for the disabled will enhance his advisory capacity.[181]

VIII PROCEDURE IN GUARDIANSHIP SCHEME

Having decided that the Court is the appropriate adjudicating body in guardianship matters[182] it is necessary to examine how the due process requirements of a judicial procedure can be applied in the context of property guardianship. At this juncture it is pertinent to be reminded of the nature of guardianship and the dire implications of having been declared incompetent.

> Guardianship is a legal relationship in which guardians become substitute decision makers for wards who are unable to take care for themselves. Although the state has a significant interest in protecting its incapacitated citizens, imposition of a guardianship directly limits the ward's basic rights of liberty and autonomy. Thus the power to impose guardianships must be employed cautiously, and proceedings for determining whether an individual requires a guardian must conform with due process requirements.[183]

The California Supreme Court compared the consequences of guardianship to incarceration: "a conservatee must be subject to greater control of his or her life than one convicted of a crime".[184] It is a misconception to regard property guardianship as involving a less significant loss of rights without any interference of civil rights as the Uniform Probate Code[185] has done by requiring a full trial for the appointment of a guardian of the person and a shorter hearing with less procedural safeguards for the appointment

of a guardian of property.[186] That rights in property, like the right to speak and the right to travel are basic civil rights has long been recognised.[187] The safeguards of due process must, therefore, apply equally to all forms of guardianship hearing.

A. Applications

To prevent trivial or malicious allegations, the application will have to be made under oath to allow the prosecution of applicants who knowingly supply misleading information.[188] Apart from standard informational requirements, like the names, ages and addresses of various parties who will be involved or presumed to have sufficient interests in the hearing to receive notice, the application should include the following:

1. the nature of the alleged disability;
2. the particular needs for estate administration resulting from the disability;
3. the particular type of service and assistance required, for example, plenary guardianship, limited guardianship or training programmes;[189] Reasons must be given as to why the service sought is the least restrictive alternative available;
4. the limitation of rights requested;
5. the specific powers sought by the property guardian;
6. the requested term of guardianship;
7. it should be optional to have the application accompanied by a report of a psychologist or doctor;[190]

8. a statement that the applicant has discussed with the officer who is supposed to explain the effects of the order requested and to explore the alternatives available;[191]
9. the consent of the proposed guardian if he or she is not the applicant.[192]

While it is desirable to have specific requirements for making an application in order to prevent any abuse, it is equally important that these requirements do not present an obstacle course for the appropriate applicant. The requirement of a report written by a professional person confirming the need for guardianship is a common feature of guardianship legislation. Such a report should not be compulsory as the cost of such a service may discourage people from lodging an aplication. Moreover the opinion of such a professional person will usually be no more valuable than that of a non-professional person.[193]

Any greater specificity in the application procedure than that suggested by the writer would undoubtedly be too complicated and confusing for the ordinary person.[194] The application procedure is only meant to show the Court that the applicant has made out a prima facie case. To require more conclusive evidence, for example, a professional report, would be to transfer the actual hearing to the application. stage. In addition, the fact that the applicant is expected to bear the cost of the application will serve as a deterrent against frivolous claims.

There is no provision under the Mental Health Act 1969

for the making of an application for guardianship because every person who is committed to a psychiatric hospital is automatically put under the property guardianship of the Public Trustee.[195] There are, however, provisions under the Act governing the application or request procedure for the commitment of persons into mental institutions.[196]

Before any person can become a protected person under the Aged and Infirm Persons Protection Act 1912 there must first be an application made by petition to the High Court for a protection order.[197] However, the Act does not state any specific requirements governing the making of such application; all it does is to list the persons who are entitled to make the application.[198]

B. Notices

After the Court has set a date for hearing, it should serve notice of the rights of the parties, the date, time, place, purpose and possible consequences of the hearing on various people. Alternatively, notice of an intended guardianship can be effected by the applicant serving a copy of his or her application to various people.

There are two primary considerations in the area of notice. First, sufficient notice of a guardianship application must be given to as many interested persons to prevent persons from being streamlined into guardianship, Second, if such notice is freely distributed, it may cause additional

bureaucratic delay and also create a stigmatism of the person subject to the application.[199]

The various guardianship legislation and proposals are in agreement as to the core group of people who should receive notice. Beyond that group, they may differ as to who should be entitled to notice.[200] It is suggested that the following people or entities should be notified:

1. the subject of the proposed guardianship;
2. the applicant (where the notice is to be given by the Court);
3. the spouse of the subject of the proposed guardianship;
4. the parents of the subject of the proposed guardianship, or the person who has his care and custody;
5. the existing personal guardian and/or property guardian, if there are any;
6. the proposed property guardian;
7. the Public Advocate;
8. the Public Trustee;
9. any interested person who, in the opinion of the Court should be notified.

Apart from those stated above, there is no compulsion to give notice to others, like possible heirs of the subject of the hearing, his or her other relatives, persons with a financial interest. These people would probably fall under category 9 as "interested people". There is no proper provision for the service of notices under the Aged and Infirm Persons

Protection Act 1912. The Act only requires that where an application for a protection order is made by any other person than the alleged disabled, the petition must be served to the latter unless the Court directs otherwise.[201]

The notice should be given as soon as possible to allow sufficient time for the alleged disabled person to organise a meaningful defence. There may be a need to call independent expert opinion to challenge the alleged incapacity. Some of the suggested periods of time for the service of notice prior to the hearing are as follows: at least ten days,[202] seven to fourteen days,[203] at least fourteen days,[204] or an unstated period.[205] A three to ten day notice seems quite short when the first people to whom the subject of the hearing is likely to turn to, his family, are likely to be the applicants.[206] A period of at least fourteen days is therefore more meaningful.

The mode of service of the notice must be that which is most likely to give actual notice. First, there must be personal service to the person alleged to be in need of assistance. Second, such notice must be more than just mere contact, but rather one that requires understanding and the opportunity to make a choice.[207] Even the ordinary person is unfamiliar with words like "guardian", "estate administrator" or "limited guardianship", the alleged disabled person will have even more difficulty grasping such concepts.

> [T]he notice given is unlikely to be very informative or useful since the notice prescribed by most statutes is a notice of hearing; the recipient thereby learns that a hearing on the petition will be held on a

> certain date. He or she will not be advised of the serious legal and personal implications of the determination to be made, the importance of countering the allegations, the standard by which competency will be judged, the evidence to be introduced, or rights to legal representation and a jury trial, even if the latter is guaranteed by the statute. In those jurisdictions where a copy of the petition accompanies the notice of hearing, the prospective ward will still not be apprised of the facts which underlie the petition, or which actions he or she will be called upon to defend, because the petition itself merely parrots the grounds ennunciated in the statute.[208]

The notice must also be in the language that is most meaningful to the alleged disabled person:

> While some individuals either because of youth or disability, will not be able to grasp the meaning of the notice no matter how well it is explained, most will be able to understand it if explained properly. For example, an explanation of the notice in English to a respondent who understands only Spanish, Vietnamese or Navajo is of little use whether or not that individual is a partially disabled person.
>
> Attempting to communicate verbally or through a standard printed form to someone who can only understand sign language or read Braille, or couching an explanation in technical legal terms is equally futile. Yet, in too many instances, the subjects of intervention proceedings fail to receive proper notice, not because they are unable to understand, but because no-one had made the effort to present the information in a manner that is comprehensible to them. By

> specifying that the notice must be in the language, mode of communication and terms which the subject of the intervention proceedings is most likely to understand, this provision mandates such an effort be made.[209]

The proposed legislation for New Zealand allows service to be dispensed with where either the disabled person is incapable of understanding the nature and consequences of the hearing or that service would have a detrimental effect on that person.[210] However, it has been submitted that there should never be any provision for the dispensation of notice even if it could be shown that it would have a harmful effect on the person served.[211] The reason being that a wrongful imposition of guardianship would result in a severe restriction of the person's rights to liberty. Rather than allowing dispensation of notices where there may be possible detrimental effect on the person served, it would be better to allow the Court to appoint a counsellor to explain to the disabled person what the notice means and what a guardianship hearing involves.[212] Another reason why there should be no allowance for dispensation of notices is because "experience with statutes allowing a dispensation of these rights shows that the one-sided nature of the evidence used to support dispensation often results in its frequent and unwarranted occurrence".[213]

C. Prehearing Examination

Common to almost all limited guardianship laws or proposals is the provision for an evaluation of the subject of the guardianship proceedings by a multidisciplinary team

of mental health professionals, usually including a physician, psychiatrist and social worker.[214] The result of the examination will be in the form of a written report submitted to the Court, applicant and the person examined. The main objective of the report is to make available to the Court, independent expert testimony, so that the Court can make the correct decision. This report takes on even greater significance in view of the variety of dispositional choices available and the need to select the least restrictive alternative one.[215]

The criticism against such an evaluation is one that is expressed against every new legal mechanism introduced - excessive cost. The American Bar Association suggested that the Court should have the obligation of obtaining and bearing the costs of such reports.[216] While this may overcome a major financial obstacle that the applicant or the alleged disabled would have to face, its net result would be to shift the burden on the taxpayers.

Bureaucratic delay and "red tape" is another problem that every administrative set-up seems to have to grapple with. A few attorneys concluded that the procedure was too much like civil commitment and some anticipated "great delays" and unnecessary crowded Court dockets.[217] It is ironical that such an involved evaluation procedure should be criticised when the principal objection to traditional guardianship procedure is that it is too quick and insufficiently concerned with the details of the disability of the proposed ward.[218]

In order to cut cost and delay, it could be suggested

that such formal evaluation be dispensed with where the appointment of a guardian was uncontested. This would no doubt add to the expediency of railroading people into guardianship. One wonders how a partially disabled person can actually give a valid consent to a guardianship where no medical evidence has been adduced. The only safe thing to do is to require compulsory evaluation in all cases.

There is no provision in present New Zealand law for such a prehearing examination and it is therefore suggested that future legislation on guardianship should make provision for such an examination.

D. Right of Presence at Hearing

It may be in the self-interest of the applicant to convince the Court to waive presence by pointing to the fact that, the alleged disabled is bed-ridden or easily disturbed emotionally.[219] Professor Frolik argued that there is no reason to almost automatically make the hearing ex parte in all such cases.[220] The presence of the subject of the hearing could be beneficial in several ways. He or she may be able to enlighten counsel as to the reasons why certain evidence of his or her unusual behaviour put forward by the applicant is not the result of mental incapacity. Bearing in mind the conclusionary nature of psychiatric reports and their questionable reliability, it would be more helpful if the alleged ward is actually present, so that the Court can judge for itself, the extent of mental incapacity. The presence of the proposed ward would also accord with the principle of normalisation and minimum intervention.

> If a primary goal of the guardianship programme is encouragement of self-reliance and independence on the part of the ward, then these statutory provisions requiring the presence of the ward at the hearing and direct consultation with the ward have much to recommend them. Through his active participation in the proceedings, the ward has an opportunity to view first hand, the legal process that will so directly affect his life, to express his opinions concerning this process, and to exercise a degree of control - however small - over his own destiny.[221]

The rules of natural justice requires any subject of a judicial hearing, be given the right to presence unless he chooses to waive the right.[222] Therefore in every guardianship proceedings where counsel demands that his client be present, the hearing shall be stopped until that issue has been resolved.[223]

It is unfortunate that the Aged and Infirm Persons Protection Act 1912 provides no guarantee for such a right to the subject of a hearing for a protection order. Not only must the future New Zealand guardianship scheme include such a right, it must also make no allowance for dispensation of such a right.[224]

E. Representation at Hearing

Procedural due process entitles a subject of a hearing to be represented by a lawyer or a guardian ad litem. Within the American states, fifteen provide for representation by counsel, seven provide for appointment of a guardian ad litem, five permit for both, two permit one or the other,

and thirteen direct a lawyer to take on both roles.[225] The two diverse roles of counsel and of a guardian ad litem are contrasted as such:[226]

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

The allocation of the two functions into two separate individuals will ensure a better protection of the rights of individuals involved in guardianship proceedings.

> [A] lawyer attempting to function as both guardian ad litem and legal counsel is cast in the quandary of acting as both attorney and client, to the detriment of both capacities and the possible jeorpardising of the infant's [or the disabled person's] interests.[227]

There are serious reasons why counsel should act as an adversarial advocate rather than as a promoter of the best interests of the client.[228] First, counsel's role should be like that of a criminal defence lawyer who serves society best by an active, adversarial defence of his client. Guardianship entails the loss of independence and civil rights, and can be worse than a conviction.[229] A lawyer who is allowed to promote the best interest of his client may

decide that he or she is in need of guardianship although the client thinks otherwise or expresses no opinion, and although there are other least restrictive alternatives available. In such a case, counsel would be reluctant to challenge medical evidence introduced by the guardianship applicant. The cost of guardianship to the unwilling ward is enough to require society to prove its case against vigorous opposition from counsel.

Second, a legal advocate cannot or may not formulate a tactical manoeuvre in Court that accurately promotes the best interests of the client.

> [C]ourts will experience great difficulty separating out those lawyers who have acted in a manner they considered consistent with the best interests of the client from those who have acquiesed in commitment simply as a means of avoiding work.[230]

Third, subordinating the adversarial role to the best interests role can lend itself to the creation of a situation where counsel's presence is a mere procedural formality.

More importantly, if counsel were to act in the best interest of the client, he or she would have to ascertain the mental ability of the client. Counsel is a legal professional whose expertise in legal matters does not include the skills to decide whether his client is incompetent or that guardianship is the least restrictive alternative available.

It is in the best interest of society and the subject of a guardianship proceeding that counsel should, in all cases,

assume a zealous adversarial role free from the responsibilities of a guardian ad litem.

In order to promote the principles of normalisation and least restrictive intervention, disabled persons should at all times possible, decide for themselves what their best interests are. It is only when a disabled person cannot determine those interests without assistance nor has no existing guardian that a guardian ad litem should be appointed.[231] Such a person should encourage the person he or she is acting for, to participate in all decision making to the maximum extent.[232] The extent to which a guardian ad litem may exceed his advisory jurisdiction to act as a substitute decision maker in giving instructions to counsel, should be indicated by the appointment order made by the Court.[233] The granting of such a wide power to the guardian ad litem has been criticised for undercutting the zealous adversarial role of counsel, as the guardian ad litem in promoting the best interest of the client may consent to the evidence of incapacity presented by the applicant; the right to counsel would only be a shadow protection.[234]

The Aged and Infirm Persons Protection Act 1912 contains no provision for the right of the proposed protected person to have any form of representation. The current New Zealand proposals suggest that the court be empowered to appoint counsel to represent the person at the guardianship hearing.[235] However, for reasons already discussed, the disabled person should also be represented by a guardian ad litem whose function is to assist the disabled person to determine what their best interests are.

F. Right to Closed Hearing

The case against a closed hearing is argued along the line that it may produce "clubhouse justice".[236] The "cleansing effects of exposure and accountability" will ensure that judicial decisions are of the highest quality.[237] An open hearing will serve an educative function in familiarising the public with the guardianship hearing procedures. The constitutional importance of an open hearing cannot be ignored - justice is done as well as seen to be done. On the other hand closed hearings are justified because they avoid the humiliating spectacle and stigmatization a subject might suffer in discussing their personal difficulties in public.[238]

The Victoria model[239] is in favour of hearings which are generally open to the public with members of the press allowed but prohibited from relasing information which would likely reveal the identify of the subject. The other members of the public are subject to the discretion of the Tribunal to exclude some or all of them where their presence may be detrimental to the best interest of the subject. Ultimately, the decision would be reached weighing the two competing public interests in the scrutiny of the judicial process and the need to keep the privacy of citizens intact.

The American Bar Association adopts a middle position by giving the subject the right to close proceedings to the public, except that the Court may permit persons with a legitimate interest in the matter unless the subject specifically objects.[240] It is submitted that the same approach

should be adopted for the proposed guardianship scheme in New Zealand.

G. Evidential Matters

The report of the multidisciplinary team of professionals would form the backbone of evidence that the court would rely on in giving its decision. However, both parties to the hearing should be allowed to challenge the report by active cross examination or by bringing their own expert evidence. Observations by all witnesses on the issue of the need for guardianship should be presented in person before the court. The dangers of judicial decisions based upon the written evidence of persons who are not present at the actual hearings to justify their opinions and who therefore cannot be cross-examined are all too well known to go unnoticed. The court should have a power to compel any person to appear before it and present oral evidence. This power would be exercised upon a request by the subject of the hearing.[241]

The analogy of a guardianship proceeding is that of a criminal proceeding is drawn on the basis that both involve the possible deprivation of fundamental rights and also because of the ensuing social stigma.[242] The American Bar Association in recognising the great social costs of making erroneous factual determinations, has required a petitioner to prove beyond a reasonable doubt that the subject is disabled or partially disabled and that the order sought is the least restrictive alternative available.[243] McLaughlin

in his well publicised book is of the opinion that there is no need for proof beyond reasonable doubt if there are sufficient opportunities for the person who is the subject of the application to defend himself.[244] One would tend to agree with his view as it seems anomalous that the American Bar Association[245] while proposing a criminal standard of proof should adopt the rules of civil procedure and rules of evidence applicable in civil cases for all other aspects of the hearing. Moreover, the heavy burden of proof required may have negative effects of inaccessibility and under-protection. Potential applicants may be discouraged by the overwhelming evidential hurdle that has to be overcome. This would result in the guardianship mechanism being under-utilised. Even if the actual number of applications are not reduced, their rate of success would be minimal. This unduly harsh standard would in turn result in persons who need protection being unnecessarily deprived of guardianship. The provision for a guardian ad litem and counsel together with other due process rights should adequately protect the subject from any miscarriage of justice. On top of that, a stricter enforcement of the balance of probabilities standard would provide extra protection.[246]

H. Findings and Order of the Court

The order which record the judicial findings of fact must spell out specific matters such as whether the subject is mentally disabled; the nature and extent of disability;

the legal rights he retains; the extent to which the decision making power is transferred to the guardian (including how his authority is to be exercised, how the ward's needs are to be met, and how his needs are to be financed); the duration of the order; the security to be provided the guardian; and whether the guardian is the guardian of the person, property or both.[247]

The court order should be based on the findings of actual behaviour and not on speculation of future behaviour.[248] The framing of a court order with great particularity and detail has been predicted to give rise to a "never ending controversy" between the guardian, ward and court. Further more there will be extensive court work in interpreting the order unless the guardian could exercise broad powers.[249] Such difficulties are not unexpected and it would be all too convenient to point to these problems as justifications for the existence of plenary guardianship.[250] The courts must be prepared to spend more time in formulating a precise and workable order to give full effect to the concept of limited guardianship, but the extra effort spent in ensuring the minimum deprivation of the rights of a disabled person is well worth it.

In comparison, protection orders made under the Aged and Infirm Persons Protection Act 1912 seem rather general and lacking in specificity. Such an order merely records the name of the protected person, the name of the manager

appointed, the nature of the protected estate and the powers and duties in addition to the statutory ones.[251] It would have been better if the order also specifies how the guardian's powers and duties are to be exercised, how the ward's needs are to be met and other relevant details as proposed in the discussion above.

I. Costs of Hearing

The Victoria proposals[252] support the provision of judicial hearings free of cost to the parties. The removal of all costs and economic barriers would ensure full accessibility to the benefits of guardianship for all. Therefore court charges, lawyers' fees, travelling costs and in exceptional circumstances, accommodation costs at the place of hearing incurred by the parties will be shouldered by the state. The rationale for this is analogous to underlying philosophy of the New Zealand Accident Compensation Act 1975. The factors which lead to the application for a guardianship order are in fact an inherent risk to society as a whole. It is therefore justifiable to spread such a cost over the whole community and not let if fall on a small group of unfortunate citizens who have been burdened with it through accidental (family) circumstances.

However praiseworthy such a social insurance scheme may sound, the truth of the matter is that no government in the present economic climate can finance such a scheme without a strain on the taxpayer's pockets. It is therefore more

realistic to include hearing costs as charges against the ward's assets, if any, but if he is indigent, against the state itself in the form of legal aid.[253]

J. Review of Orders

Periodic reviews are necessary for a fine-tuning of the powers and duties of a limited guardian to tailor-fit the changing needs of the ward as he or she moves towards normalisation and integration. The court should have power to reassess the order upon the request of any person at any time, or it must automatically review the case at regular intervals as stated in the order.[254] The Victoria model provides for automatic assessment within six months of the original order and proper reviews to be held at least once a year. In Alberta, orders appointing guardians must be reviewed by the courts at least every two years.[256] The Saskatchewan proposed Act provides for compulsory review anytime within five years of the date of the order.[257]

Although reviews may serve a number of other useful functions such as ensuring that the guardianship continues no longer than necessary; the disabled person has been receiving the prescribed services; the guardian has been diligent and acting in good faith; the guardian is adequately compensated for necessary out of pocket expenses;[258] the frequency of automatic reviews may result in a congestion of the courts and an overworked system. Moreover, estate administrators will already kept under the constant supervision

of Public Advocates. The account statement and report of the significant changes in the ward's managerial skills which has to be filed by the conservator annually, is itself another form of review.[259] Therefore, to prevent any administrative inconvenience and unnecessary state intervention, while at the same time, ensuring that guardians retain minimal powers which correspond with the changing capacity of the disabled person, it is suggested that the court should review an order upon the application of any interested person and at set intervals of not more than two years as the Dependent Adults Act 1976 has prescribed.

To comply with the requirements of due process, adequate notice must be given to all interested parties of the review hearing, similar to that for a guardianship hearing.[260] During the hearing itself, the Court must always explore the possibility of why the guardianship should not be terminated instead of just being modified. Thirty nine American states have provisions explicitly authorising the disabled person to initiate a termination proceeding.[261] This is in addition to the normal review procedures and is not a substitute for the periodic review process. It is an extra avenue for a disabled person to be free from guardianship when his capacity has significantly improved during the interval between review hearings.[262] Instead of waiting for a review or rehearing of the case in the same court, a disabled person should be allowed to appeal to a higher court within three months from the making of the order.[263]

K. Emergency Procedures

There may be times when a person is in urgent need of an estate administrator, for example, he has suddenly become disabled because of an accident and is right in the middle of an important business deal, or he needs to arrange finance to pay for the proposed medical treatment. In such a case, the order must be temporary and restricted to the specific needs arising out of the emergency. A new hearing would have to be fixed to expand or restrict the guardian's powers as a speedy procedure is unlikely to access the precise ambit of the incapacity suffered. The Victoria proposals direct the guardianship tribunal to exercise guardianship powers itself in emergencies for a specified period and thereafter, must appoint an individual.[264] Due to the time constraint involved, notice provisions have to be shortened or dispensed with and the hearing must be held within forty eight hours of the filing of the application.[265] The possibility for abuse of an emergency procedure which bypasses the usual checks and balances of due process in a full proceeding by adopting the truncated version cannot be taken lightly. A guardian could make decisions which are irreversible and detrimental to the disabled person.[266] It is therefore important to stress that powers granted under an emergency order must be temporary and restricted to the needs of the emergency. As an extra safeguard, the order appointing an emergency guardian should require the guardian to consult the court to get approval for expenditure exceeding a certain amount. Perhaps the best solut-

ion for avoiding the problem of an emergency appointment is to ensure that for every guardian appointed, a standby guardian is also appointed.[267] This is only limited to those who already have guardians, but not those who do not have guardians. This is because a standby guardian can only be appointed pursuant to the appointment of a guardian.

IX MISCELLANEOUS FEATURES OF A GUARDIANSHIP SCHEME

A. Testamentary, Standby and Emergency Guardians

These guardians ensure continuity in the financial affairs of an adult ward by easing transitional difficulties arising out of the death, resignation or incapacitation of present conservators.

There are existing legal provisions for testamentary guardianship of children whereby a parent (and not any other person) can appoint a person by deed or will to be a guardian after that parent's death. Such an appointment has automatic effect only if the parent was himself or herself a guardian at the time of death and the appointee is of full age and capacity.[268] It is submitted that this method of appointing guardians be extended to the guardianship of disabled adults with some modifications. The appointment power should be available to a parent as well as a guardian and all appointments made should be subject to the Court's approval.

An alternate or standby guardian may be appointed by the court at the same time as the immediate guardian is appointed. Upon the death of the existing guardian, there is an automatic transfer of guardianship authority to the standby guardian. The alternative guardian is preferred to the testamentary guardian because it ensures that the replacement guardian has been selected under the scrutiny of the guardianship hearing procedure. An appointment by will would by-pass the due process requirements of

a hearing which are essential for safe-guarding the ward's interests.

Where a standby guardian has not been appointed, there should be provisions for appointing emergency guardians for a temporary period before a proper guardianship hearing can be conducted and a more permanent guardian appointed. Due to the urgency of the matter, it is suggested that notice provisions be dispensed with or shortened and a hearing not mandatory.[269]

B. Security to be Given to Court

If individuals are to be given preference over the Public Trustee as estate administrators, then it is necessary to require them to provide security upon appointment. This will indemnify the estate against exploitation or incompetent management by the estate administrator.[270] Almost every American jurisdiction requires conservators to file a surety bond to insure against waste or misappropriation by the conservator.[271] Under the relevant New Zealand law, the Court is empowered to require security from any manager other than the Public Trustee.[272] The security given can be in the form of an insurance policy taken out by the administrator to cover the protected person in case of fraud or mismanagement by the conservator.[273]

There may be some situations where security can be disposed with, for example, where the estate administrator cannot afford such an outlay of money. It would be against

the spirit of a guardianship scheme to exclude persons who have all the attributes of a good estate administrator but who cannot provide security.

C. Annual Accounts Statement and Report

Under the present New Zealand legislation, a manager is required to file a statement in the Court or with the Public Trustee, showing the property comprised in the estate, the manner in which the property has been dealt with and such statement shall be supported by a statutory declaration or an affidavit.[274] It should not merely be an accounting statement but also a report on the significant changes in the managerial skills of the disabled person and the problems encountered.[275] This will provide valuable assistance to the Court when a case comes up for review. An accurate and comprehensive statement will enable the Court to make the necessary adjustments in the power relationship between the administrator and the disabled person to ensure that the latter is given maximum rights consistent with the minimal protection needed. Under the scrutiny of the Court, any suspicious transactions may be questioned for exploitation or incompetent administration, and the administrator required to reimburse the estate where such conduct is proved. If necessary, the security lodged with the Court can be enforced to recover the loss.

D. Payment of Guardian

All the American jurisdictions, apart from ten and the District of Columbia, allow personal guardians and conservat-

ors to collect a reasonable fee for services rendered, out of the financial resources of the disabled person.[276] In New Zealand, the estate manager is allowed to recover all expenses of administration and remuneration for services, out of the estate of the protected patient or person.[277] The Victoria proposals[278] rejected the idea of paying a guardian or an administrator (other than a Public Trustee) for services performed in pursuance of a guardian order. The rationale being that payment would encourage the existence of a class of professional guardians. This would in turn, create potential conflicts of interests. A guardian who wants to protect his own financial remuneration may not be willing to train the disabled person to become independent and thereby making himself redundant. The advantages of having a voluntary scheme has been well documented in the context of citizen advocacy.[279] The Victoria Report[280] goes so far as to disallow reimbursement for costs incurred which are incidental to the role of a guardian of the person or property on account of the possibility of conflicts of interests. However, this may result in the disabled person being deprived of the services of an appropriate administrator just because the latter is unable to afford certain basic expenses incidental to his role. It was therefore suggested that in cases of financial hardship, the administrator should be reimbursed for certain basic costs incurred by him or her, for example, transportation costs arising from performing his or her management functions. Although the Victoria Report

wanted such reimbursement to come from government funds, this may prove to be an additional burden on the limited resources of the state. The estate administered should bear such costs with the assistance of government subsidies where appropriate.

X. CONCLUSION

The recent developments in the law and mental health research overseas expose the inadequacies and anomalies of the out-dated laws we have in New Zealand regarding the care of the person and property of the mentally disabled. The plenary protection offered by the Mental Health Act 1969 and the Aged and Infirm Persons Protection Act 1912 has clearly failed to take into account the gradations of mental disability that people suffer from. There is a need to provide a broad spectrum of legal and community services from which the least restrictive alternative form of assistance can be chosen. The concept of limited guardianship is an excellent example of the adaptability of the law to change according to the times. As well as being an attractive idea, it is also deceptively simple. In practice, it is not easy to tailor suit a guardianship order to the exact degree of incapacity of the individual. Judges must be prepared to spend more time and effort in framing such orders. The organisation of the guardianship scheme into one administrative structure will replace the uneasy coexistence of the Mental Health Act 1969 and the Aged and Infirm Persons Protection Act 1912. Rather than emphasising the need to offer protection to the disabled (the protection principle), the new scheme will be geared towards the normalisation and integration of the person (the rights principle). Because guardianship is a highly restrictive form of providing supervision and assistance to individuals, it can lead to a deprivation of legal rights. To avoid any unwarranted

restriction of rights, all guardianship proceedings must be heard before a judicial body and must also contain adequate procedural safeguards.

New Zealand has the benefit of learning from the mistakes of overseas legislation when framing her own guardianship laws. The fundamental problem however, is to avoid the displacement of goals. In the words of Elizabeth Boggs :[281]

> Do not confuse means with ends. Start with the ultimate goal of affirmative rights and benefits and work backward to find what "minimal" means will be required to assure the maintenance of the goal. Advocacy is a means, not an end. Guardianship is a means, not an end, and the process is also a means, not an end. Due process is a negative claim right; the affirmative right which we seek for each person substantially handicapped through impairment of his or her capacity for self-direction is human support which effectively augments the person's own residual capacities and reinforces his internal locus of control.

FOOTNOTES

1. Eyre v Shaftsbury 23 E.R. 659,664 (Ch.1722); 2P. Wms. 103, 118. Idiots were recognised in law as natural fools (dementia naturalis) who were so deficient in mental capacity from birth as to be permanently incapable of rational conduct. Luncatics were dementia accidentalis who became insame or mad after birth and whose incapacity was or might be temporary or intermittent and interpolated with lucid intervals. See Halsbury's Laws of England (4 ed., Butterworths, London, 1980) at para. 1003.

2. Custer "The Origins of the Doctrine of Parens Patriae" (1978) 27 Emory L.J. 195.

3. 17 Edw. S.2, C.9 (1324).

4. Mitchell "The Objects of Our Wisdom and Coercion: Involuntary Guardianship for Incompetents" (1979) 52 S.Cal.L.Rev.1405, 1409.

5. Regan "Protective Services for the Elderly: Commitment, Guardianship and Alternatives" (1972) 13 Wm. & Mary L.Rev.569, 570.

6. Ibid. 571.

7. 32 Hen.S.8, C.46 (1540).

8. Carney "Civil and Social Guardianship for Intellectually Handicapped People" (1982) 8 Monash U .L.Rev.199,206.

9. Idem.

10. Wily and Stallworthy Mental Abnormality and the Law (Peryer Ltd., Christchurch, First published 1962) 17. For a further account of the legal response to the mental disorder during this period, see Jones Lunacy,Law, and Conscience 1744-1845 (Routledge & Kegan Paul Ltd., London, First published 1955).

11. Wily and Stallworthy Mental Abnormality and the Law op.cit.17.

12. Idem.

13. New Zealand inherited this jurisdiction by virtue of the Judicature Act 1908 which invested the Supreme Court (now called the High Court by virtue of S.2 Judicature Amendment Act 1979) with all the powers and responsibilities of the Court of Chancery. S.17 of the Act provides:

> The [High] Court shall also have within New Zealand all the jurisdiction and control over the persons and estates of idiots [mentally defective persons], and persons of unsound mind, and over the committees of such persons and estates respectively, as the Lord Chancellor of England, or any Judge or Judges of His Majesty's High Court of Justice or of His Majesty's Court of Appeal....

14. Working Party on Guardianship and Advocacy of Mentally Retarded People - N.Z. Institute of Mental Retardation (Inc.) Submissions on Proposed Legislation for the Administration of Incapacitated Persons' Property 1 (hereinafter referred to as The Working Party 1983 Submissions); Department of Justice An Outline of Proposed Legislation for the Administration of Incapacitated Persons' Property 1 (hereinafter referred to as Department of Justice The 1983 Outline).

15. Department of Justice The 1983 Outline 3.

16. Task Force on Review of Mental Health Legislation - Mental Health Foundation Comments of the Task Force on Review of Mental Health Legislation on an Outline of Proposed Legislation for the Administration of Incapacitated Persons' Property 2. (hereinafter referred to as The Task Force 1983 Comments).

17. The Working Party 1983 Submissions op.cit.5.

18. Ibid. 1.

19. Children are already under the guardianship of their parents. See Guardianship Act 1968.

20. Working Party on Guardianship and Advocacy of Mentally Retarded People - N.Z. Institute of Mental Retardation (Inc.) Guardianship for Mentally Retarded Adults: Submissions to the Minister of Justice (hereinafter referred to as The Working Party 1982 Report).

21. Report of the Committee Considering the Rights and Protective Legislation for Intellectually Handicapped Persons (Victoria, 1982); (hereinafter referred to as The Victoria Report).

22. American Bar Association Commission on the Mentally Disabled Guardianship and Conservatorship. (Discussion edition, Washington D.C., 1979); (hereinafter referred to as The A.B.A. Model Statute).

23. The Working Party 1983 Submissions op.cit.2.

24. Lynch v. Household Finance Corp. 405 U.S.538,552; 31 L Ed. 2d 424, 435. (1972).

25. Department of Justice The 1983 Outline op.cit.

26. The Task Force 1983 Comments op.cit.1.

27. A.B.A. Model Statute op.cit. 1 (quoting L. Trilling, The Liberal Imagination: Essays on Literature and Society 215 (1953). See generally Mitchell "The Objects of our wisdom and our coercion: Involuntary Guardianship for Incompetents" supra n.4.

28. Refer to Part I (text accompanying n.19-20) supra; The Working Party 1982 Report op.cit.5.

29. Turnbull "Law and the Mentally Retarded Citizen: American Responses to the Declarations of Rights of the United Nations and International League of Societies for the Mentally Handicapped - Where we have been, are, and are Headed" (1979) 30 Syracuse L.Rev.1093, 1098. (hereinafter referred to as Turnbull "Law and the Mentally Retarded Citizen").

30. See The Working Party 1982 Report op.cit.5.

31. Idem.

32. Generally speaking this is for "mentally ordered" persons as defined in Mental Health Act 1969, s.2.

33. The Working Party 1982 Report op.cit.3.

34. Part I (refer to text accompanying n.18) supra.

35. McCord "From Theory to Reality: Obstacles to the Implementation of the Normalisation Principle in Human Services" (1982) 20 Mental Retardation 247, 248.

36. Ibid. see generally.

37. U.N. Declaration on the Rights of Mentally Retarded Persons 1971, preamble; Art.2 states that the mentally retarded person has a right to such services "as will enable him to develop his ability and maximum potential" and Art. 4 elaborates on the normalisation principle by requiring that the mentally retarded person "should live with his own family or with foster parents and participate in different forms of community life".

38. Dependent Adults Act, s.11(b). This provision is equally applicable to the area of guardianship of the property of disabled persons to ensure maximum normalisation.

39. The Working Party 1982 Report op.cit.6.

40. Committee on Rights of Persons with Handicaps (S.A.) Vol.2 Intellectual Handicaps 236 (hereinafter referred to as the Bright Report).

41. Ibid. 235.

42. Such persons are referred to as "protected patients"; see s.82 of the Act. Those whose estates are administered under the Aged and Infirm Persons Protection Act 1912 are known as "protected persons", see s.2 of that Act. For a further discussion on how a person can become a "protected patient" or a "protected person" see Part III, infra.

43. Mental Health Act 1969, s.84(1). However under subs.(4) the Court may make any adjustments to compensate the other party who has suffered loss as a result of the cancellation of the contract.

44. Supra, n.42.

45. Aged and Infirm Persons Protection Act 1912, s.24(1). Subs.(2) provides that where the other party entered into the contract in good faith and without notice of the fact that the person is a protected person, the contract shall be valid.

46. Such an appointed person is referred to as the "manager" under s.82 Mental Health Act 1969 and s.2 of the Aged and Infirm Persons Protected. For a discussion on how a "manager" is appointed, see Part IV, infra.

47. Mental Health Act 1969 SS.86(2), 93(1) and 95(5).

48. Carney, supra n.8, 201.

49. Turnbull "Law and the Mentally Retarded Citizen" supra, n.29, 1099.

50. Ibid. 1098.

51. See Dussault "Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens" (1978) 13 Gonz.L.Rev. 585, 617.

52. The Task Force 1983 Comments op.cit.2.

53. Ch.95, 1, 1975 Wash. Laws (ist. Ex.Sess.) (codified at WASH.REV.CODE 11.88.005 1976)).

54. Report of Committee on Legal Incapacity, Probate and Trust Division "Limited Guardianship: Survey of Implementation Considerations" (1980) 15 Real Prop. Prob. & Tr. J. 544, 546.

55. Mental Health Act 1969, s.82 definition of "protected patient". For a further discussion on how a person becomes a "protected patient", see Part III, infra.

56. The Working Party 1982 Report op.cit. 5.

57. Idem.

58. The Working Party 1982 Report op.cit.6. For a further discussion of plenary guardianship and limited guardianship, refer to Part V; and for the discussion of the alternative forms of protection to guardianship, refer to Part VI, infra.

59. Refer to Part VI, infra.

60. The Task Force Comments 1983 op.cit.10. The powers of the Public Trustee can be found in the Third Schedule of the Mental Health Act 1969. A cursory examination reveals the wide powers of the Public Trustee to do virtually everything including taking possession of the property, selling, leasing or otherwise disposing of such property. For an elaboration of the powers of the Public Trustee, refer to Part V, infra.

61. Aged and Infirm Persons Protection Act 1969, s.10.

62. Ibid. s.15.

63. The Working Party 1982 Report op.cit.7.

64. For a concise discussion of such rights, see Black Black's Law Dictionary (5 ed., West Publishing, St. Paul Minn., 1979) under "Due process of law".

65. See Part II C (text accompanying n.57) supra.

66. Refer to Part VIII, infra.

67. Refer to Part II D (text accompanying n.58-62) supra.

68. Jones Lunacy, Law and Conscience 1744-1845 op.cit. at introduction, ix.

69. See Mental Health Act 1969, s.2 definition of "patient".

70. Ibid. Part II; Linton Consent to Treatment for Psychiatric Patients - Proposals for Reform (Unpublished, LL.M. Research Paper, VUW, 1982) 26 commented that this is so in theory, at least.

71. Mental Health Act 1969, s.22 provides that a reception order can be made by a District Court Judge who upon the examination of the person with the assistance of two medical practitioners is of the opinion that the person examined is "mentally disordered" within the interpretation of s.2 of the Act.

72. Ibid. s.73.

73. Linton Consent to Treatment for Psychiatric Patients - Proposals for Reform op.cit. 30; see Mental Health Act 1969, Part IV.

74. Mental Health Act 1969, Part V.

75. Ibid. s.82. These other patients include:

a) informal patients in respect of whom certificates have been given under s.8 of the Mental Health Amendment Act 1961 declaring such patients to be unable to manage their own affairs and in respect of whom the estate administration function of the Public Trustee under Part VIII of the Mental Health Act 1911 have not ceased. This is a small class of informal patients as the majority would now be admitted under s.15 of the 1969 Act and would not be protected patients.

b) all special patients other than those subject to:

(i) any orders made pursuant to s.39B (detention in a hospital for observation pending a hearing or trial for any offence punishable by imprisonment) or s.47A (detention for purposes of obtaining a psychiatric

report where a person is charged or convicted with any offence punishable by imprisonment) of the Criminal Justice Act 1954 or

(ii) any orders made pursuant to the proviso to subs.3 of s.171 (a defendant who is committed for trial but is detained in a psychiatric hospital because of a mental disorder) of the Summary Proceedings Act 1857 or

(iii) a temporary reception order made under s.42(4) of the Mental Health Act 1969 for a person detained in a penal institution to be admitted in hospital pending the hearing of a charge or a trial or

(iv) any arrangements made under s.43 of the Mental Health Act 1969 by the Secretary for Justice for the hospitalisation of any person detained in a penal institution.

c) those persons who have been patients under the Mental Health Act 1911 and whose estates are still administered by the Public Trustee under that Act.

76. Aged and Infirm Persons Protection Act 1912, §4 and 5.

77. ibid. s.4. The three categories of mental illness, mental infirmity and mental subnormality included in s.4 are also the three classes of mentally disordered persons as defined in the Mental Health Act 1969. These people may therefore be committed into mental institutions and become protected patients under the Mental Health Act 1969. But those who are not hospitalised or do not come within the definition of protected patients, can become protected persons under the Aged and Infirm Persons Protection Act 1912. In fact s.27 of this Act goes further by allowing its application to those who might be protected patients. This, it is submitted, is an unnecessary duplication of legislative provisions which highlights the need to assimilate the two Acts into a single scheme.

78. Aged and Infirm Persons Protection Act 1916, s.4.

79. Ibid s.5.

80. The Working Party 1982 Report op.cit. 2.

81. Regan "Protective Services for the Elderly: Commitment, Guardianship and Alternatives" supra n.5, 604. Upon the discharge of the protected person from hospital, §85(5)(b) and (c), and 87(3)(e) and (f) of the Mental Health Act 1969 provide that the property guardianship under the Act shall cease.

82. Refer to Part II.E (text accompanying n.65) supra.

82A. The Working Part 1982 Report op. cit. 11.

83. Victoria Report op. cit. 26-27; 95.

84. The Working Party 1982 Report op.cit.12.

85. Idem.

86. Victoria Report op.cit.95.

86A. The Working Party 1982 Report op. cit. 12.

87. Department of Justice The 1983 Outline op.cit.1.

88. The Working Party 1982 Report op.cit.2.

89. The Task Force 1983 Comments op.cit.3.

90. Bright Report op.cit.191.

91. Victoria Report op.cit. 97-100.

92. The Mental Health Act 1969(NZ) §86-88 has a preference for the Public Trustee. However, see Aged and Infirm Persons Protection Act 1912 s.7 which places spouses and relatives on an equal footing with the Public Trustee.

93. A.B.A. Model Statute op.cit.100.

94. Regan "Protective Services for the Elderly: Commitment, Guardianship and Alternatives" supra n.5 609; Victoria Report op.cit. 98, The Public Trustee of Victoria has personal knowledge of cases where the property of the disabled person has been appropriated or improperly used for the benefit of the family member, for example, interest free "loans" to a business of a relative. It also arouses one's suspicion in cases where family members who had previously neglected the disabled person suddenly becomes attentive.

95. Regan, idem., Monahan "Empirical Analyses of Civil Commitment: Critique and Context (1977) 11 Law & Soc. Rev. 619, 624.

96. The Working Party 1982 Report op.cit. 31.

97. Frolik "Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform: (1981) 23 Ariz.L.Rev. 599, 645 (hereinafter referred to as Frolik "Plenary Guardianship").

98. For example California and Maine, see Hodgson "Guardianship of Mentally Retarded Persons: Three Approaches to a long Neglected Problem" (1973) 37 Albany L.Re.407, 413-416 (hereinafter referred to as Hodgson "Three Approaches").

99. See Bright Report op.cit. 199-203 where an independent watch dog or advocacy is proposed; the "Official Representative" described in the proposed Saskatchewan law is not to act as a guardian in any case, see Saskatchewan Law Reform Commission Proposals for a Guardianship Act Part I: Personal Guardianship 1983 10. (hereinafter referred to as the Saskatchewan Proposals).

100. Victoria Report op.cit. 53 where the reason advanced was that of the fear of a proliferation of government bureaucracies; the Dependent Adults Act 1976 (Alberta) §12 and 13 has combined the two functions into the

person of the Public Guardian.

101. Hodgson "Three Approaches" supra n.98, 440. Victoria Report op.cit. 89.

102. A.B.A. Model Statute op.cit.100

103. Victoria Report op.cit. 89-90.

104. Victoria Report idem.

105. Frolik "Plenary Guardianship" supra n.97,656.

106. Mental Health Act 1969, Third Schedule, Cl.2(a).

107. Ibid. Cl.2(b).

108. Ibid Cl. 2(b), (p) and (m).

109. Frolik "Plenary Guardianship" supra n.97, 653.

110. Bruggeman, "Guardianship of Adults with Mental Retardation: Towards a Presumption of Competence" (1980) 14 Akron L.Rev. 321, 327.

111. Ibid. 328.

112. Ibid. 337.

113. See Working Party 1982 Report op.cit.26 for an enumeration of the advantages of limited guardianship.

114. The Saskatchewan Proposal op.cit. 10.

115. Frolik "Plenary Guardianship" supra n.97, 654.

116. Report of Committee on Legal Incapacity, Probate and Trust Division "Limited Guardianship: Survey of Implementation Considerations" (1980) 15 Real Prop. Prob. & Tr. J. 544, 545.

117. See Ibid,546 for a summary of the criticisms put forward.

118. The Working Party 1982 Report op. cit. 3

119. The Victoria Report, supra n.18, 45.

120. Turnbull, "Law and the Mentally Citizen" supra, n.29, 1125.

121. Dependent Adults Act (Alberta) s.10(2).

122. Frolik "Plenary Guardianship" supra n.97, 657.

123. Ibid. 656.

124. Report of Committee on Legal Incapacity, Probate and Trust Division "Limited Guardianship: survey of Implementation Considerations" supra n.116.

125. Refer to Part III (text accompanying n.67-89) supra.

126. Aged and Infirm Persons Protection Act 1912, s.15; The Protection forms in the First and Second Schedules allow for such provisions.

127. This concept is better known in New Zealand child law where a child's welfare is said to be the paramount consideration in all matters affecting him; Guardianship Act 1968, s.23; Children and Young Persons Act 1974, s.4.

128. The Saskatchewan Proposals Proposed Personal Guardian ship Act, s.8(b)(i) op.cit.14.

129. Refer to Part VI A, infra.

130. Victoria Report op.cit. 61.

131. The Saskatchewan Proposals Proposed Personal Guardianship Act s.8(b)(ii), op.cit. In this context the observations of Turnbull are relevant -

> A final dilemma faces those who represent the retarded person's interests as an attorney, guardian and litem, or in any other capacity. As is true in most relationships between a layman and a professional, the "power relationship" is unbalanced, tilted toward the professional. Mental retardation law reform is attempting to redress this problem by putting the relationship into a fairer balance. Moreover, consideration about the effectiveness and efficiency of representing the client do not always permit the professional to consult with the layman at every turn.

Turnbull "Law and the Mentally Retarded Citizen" supra, n.29 1009-1100

132. Mental Disability Legal Resource Centre, "Limited Guardianship for the Mentally Disabled" (1978) 12 Clearinghouse L.Rev. 231, 232.

133. The Saskatchewan Proposals op.cit.8.

134. Boggs "The Evolution and Implementation of Affirmative Rights for Persons with Mental Handicaps" in The Law and the Mentally Retarded: A Seminar on the Rights of the Mentally Retarded (Wellington, 7-8 September 1981) 40, 52.

135. Wolfensberger A Multi-Component Advocacy Protection Scheme (Toronto, Canadian Association for the Mentally Retarded, 1977).

136. Beattie J. Advocacy and the Attainment of the Rights of the Intellectually Handicapped (Annual Conference, N.Z. Society for the Intellectually Handicapped, Gisborne, 1976).

137. Bright Report op.cit. 196-7; an advocate who is too preoccupied with providing services may try to streamline his or her service providing role by ignoring the rights of the disabled.

138. Boggs "The Evolution and Implementation of Affirmative Rights for Persons with Mental Handicaps" supra n.134, 53.

139. Hodgson "Three Approaches" supra n.98, 430.

140. Hinde and Hinde New Zealand Law Dictionary (3 ed. Butterworths, Wellington 1979) under definition of "power of attorney". See also Property Law Act 1952, Part XII, Land Transfer Act 1952, §146-153; and Hinde MacMorlane and Sim Land Law Vol. I (Butterworths, Wellington 1978) 279-282.

141. Adams "Powers of Attorney" (1956) 32 N.Z.L.J. 202,203.

142. I New Zealand Encyclopaedia of Forms and Precedents (ed. Adams, Butterworths, Wellington 1963) 83, Elliot v. Ince (1857), 7 De G.M. & G. 475; 44 E.R.186, and Daily Telegraph Newspaper Co. v. McLauchlin [1904] A.C. 776.

143. This seems to contradict one of its purposes in the first place - to protect the donor's interest in the face of a threatening incapacity. The exceptions to that general rule can be found in the Property Law Act §136 and 137 which relate to irrevocable powers of attorney affecting land.

144. Dreyfus "A Guardianship Tribunal" April (1983) Legal Serv. Bull. 75,76.

145. Jeffries J. "The Rights and Welfare of the Mentally Retarded during their lifetime - the parents' role and meeting the need after their death" in The Law and the Mentally Retarded: A Seminar on the Rights of the Mentally Retarded (Wellington, 7-8 September 1981) 12, 20.

146. Frolik, supra n.97, 651.

147. Bruggemen, "Guardianship of Adults with Mental Retardation: Towards a Presumption of Competence", supra, n.110, 328.

148. Refer to Part III (text accompanying n.68-75) supra.

149. Victoria Report op.cit. 83-84.

150. Ibid. 28.

151. Ibid. 28-29.

152. See, for example, Guardianship Act 1968, s.28.

153. Family Courts Act 1980, s.10.

154. The Working Party 1982 Report op.cit.21.

155. Idem., see also Report of the Royal Commission on Courts (Wellington, 1978) paras. 581-588.

155A S.8 of the Family Courts Act 1980 empowers the court to make such appointments.

156. Turnbull "Law and the Mentally Retarded Citizen" supra n.29, 1123. Refer to Part VIII.C. infra; see also The Working Party 1983 Submissions op.cit.2.

157. The Task Force 1983 Comments op.cit.3.

158. Victoria Report op.cit. 31-32.

159. See, for example, Guardianship Act 1968, s.28, supra n.152.

160. Frolik "Plenary Guardianship" supra n.97, 609.

161. Ibid. 609-610.

162. Victoria Report op.cit. 31-32.

163. Atkinson "Towards a Due Process Perspective in Conservatorship Proceedings For the Aged" (1979 -80) 18 J. Fam.L. 819,833. For examples of such cases, see In re Micetich, 77 P 9858 (Circuit Court Cook County, filed Jan.10, 1978) and In re Dash, 77 P 9855 (Circuit Court Cook County, filed Dec. 20, 1977).

164. Atkinson "Towards a Due Process Perspective in Conservatorship Proceedings for the Aged" idem.

165. Carney "Civil and Social Guardianship for Intellectually Handicapped People" supra n.8, 227.

166. Mesibov "Limited Guardianship Laws and Developmentally Disabled Adults: Needs and Obstacles" (1980) 18 Mental Retardation 221, 225.

167. A.B.A. Model Statute op.cit.90.

168. Refer to Part VIII A, infra. See A.B.A. Model Statute op.cit. 85-86, where it explains the functions of such an officer called the Disability Resources Officer.

169. Uniform Probate Code (U.P.C.) §5-404(a) (4th ed.1975), approved and quoted in A.B.A. Model Statute, op.cit.91.

170. Aged and Infirm Persons Protection Act 1912, s.6.

171. See Part VIII, infra.

172. Dependent Adults Act 1976, s.13; The Illinois Guardianship and Advocacy Commission has been characterised as an "ombudsman" that is independent of the Department of Mental Health, see Paull, "The Creation of the Ombudsman: The Guardianship and Advocacy Commission" (1980) 29 De Paul L. Rev. 475. However its capacity to perform its watchdog function effectively is weakened by the fact that it can become a guardian as well.

173. Victoria Report op.cit. 53.

174. A.B.A. Model Statute op.cit. 86-90.

175. Similarly, the proposed "Official Representative" in the Saskatchewan model is responsible for protecting the interests of wards and investigating complaints but would never act as a guardian. See The Saskatchewan Proposals op.cit.11.

176. This power of investigation is not intended to extend to misconduct or neglect by an individual volunteer conservator since the subjects of intervention proceedings will have legal representation: A.B.A. Model Statute op.cit.89.

177. Victoria Report op.cit. 56-57.

178. J.R. Christie "Guardianship: the Alberta Model" unpublished paper presented at IASSMD World Congress on Mental Retardation, Toronto, Canada, August 1982, 11 as quoted in the Victoria Report op.cit. 56.

179. Carney "Civil and Social Guardianship for Intellectually Handicapped People" supra n.8, 228.

180. An active outreach model is best illustrated by the proposed watchdog or Advocacy agency in South Australia, see Bright Report, op.cit. 199-203.

181. See Bright Report op.cit. 202; Victoria Report op.cit. 58.

182. Refer to Part III.A (text accompanying n.96-110.)

183. Ratcliffe "In re Boyer. Guardianship of Incapacitated Adults in Utah" (1982) Part 2 Utah L.Rev. 427. See In re Boyer 636 P. 2d. 1085 (Utah 1981) where the Utah Supreme Court adopted a restrictive approach to the imposition of guardianship and exacted a high standard of due process protections.

184. Heap v. Roulet 590 P.2d.1,3 (Cal.1979)

185. Uniform Probate Cod, §5-503, 404-407(1975).

186. Atkinson "Towards a Due Process Perspective in Conservatorship Proceedings For the Aged" supra n.163, 828.

187. Lynch v. Household Finance Corp. 405 U.S. 538, 552; 31 L Ed. 2d 424, 435 (1972).

188. See generally, Oaths and Declarations Act 1957.

189. It has been suggested that an application for plenary guardianship should permit the judge to appoint a plenary or limited guardian but not vice versa. See McLaughlin Guardianship of the Person op.cit.106.

190. Under the Dependent Adults Act 1976, s.2(1) the report of a physician or psychologist stating the reasons for the need for guardianship is mandatory.

191. A.B.A. Model Statute op.cit.91, s.6(1)(b)(xiv). This will act as a screening device to ensure genuine applications.

192. Dependent Adults Act 1976, s.2(3).

193. Victoria Report op.cit. 131-137.

194. See Report of Committee on Legal Incapacity, Probate and Trust Division "Limited Guardianship: Survey of Implementation Considerations" supra n.54, 546-547.

195. Refer to Part III A (text accompanying n.68-75) supra.

196. See Mental Health Act 1969 S.19; Mental Health (Fees and Forms Regulations 1969, First Schedule, Form 1 which is the form for the Request for Reception into Hospital.

197. Aged and Infirm Persons Protection Act 1912, s.6.

198. Idem.

199. McLaughlin, Guardianship of the Person op.cit. 106.

200. See for example, A.B.A. Model Statute op.cit. 138-142; Dependent Adults Act 1976, s.3(2); The Saskatchewan Proposals op.cit. Proposed Act, s.5; Victoria Report op.cit. 33-35; The Task Force 1983 Comments op.cit.6.

201. Aged and Infirm Persons Protection Act 1912, s.6(2).

202. Dependent Adults Act 1976, s.3(2).

203. Most American jurisdictions require notice, see A.B.A. Model Statute op.cit.5.

204. Victoria Report op.cit.33.

205. The Saskatchewan Proposal op. cit. Proposed Act, S.5.

206. Atkinson "Towards a Due Process Perspective in

Conservatorship Proceedings for the Aged" supra n.163, 840.

207. Ibid.837.

208. Mitchell "Involuntary Guardianship for Incompetents : A Strategy for Legal Service Advocates" (1978) 12, Clearinghouse Rev.451, 453.

209. A.B.A. Model Statute op.cit. 140.

210. Department of Justice The 1983 Outline op.cit.4.

211. The Working Party 1982 Report op.cit.15.

212. Idem.

213 Idem.

214. Refer to Part VII A.1. (text accompanying n.156-157).

215. A.B.A. Model Statute op.cit.93.

216. Idem.

217. See Report of Committee on Legal Incapacity, Probate and Trust Division "Limited Guardianship: Survey of Implementation Considerations" supra n.194, 548.

218. Ibid. 548-549.

219. Comment "The Disguised Oppression of Involuntary Guardianship : Have the Elderly Freedom to Spend?" (1964) 73 Yale L.J. 676, 685.

220. Frolik "Plenary Guardianship" supra n.97, 638-639.

221. Solberg "North Carolina Guardianship Laws - The Need for Change" (1976) 54 N.C.L. Rev. 389, 415-416.

222. Frolik "Plenary Guardianship" supra n.97, 638-639.

223. Idem.

224. The Working Party 1982 Report op.cit. 15-16; Refer to Part VIII B (text accompanying n.199-213) supra.

225. A.B.A. Model Statute op.cit.5.

226. Ibid 81-82.

227. In re Dobson, 125 Vt. 165, 168; 212 A.2d.620,622 (1965)

228. Frolik "Plenary Guardianship" supra n.97, 634-637; see also, Morris "Conservatorship for the 'Gravely Disabled': California's Nondeclaration of Nonindence" (1978) 15, San Diego L. Rev.201 as to why counsel in civil commitment hearings should always perform an adversarial role rather than the "best interests" one.

229. Heap v. Roulet 590 P.2d. 1,3 (Cal.1979).

230. Note "The Role of Counsel in the Civil Commitment Process: A Theoretical Framework" (1975) 84 Yale L.J. 1540, 1561.

231. A.B.A. Model Statute op.cit. 144.

232. See Dussault "Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens" supra n.51 where such a role is said to involve explaining the substance of the application, the nature of the hearing, the right to oppose the application, the identification of the proposed guardian and other hearing rights.

233. A.B.A. Model Statute op.cit.174.

234. Frolik "Plenary Guardianship" supra n.97, 636.

235. Department of Justice The 1983 Outline op.cit.4.

236. Report of the Committee on Legal Incapacity, Probate and Trust Division "Limited Guardianship: Survey of Implementation Considerations" supra n.194, 350.

237. Nebraska Press Association v Stuart 427 U.S.539,587 (1976).

238. A.B.A. Model Statute op.cit.134.

239. Victoria Report op.cit.39.

240. A.B.A. Model Statute op.cit. 134-135

241. Victoria Report op.cit. 38.

242. Heap v. Roulet 590 P.2d. 1,3 (Cal.1979)

243. A.B.A. Model Statute op.cit.162-164.

244. McLaughlin Guardianship of the Person op.cit.112.

245. A.B.A. Model Statute op.cit.165.

246. Atkinson "Towards a Due Process Perspective in Conservatorship Proceedings for the Aged" supra n.163,842.

247. Frolik "Plenary Guardianship" supra n.97, 1123-1124.

248. Report of Committee on Legal Incapacity, Probate and Trust Division "Limited Guardianship: Survey of Implementation Considerations" supra n.194, 550.

249. Idem.

250. Refer to Part V B (text accompanying n.110-126.)

251. Aged and Infirm Persons Protection Act 1912, First and Second Schedules.

252. Victoria Report op.cit.14-42.

253. This a feature common to almost all guardianship laws and proposals, Turnbull "Law and the Mentally Retarded Citizen" supra n.29, 1124.

254. The Working Party 1982 Report op.cit.32-33.

255. Victoria Report op.cit. 91-92.

256. Dependent Adults Act 1976, s.8.

257. The Saskatchewan Proposals op.cit. Proposed Act, s.11.

258. A.B.A. Model Statute op.cit. 101

259. Refer to Part IX C, infra.

260. Refer to Part VIII B, infra.

261. A.B.A. Model Statute op.cit. 6;

262. A.B.A. Model Statute op.cit. 103.

263. See Victoria Report op.cit. 91.

264. Ibid 35. For reasons based on the potential conflict of interests, it is suggested that such adjudicative body should never assume the role of guardianship. Such a role could perhaps be fulfilled by a public guardian who is not involved in adjudication. Refer to Part IV E.3 (text accompanying n.97-104).

265. A.B.A. Model Statute op.cit. 146.

266. Victoria Report op.cit.35.

267. Refer to Part IX A (infra).

268. cf Guardianship Act 1968, s.7; Thirty four states in America have provisions for testamentary guardianship of mentally disabled adults. See A.B.A. Model Statute op.cit.4.

269. Idem.

270. Victoria Report op.cit.89.

271. A.B.A. Model Statute op.cit.5.

272. Mental Health Act 1969, s.89; Aged and Infirm Persons Protection Act 1912, s.9.

273. Victoria Report op.cit.5.

274. Mental Health Act 1969, s.90; Aged and Infirm Persons Protection Act 1912, s.18; The Aged and Infirm Persons Protection Rules 1936 makes more specific provisions for the filing of statements of accounts, see especially Rules 4, 5 and 7.

275. For a list of items that such a report should contain, see A.B.A. Model Statute op.cit.115.

276. Ibid.5.

277. Aged and Infirm Persons Protection Act 1912, s.28; Mental Health Act 1969, s.94.

278. Victoria Report op.cit. 67.

279. Refer to Part VI A (text accompanying n.134-139.

280. Victoria Report op.cit. 68 and 91.

281. Boggs "The Evolution and Implementation of Affirmative Rights for Persons with Mental Handicaps" supra n.134, 58.

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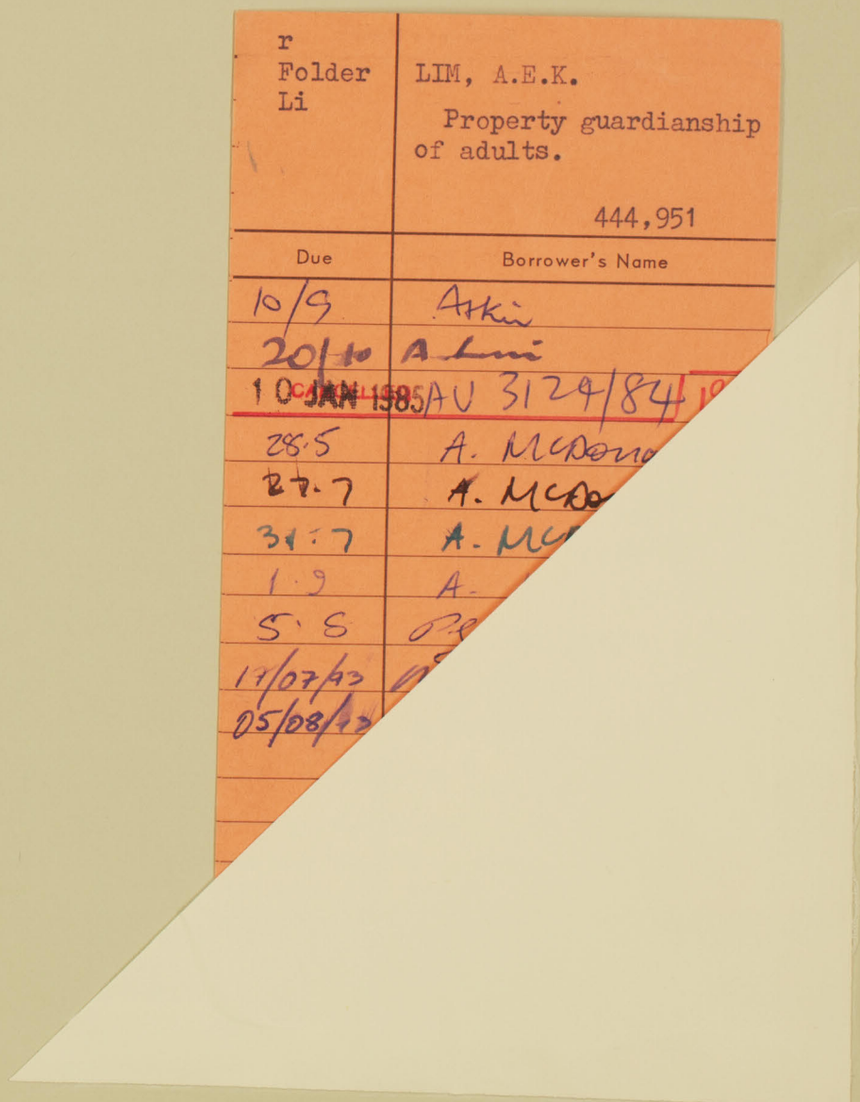

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