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THE ILLINOIS GUARDIANSHIP FOR DISABLED ADULTS LEGISLATION OF 1978 AND 1979: PROTECTING THE DISABLED FROM THEIR ZEALOUS PROTECTORS

DEAN TIMOTHY JOST*

The decision that an adult is so disabled as to be incapable of forming or expressing rational judgments concerning basic financial and personal questions is among the most weighty and complex which the law is called upon to make. The Illinois Guardianship for Disabled Adults Act and its comprehensive "technical" amendments represent the most recent attempt by the Illinois General Assembly to set forth standards and procedures for making this decision. Considered together, the Act and amendments have brought about a radical and comprehensive change in Illinois guardianship law, undoubtedly the most significant change since the Illinois legislature first addressed this problem in 1823.3

The Act and amendments bring about three major changes from previous guardianship law. First, and most important, the Act and amendments significantly expand the due process protections afforded an alleged disabled person. Second, the laws embrace a philosophy of encouraging those involved in the guardianship process to discern and utilize guardianship alternatives that least restrict the disabled person's rights. Finally, the legislation creates or adopts several innovations to make managing the estate of a disabled person more efficient and to involve that person and his family more in the planning process. This

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1. Hereinafter referred to as the Act.
2. The provisions of the Act follow closely the recommendations of the Governor's Commission for Revision of the Mental Health Code of Illinois. See REPORT, GOVERNOR'S COMMISSION FOR REVISION OF THE MENTAL HEALTH CODE OF ILLINOIS (1976) [hereinafter referred to as GOVERNOR'S COMMISSION]. The recommendations of the commission, initially limited to cover only the mentally disabled, were expanded to provide for guardianships for all disabled persons. Otherwise, the recommendations of the commission were adopted nearly intact. After the Act was adopted into law, the Chicago Bar Association, Probate Committee, Mental Health Subcommittee became concerned about the Act's practicality and drafting. This subcommittee, meeting with representatives from the Mental Health Committee of the Chicago Council of Lawyers, substantially worded the Act. The product of this effort, with minor modifications, became Public Act 81-795. 1979 Ill. Legis. Serv. P.A. 81-795 (to be codified at scattered sections of ILL. REV. STAT. ch. 110½) [hereinafter referred to as the amendments].

1087
article will discuss the changes brought about by the Act and amendments in each of these areas.

**Due Process Considerations**

The Act and amendments afford the disabled person substantially greater procedural protection than did the former guardianship law. The questions of how much and what sort of process is due an alleged incompetent has been the subject of much commentary. If a guardianship action is seen as a protective proceeding initiated by concerned friends or relatives who seek no advantage for themselves other than the security of knowing that their loved one is properly cared for—to guard the health and promote the best interests of the alleged disabled person—then it may make sense to expedite the rescue attempt and to do as little as possible to discourage the efforts of the solicitous petitioners.

The literature suggests, however, that such a sanguine perception of guardianship proceedings is illusory. First, an assumption that guardianship is in the best interests of the ward always must be seriously questioned, despite the immediate appeal of the notion in many cases. Research has shown that protective intervention in the lives of mentally or physically disabled persons can cause a higher incidence of deterioration and death than would result without intervention, particularly if such intervention leads to institutionalization in a nursing home or mental hospital. While protective intervention may relieve concerned relatives or social workers of guilt and the feeling that a situation is out of control and nothing is being done, it is unlikely to pro-

7. *Protective Services, supra note 6, at 138-58; Aging, supra note 4, at 7, 23-24; Mitchell, supra note 6, at 462-65.*
tect the health or promote the welfare of the alleged disabled person. Procedural protections are necessary, therefore, to protect disabled persons from the deleterious effects of guardianship.

Second, due process is necessary to protect the alleged disabled person from his alleged protectors. There is often a conflict of interest between the guardian and ward when the principal issue in the guardianship action is the conservation of a ward's estate. The original guardianship act entitled an "Act regulating the estates of Idiots, Lunatics, and persons distracted" implicitly recognized this conflict by identifying "any creditor or relation" as preferred petitioners. This predecessor of the present law obviously sought to protect the interest of those who expected to gain from the ward's estate. The present law often serves the same result.

While this potential for conflict is most obvious where an estate is concerned, a conflict of interest may also arise between a guardian and ward regarding personal decisions. Examples of such decisions would be found in situations where a parent is a guardian and must decide whether or not to sterilize a sexually active, developmentally disabled woman or to preserve the life of a severely disabled or deformed infant. Research confirms that guardianship proceedings are initiated with surprising frequency to protect the interests of a guardian rather than the ward.

Third, due process protections are necessary because the complexity of the problems which a guardianship proceeding addresses demands carefully prepared evidentiary presentations and thorough cross examination. Guardianship determinations are difficult because of the

8. See Protective Services, supra note 6, at 138-58; Aging, supra note 5, at 22-24; Note, The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend? 73 Yale L.J. 676, 690 (1964) [hereinafter referred to as Disguised Opposition].
9. 1823 Ill. Laws § 1.
10. Until the eighteenth century, courts were very suspicious of the motives of heirs who sought guardianship over their relatives. In re Pfleghar, 31 Misc. 2d 244, 62 N.Y.S.2d 899 (Sup. Ct. 1946); Disguised Oppression, supra note 8, at 686. There is little recent evidence of such judicial suspicion. The appointment of relatives as guardians in Illinois generally has been favored and potential conflicts of interest ignored. In re Conservatorship of Browne, 54 Ill. App. 3d 556, 370 N.E.2d 148 (1977); Rathbun v. Rimmerman, 6 Ill. App. 2d 101, 126 N.E.2d 856 (1955).
vague standard by which the court must evaluate the competency of the alleged disabled person.\textsuperscript{13} It is axiomatic that people frequently make serious errors in judgment in personal and financial decisions, and that someone can always be found more capable of making any given decision than the person who actually makes it. This makes it exceedingly difficult to describe in objective terms the point where a person's judgment becomes so poor that substitution of judgment is always necessary.

While the judicial fact-finding process normally attempts to illuminate a factual situation which existed at one point in the past by examining the traces which it left behind, the process in a guardianship proceeding is essentially predictive. Our judicial system is not well fitted to make prophetic decisions.\textsuperscript{14} If society insists upon courts making such decisions, it is imperative that the alleged disabled person be given every opportunity to be competently represented and to direct his defense so that full development and probing of the evidence is possible.

Finally, the notion that the state shall not "deprive any person of life, liberty or property, without due process of law"\textsuperscript{15} demands that procedural protections be afforded. The delineation of what process is due an individual is dependent upon the particular situation and the importance of the rights involved. The more important the rights that are at stake, the more important the procedural safeguards surrounding those rights must be.\textsuperscript{16} Appointment of a guardian results in a total deprivation of control over property. It may result in deprivation of a number of recognized liberty interests, such as the right to go from place to place at will,\textsuperscript{17} to meet with persons in public places,\textsuperscript{18} to enjoy privacy of marriage and family life,\textsuperscript{19} and to determine appropriate medical care.\textsuperscript{20} As appointment of a guardian frequently leads to institutionalization,\textsuperscript{21} and since institutionalization may result in death,\textsuperscript{22}

\begin{enumerate}
\item Alexander, supra note 5, at 1015-16.
\item Id. at 1016-17. See also Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693 (1974), for a discussion of the general problem of making prospective judicial findings.
\item U.S. Const. amend. XIV, § 1.
\item Speiser v. Randall, 357 U.S. 513, 520-21 (1958).
\item Cf. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), where the Court, reviewing a law prohibiting vagrancy, extolled the virtue of being able to walk about.
\item Cf. Coates v. City of Cincinnati, 402 U.S. 611 (1971) (statute prohibiting persons to gather on sidewalk held to be violative of due process).
\item Roe v. Wade, 410 U.S. 113 (1973).
\item See Horstman supra note 5; Levy supra note 12; Morris supra note 12.
\item See Protective Services, supra note 6, at 142-53; Horstman, supra note 5, at 274-75.
\end{enumerate}
appointment of a guardian may result in a deprivation of life. An alleged incompetent therefore ought to be afforded the full panoply of due process rights afforded by our judicial system.

In spite of these considerations, due process protections under the Illinois Probate Act as it existed in 1978 were minimal. Summons had to be served on the alleged incompetent at least three days prior to the hearing. Personal service could be excused in favor of abode service or any other form of service provided for civil cases "upon good cause shown supported by affidavit." Notice of the proceedings was to be given to a designated relative, although failure to give such notice was not jurisdictional. The alleged incompetent "or any other interested person" could demand a jury, although failure to demand a jury waived this right regardless of the capacity or incapacity of the respondent to make a knowing waiver. The court could appoint a guardian ad litem, but the court was not required and seldom did make the appointment. The law did not recognize a right to appointed counsel or require the alleged incompetent's presence in court.

The stage was set for the new legislation by Rud v. Dahl, which challenged the paucity of procedural protections under the previous law. This action focused on three deficiencies in the law: the inadequacy of notice, the absence of a requirement of the presence of the alleged incompetent for adjudication of incompetency, and the lack of appointed counsel. The district court dismissed the complaint on procedural grounds and did not address the merits. The United States Court of Appeals for the Seventh Circuit reversed the district court's procedural decision, but rejected all of the plaintiff's claims on the merits. The court held that the summons served on the plaintiff informed him sufficiently of the pendency, time, date, and place of the hearing involved, as well as the nature of the proceeding, and was thus sufficient to meet the demands of due process. The court rejected plaintiff's claims that there was further need to inform the alleged incompetent of the proceedings.

23. ILL. REV. STAT. ch. 110 1/2, § 11-10(a) (1977).
24. Id. Provision for excusing personal service was almost limited to Illinois. See S. BRAKEL & R. ROCK, MENTALLY DISABLED AND THE LAW 258 (1971) [hereinafter referred to as BRAKEL & ROCK].
25. ILL. REV. STAT. ch. 110 1/2, § 11-10(b) (1977).
26. Id. § 11-10(c).
27. Id. § 11-10(e).
28. Id. See also Rankin v. Rankin, 322 Ill. App. 90, 54 N.E.2d 58 (1944).
30. 578 F.2d 674 (7th Cir. 1978).
31. See id. at 676.
32. Id. at 676-78.
incompetent of the effect of a finding of incompetency or to make efforts beyond the service of a brief summons to assure that the alleged incompetent was aware of and understood the proceedings. Rather, the court held that there was no necessity for the alleged incompetent to be present at the proceedings.33 Moreover, an alleged incompetent was held to have no right to appointed counsel.34 The Seventh Circuit observed that the deprivation of rights was less severe than in other proceedings where counsel was mandated; that "the technical skills of an attorney are less important, as the procedural and evidentiary rules of incompetency proceedings are considerably less strict than those applicable in other types of civil and criminal proceedings,"35 and that the costs associated with counsel would undermine the real purpose of incompetency proceedings: the conservation of the estate. In sum, the Seventh Circuit accepted the argument that the presumed benevolent intent of the petitioner in an incompetency hearing is an adequate substitute for the more traditional protections of counsel, notice, and confrontation of accusers and witnesses.

The Illinois General Assembly, in a roughly contemporaneous consideration of the issue, took the demands of due process more seriously. Both the Act and the amendments deal extensively with procedural protections for alleged disabled persons.36 As the amendments altered substantially every procedural protection provided by the Act, each procedural issue will be discussed separately.

One issue is provision for a guardian ad litem. The appointment of a guardian ad litem is an important procedural protection when a proceeding involves a person of uncertain mental capacity.37 Section 11a-10(a) of the Act, as amended,38 requires that the court appoint a guardian ad litem to represent the respondent.39 The guardian ad litem must be an attorney.40 The guardian ad litem may consult with specialists in the type of disability affecting the respondent.41

Under the Act, the guardian ad litem's duties consisted of personally interviewing the respondent prior to the hearing and informing the respondent orally and in writing of the contents of the petition and of

33. Id. at 678.
34. Id. at 679.
35. Id. at 678-79.
39. Id.
41. 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-10(a).
the respondent's rights under the Act.42 The amendments significantly alter the provisions of the Act dealing with the guardian ad litem. The appointment of a guardian ad litem may be excused, according to the amendments, "when as a result of personal observation of the respondent in open court, the court determines that such appointment is not necessary for the protection of the respondent or a reasonably informed decision on the petition."43 In very limited circumstances, there may be a respondent so obviously disabled or not disabled that a guardian ad litem is not required to inform and assist the respondent and a judge can make a disability decision in open court without the assistance of a guardian ad litem. The guardian ad litem's duties were changed by the amendments so that the guardian ad litem can be excused by the court, upon good cause shown, from informing the respondent orally and in writing of the respondent's rights and of the contents of the petition.44 If the respondent is comatose, profoundly retarded, or otherwise impervious to oral and written communications, the guardian ad litem only need personally observe the respondent.45 The other requirements of the Act providing for a guardian ad litem are unchanged.

Another important protection within the legal system is the right to counsel.46 Section 11a-10(b) of the Act, as originally drafted, mandated that "[t]he court shall require that the respondent be represented by counsel unless the court determines that the interests of the petitioner are not adverse to the respondent, and the guardian ad litem or respondent properly waives counsel."47 The Act directed the court to appoint counsel unless the respondent had his or her own counsel.48 Problems with the Act's initial approach to appointment of counsel were readily apparent: Because a guardianship action is by definition an adversary proceeding, the interests of the petitioner are always adverse to the respondent. Also, there was always a possibility that the guardian ad litem and respondent would have different perceptions of what was in the best interests of the respondent, making it inappropri-

42. Id.
43. 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-10(a). The amendments also provide that the guardian ad litem may be paid from funds appropriated for that purpose by the Illinois General Assembly if the respondent is unable to pay for the services of the guardian ad litem. Id. § 11a-10(c).
44. Id. § 11a-10(a).
45. Id.
47. ILL. REV. STAT. ch. 110/, § 11a-10(b) (Supp. 1978).
48. Id.
ate to allow the guardian ad litem independent authority to waive counsel.

These defects in the provision for the appointment of counsel were largely remedied by passage of the amendments. Under section 11a-10(b) of the amendments, the court is required to appoint an attorney if the respondent requests one or if the respondent takes a position adverse to the guardian ad litem. The court also may appoint an attorney if it finds that the interests of the respondent will be best served by the appointment.

This amendment is probably as good a solution as can be found to the problem of when counsel ought to be appointed in addition to the guardian ad litem. The guardian ad litem is responsible for representing the respondent. Traditionally, this has meant representing the respondent’s best interests as opposed to serving as an advocate for the respondent’s possibly ill-advised desires. If the respondent agrees with the guardian ad litem as to what is in his or her best interests, or if the respondent is absolutely incapable of forming or communicating a position independent of that of the guardian ad litem, there is no point in burdening the estate or the state with the added cost of independent counsel. Should the respondent request counsel, or indicate to the court that he or she is dissatisfied with the guardian ad litem’s representation by taking a position adverse to the guardian ad litem, counsel is necessary to assure the respondent due process. The amendment covers all of these contingencies.

A third basic due process requirement is notice of a hearing. Section 11a-10(d) of the Act and section 11a-10(e) of the amendments provide that, unless the respondent is the petitioner, he or she is to be served with a copy of the petition and a summons not less than

49. 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-10(b). Appointed counsel may be paid from funds appropriated by the Illinois General Assembly for that purpose if the respondent is unable to pay the fee. Id. § 11a-10(e).
50. Id. § 11a-10(b).
51. Id.
52. Id. § 11a-10(a).
53. For a discussion of the various roles which an attorney may assume while representing the mentally impaired, see Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 Tex. L. Rev. 424 (1966); Zenoff, Civil Incompetency in the District of Columbia, 32 Geo. Wash. L. Rev. 243 (1964).
54. 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-10(e).
57. 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-10(e).
fourteen days before the hearing. Personal service is required. Section 11a-10(d) of the Act require that notice of the time and place of hearing be given by mail or in person to the respondent and to others whose names appear in the petition fourteen days before the hearing. Under section 11a-10(d) of the Act, notice could be waived by the respondent or his attorney providing the waiver was in writing and the respondent attended the hearing or the guardian ad litem confirmed the waiver after conferring with the respondent. Under section 11a-10(f) of the amendments, notice of the hearing can be waived by any party without special procedures.

The right to a hearing, another basic procedural right, encompasses a number of subsidiary rights. Section 11a-11 of the Act recognizes that the respondent has the right to demand a jury of six persons to present evidence and to confront and cross-examine witnesses. The hearing may be closed to the public upon the request of the respondent, his counsel, or the guardian ad litem. The respondent is required to be present at the hearing unless his or her presence is excused for good cause shown. None of these rights are modified by the amendments.

The right to cross-examine witnesses includes the right to exclude hearsay testimony. The Act requires that, unless excused by the court for good cause shown, the person who prepared the report to the court required by section 11a-9 of the Act describing the respondent’s condition or the person who performed an evaluation upon which that report was based must testify. This should put an end to the prior practice under which respondents were routinely stripped of all of their civil rights and property on the basis of a doctor’s hearsay statements submitted in affidavit form.

The right to present evidence may include the right to appointed experts when pivotal questions require expert consideration. Section 58. Id.
60. 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-10(f).
65. Id.
66. Id.
69. See In re Conservatorship of Browne, 35 Ill. App. 3d 962, 343 N.E.2d 61 (1976), where this practice was condemned.
11a-11(c) of the Act\textsuperscript{70} requires the court to appoint one or more independent experts to be compensated from the estate or, if necessary, from state funds to examine the respondent if the respondent or his counsel requests such examination. The amendments allow the guardian ad litem or the court on its own motion to demand such an examination.\textsuperscript{71}

Due process protection also includes a right to considered, reviewable decisions.\textsuperscript{72} Section 11a-12 requires a court order adjudicating\textsuperscript{73} a person disabled to be in writing and to recite its factual basis. This requirement should have the effect of making judges consider more carefully the evidence before them.

The protective reach of due process does not end when a guardian is appointed. Section 11a-19 of the Act\textsuperscript{74} requires the court to provide a ward, at the time the guardian is appointed, with a written statement informing the ward of the right to petition for modification of the guardianship order or for termination of the adjudication of disability and revocation of the letters of guardianship at any time. A ward may request modification or termination of disability by any written communication to the court, including an informal letter.\textsuperscript{75} Upon receipt of such a letter, the court may appoint another guardian ad litem to prepare the ward's petition.\textsuperscript{76} Under the amendments, a ward is entitled to appointed counsel, to a jury of six persons, and to present evidence and confront and cross-examine witnesses in a modification or discharge hearing, just as in an initial hearing.\textsuperscript{77}

Other provisions of the Act and other aspects of mental health legislation also affect the procedural rights of alleged disabled persons. Under section 2-101 of the Illinois Mental Health Code,\textsuperscript{78} determinations of competency are not permitted in judicial proceedings held to determine whether a person is subject to involuntary admission or whether a person meets the standard for judicial admission to a mental health facility. Under section 9-11 of the Illinois Mental Health Code,

\begin{itemize}
  \item 70. ILL. REV. STAT. ch. 110\textsuperscript{1/2}, § 11a-11(c) (Supp. 1978).
  \item 71. 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-11(c).
  \item 73. Public Act 80-1415 required a finding of disability as a condition precedent to appointment of a guardian. ILL. REV. STAT. ch. 110\textsuperscript{1/2}, §§ 11a-3, 11a-12 (Supp. 1978). Under Public Act 81-795, an adjudication is required rather than a finding. 1979 Ill. Legis. Serv. P.A. 81-795, §§ 11a-12(b), 11a-12(c).
  \item 74. ILL. REV. STAT. ch. 110\textsuperscript{1/2}, § 11a-19 (Supp. 1978).
  \item 75. Ill. Legis. Serv. P.A. 81-795, § 11a-20(b).
  \item 76. Id.
  \item 77. Id. § 11a-21.
  \item 78. ILL. REV. STAT. ch. 91\textsuperscript{1/2}, § 2-101 (Supp. 1978).
\end{itemize}
in effect prior to 1979, separate determinations of incompetency were permitted in mental health proceedings with procedural standards different from those under the Illinois Probate Act. Authenticated transcripts of judicial proceedings for commitment remain admissible in evidence in wardship proceedings. If the petition is for the appointment of a guardian for a disabled beneficiary of the Veteran’s Administration, a Veteran’s Administration certificate that the beneficiary has been determined to be incompetent and in need of a guardian, a condition precedent to the payment of benefits, is prima facie evidence of the necessity to appoint a guardian.

Finally, section 11a-4 of the Act allows for appointment of temporary guardians. The procedures which must be followed to secure the appointment of a guardian are of necessity rather lengthy. Therefore, they may cause problems where an emergency health or financial problem necessitates emergency action. The Act allows, therefore, for temporary guardians “on such notice and subject to such conditions as the court may prescribe.” The temporary guardian only has such powers and duties as are specifically enumerated in the court order. These powers must be strictly circumscribed or they will subvert the entire procedural structure of the Act. A temporary guardianship is also strictly limited in time. It cannot exceed sixty days and the ward may at any time petition to revoke the appointment.

In sum, the provisions of the Act and amendments represent a revolutionary expansion of the rights of persons subject to guardianship proceedings. This in itself renders the Act noteworthy. Procedural protections are, however, only one of the features of the new legislation.

LIMITED GUARDIANSHIP: THE LEAST RESTRICTIVE ALTERNATIVE

A second pivotal principle of the guardianship legislation is that a mentally disabled person should not be deprived of his independence

79. Id. § 9-11.
82. Id.
83. Id.
84. Rule 12-8 of the Circuit Court of Cook County provides additional requirements for the appointment of a temporary guardian. The petition for a temporary guardian must state the facts upon which the petition is based. Notice of the hearing must be served by mail or in person on the alleged disabled person and the persons listed in the petition not less than three days before the hearing unless waived by the court.
to a greater degree than is necessary. The principle that disabled persons needing treatment or assistance should be subject to the least restrictive alternative means of delivering the services is at the heart of the mental health reform legislation in Illinois. This was first articulated as a basic constitutional principle in *Shelton v. Tucker* and has been adopted by subsequent lower court decisions.

The sections of the Act providing for limited guardianship are premised upon the idea of the least restrictive alternative. In a limited guardianship proceeding, as opposed to plenary guardianship, particular consideration is given to the ward’s total condition to the end that the ward is deprived only of such rights and powers as are warranted by his or her limitations. Limited guardianship has been acclaimed by commentators as avoiding the dehumanizing stigma of total incompetency while at the same time providing necessary protection for the ward. As one commentator has noted:

> For the majority of the mentally disabled loss of all civil rights and social rights is unnecessary and undesirable. There is therapeutic value in permitting mentally ill persons to perform certain normal functions which they are capable of performing, and in fact hospitals at times allow patients to do so despite the fact that they may be formally incompetent.

Under the Illinois Probate Act, competency was an all or nothing proposition. A person was presumed to be competent but, if the evidence supported a finding of incompetency, the only discretion left with the court was to determine whether the ward was incompetent to

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86. *Governor’s Commission*, supra note 3, at 126.
88. 364 U.S. 479 (1960). In *Shelton*, the Supreme Court declared unconstitutional an Arkansas statute that required teachers in state-supported schools to file affidavits as to their fitness and competence. The Supreme Court reasoned that the statute stifled fundamental personal liberties when the state goal of having competent teachers could have been achieved without such a broad intrusion into personal freedom. *Id.* at 488-90.
care for his or her person or estate.\textsuperscript{95}

In contrast, the new Act favors limiting guardianship to what is necessary under the circumstances. Section 11a-3(b)\textsuperscript{96} provides that:

Guardianship shall be utilized only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical, and adaptive limitations.\textsuperscript{97}

From the outset, the Act focuses the attention of the court upon the nature of the disability and upon how the disability actually affects the disabled person. Section 11a-3(a) defines the power of the court to appoint a guardian in terms of whether the ward's disability causes the ward to lack "sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person" or to be "unable to manage his estate or financial affairs."\textsuperscript{98}

Section 11a-9 requires a report which must contain 1) a description of the nature and type of the respondent's disability; 2) evaluations of the respondent's mental and physical condition and, where appropriate, educational condition, adaptive behavior, and social skills which have been performed within three months prior to filing the petition; 3) an opinion as to whether guardianship is needed and the type and scope of guardianship needed; and 4) a recommendation as to the most suitable living arrangement, treatment, or habitation plan for the respondent and the reasons for the recommendation.\textsuperscript{99} The report must

\textsuperscript{95} ILL. REV. STAT. ch. 110½, § 11-4 (1977).
\textsuperscript{96} Id. § 11a-3(b) (Supp. 1978).
\textsuperscript{97} Id.
\textsuperscript{98} Id. § 11a-3(a). The history of efforts to define when a conservator or guardian may be appointed in Illinois reveals a developing understanding of the nature of mental disability. Under the 1823 act, the mere possession of property coupled with being an idiot, lunatic, or distracted person was sufficient grounds for a conservator to be appointed. 1823 Ill. Laws § 1. Under the 1869 act, habitual drunkards whose intoxication impaired their minds and who were thus incapable of managing their estates were also subject to being found incompetent. 1869 Ill. Laws § 1. The 1874 act, which provides the basis for the definition which existed until 1978, added spendthrifts. 1874 Ill. Laws § 1. The 1887 act was the first to allow the appointment of conservators for persons committed to mental institutions. 1887 Ill. Laws §§ 24, 25. 1903 was the first year the probate court was required to consider not only mental disability, but the ability of the respondent to manage his or her property as well. 1903 Ill. Laws § 1. In 1919, the physically disabled were added to the list of those subject to a finding of incompetency. 1919 Ill. Laws §§ 1, 52. Old age was added as a ground for incompetency in 1939. 1939 Ill. Laws § 112.

However, it has remained the law in Illinois that physical incapacity or old age alone, without consideration of ability to manage person or estate, is insufficient to support a finding of incompetency. See In re Conservatorship of Stevenson, 44 Ill. 2d 525, 256 N.E.2d 766, cert. denied, 400 U.S. 850 (1970); Loss v. Loss, 25 Ill. 2d 515, 185 N.E.2d 228 (1962); McDonald v. LaSalle Nat'l Bank, 11 Ill. 2d 122, 142 N.E.2d 58, appeal dismissed, 355 U.S. 271 (1957); In re Estate of Peak, 53 Ill. App. 3d 133, 368 N.E.2d 957 (1977).

\textsuperscript{99} ILL. REV. STAT. ch. 110½, § 11a-9(b) (Supp. 1978).
be filed with the petition and, if no report is presented, the court must
order one to be presented at least ten days before the hearing.100 At
least one of the persons making the evaluations or the report must tes-
tify at the hearing unless excused by the court.101

While the report is to be signed by a physician,102 much of the
evidence requested is non-medical in nature. The Act recognizes that a
number of persons may be involved in the evaluation. The most useful
information on a respondent's condition may be available from a psy-
chologist, social worker, or other professional. Under the Act, such in-
formation can and should be included in the report. Further, the
person testifying under section 11a-11(d) need not be a physician.103 A
frequent criticism of guardianship actions in the past has been that
courts have abdicated to physicians the responsibility of making the
legal decision on the need for guardianship.104 Under the new Act, this
medical expertise should be de-emphasized and attention focused upon
the practical effects of the disability.

At the hearing, the court is instructed to inquire regarding the na-
ture and extent of respondent's general intellectual and physical func-
tioning; the extent of the impairment of respondent's adaptive behavior
if he is developmentally disabled, or the nature and severity of his
mental illness if he is mentally ill; the understanding and capacity of
the respondent to make and communicate responsible decisions; the
ability of the respondent to manage his estate and financial affairs, the
appropriateness of proposed alternate living arrangements; and any
other area of inquiry deemed appropriate by the court.105

The court may not appoint a plenary guardian unless the respon-
dent is found totally without capacity to make or communicate respon-
sible decisions concerning his or her person or to manage his or her
estate or financial affairs.106 Should the respondent be adjudged dis-
abled and lacking some, but not all, capacity, then the court must ap-
point a limited guardian.107 In either case, the court must enter a

100. Id. The report does not become part of the public record and is available only to the
court, the parties, their attorneys, and the guardian ad litem. Id. § 11a-9(c).
101. Id. § 11a-11(d).
102. Id. § 11a-9(a)(5).
103. Id. § 11a-11(d).
104. See ALEXANDER & LEWIN, supra note 12, at 18-25; Conservatorship, supra note 91, at
1119-22; Regan, Protective Services for the Elderly: Commitment, Guardianship, and Alternatives,
13 WM. & MARY. L. REV. 569, 603-04 (1972); Shah, Some Interactions of Law and Mental Health
105. ILL. REV. STAT. ch. 110 1/2, § 11a-11(e) (Supp. 1978).
107. Id. § 11a-12(c).
written order stating the factual basis for its findings. If the court decides to appoint a guardian, it must give due consideration to the preference of the disabled person as to the choice of the guardian, although the court retains discretion over the appointment.

Under the Act, as initially adopted, a limited guardianship order removed from a ward only those legal abilities specifically transferred from the ward to the guardian by the order. Under the amendments, the appointment of a limited guardian deprives the ward of only those powers specifically conferred upon the guardian. An order appointing a limited guardian of the estate, on the other hand, transfers all authority provided for under the Act not specifically reserved to the ward to the guardian. This was thought necessary to allow limited guardians to deal with financial institutions without requiring constant review by the court.

Section 11a-14.1 of the Act provides that no guardian may place his or her ward in a treatment center without court permission, although the conditions under which placement will be permitted may be specified in the original order. There is ample evidence that in other states guardianship with subsequent institutional placement has been used to subvert mental health code procedural protections. The passage of this provision is intended to eliminate this type of subterfuge in Illinois.

The duties of a guardian as defined in the Act include assisting the ward "in the development of maximum self-reliance and independence." The guardian is also required to file periodically a report including a recommendation as to the need for continued guardianship. The Act thus contemplates temporal limitations as well as structural limitations on guardianship. Finally, the ward may move for modification or termination of the guardianship at any time, thus further limiting the guardianship.

108. Id. §§ 11a-12(b), 11a-12(c).
109. Id. § 11a-12(d).
111. Id. P.A. 81-795, § 11a-14(a).
112. Id. § 11a-14(b).
116. Id. § 11a-17(b).
117. Id. § 11a-5(c).
A number of provisions of the new legislation can be considered devices for improving and expediting the planning and handling of estates of disabled persons. Several of these provisions deal with the choice of guardian. Section 11a-5 of the Act generally follows former law as to who may serve as a guardian. However, the court must make a finding that the guardian is capable of providing an active and suitable program of guardianship for the disabled. Although courts will seldom refuse to make this finding, the provision allows the court to refuse to grant a guardianship to a clearly inappropriate petitioner. Under section 11a-5(b), any public agency or private not-for-profit corporation providing services compatible with the ward’s disability may be appointed as guardian of the person or estate or both. A corporation qualified to accept and execute trusts also may be appointed guardian for an estate. A guardian for an estate must be a resident of Illinois. An agency or corporation may not be appointed guardian if it is providing residential services for the ward.

The living will, an important estate planning provision enacted in 1977, is carried forward in section 11a-6. This provision allows a person still of sound mind and memory to designate the person or persons whom he or she wishes as his or her guardian should he or she become disabled. If such a document is executed and witnessed in the same form as a will, it will have prima facie validity. Final discretion to appoint a guardian, of course, resides in the court. But the court must appoint the designated guardian if it finds the appointment to be in the best interests of the ward.

A guardian for a disabled child may be designated by the child’s

118. Id. §§ 11a-15 (successor guardians), 11a-16 (testamentary guardians).
120. ILL. REV. STAT. ch. 110½, § 11-3 (1977).
122. Id. § 11a-5(c).
123. Id. § 11a-5(a).
124. Id. § 11a-5(b).
127. Id.
128. ILL. REV. STAT. ch. 110½, § 4-3 (1977).
parents by will.\textsuperscript{130} Under section 11a-16 of the Act,\textsuperscript{131} a parent who had been appointed as a guardian or conservator of his or her child could designate by will a testamentary guardian who would serve subject, of course, to court order. Under the amendment,\textsuperscript{132} a parent of an adjudged disabled child may designate a guardian by will to become effective on the death, incapacity, resignation, or removal of the prior conservator or guardian. If no conservator or guardian is acting at the time of the death of the parent, the designated person may petition to be appointed guardian.\textsuperscript{133} The court shall appoint the designated guardian if it finds that the appointment will serve the best interests or welfare of the ward.\textsuperscript{134}

The legislation also provides for successor guardians. Section 11a-15 of the Act\textsuperscript{135} provided that at the time of the initial hearing a successor guardian could be appointed. The appointment was to become effective upon the death, incapacity, resignation, or removal of the original guardian. Due to concern that a substantial period of time might elapse between the initial appointment of a successor and the guardian's succession to office and the fact that the successor could become unsuitable during that time, the amendments eliminated the automatic appointment provisions.\textsuperscript{136} The amendments also alter the original act by requiring that a successor be appointed or disability be terminated if the original guardian becomes unable to serve.\textsuperscript{137} This should eliminate a common situation of judicially determined incompetents without guardians being unable to obtain medical care because of their inability to provide consent for their own treatment.

Section 11a-23\textsuperscript{138} carries forward another recent innovation—durable powers of attorney. Under this section, if a person, while competent, executes a valid written instrument of agency before the filing of a petition for adjudication of disability, the principal will be deemed competent for the purpose of the agency and for the purposes of the agent's dealing with third persons until the principal is adjudged to be a disabled. A third person dealing with the agent may presume that the instrument is valid and that the principal was competent at the time of

\textsuperscript{130} Id. § 11a-16.
\textsuperscript{132} 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-16.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. § 11a-23, as amended by P.A. 81-795 § 11a-23 (1979).
execution, unless he has knowledge to the contrary. Powers of attorney executed by persons with deteriorating intellectual or physical capacity while competent may be used to avoid later costs incident to guardianship.

Provisions found elsewhere in the mental health legislation will also influence planning for disabled persons. Section 3-907 provides that any person legally incompetent solely by reason of a court order adjudicating the ward mentally ill entered prior to January 1, 1964 shall be deemed legally competent as of June 29, 1979, unless prior to that time a guardian was appointed under the Illinois Probate Act. Prior to 1964, if a person was committed to a hospital as mentally ill he or she was automatically found to be incompetent. A conservator could then be appointed in probate court without a finding of incompetency. Hundreds of persons, many with conservators actively involved with their estates or persons, are restored under this provision.

Section 4-207 of the Illinois Mental Health Code provides that, six months prior to his or her eighteenth birthday, a client receiving residential care must be evaluated to determine capacity to consent to residential placement. If capacity is found not to exist, the client's parents or, if they are unwilling, the facility director must initiate guardianship proceedings. Moreover, an agency providing non-residential services under contract with the Illinois Department of Mental Health must, six months prior to the eighteenth birthday of a client, notify the client's parents or another interested party of the potential need for guardianship. If an evaluation is done and the client is found to need guardianship, the client's parents or the facility or department must file a guardianship petition.

Finally, contemporaneous legislation established the office of state guardian and substantially changes the office of public guardian. Under the public guardian law, a state guardian's office is established as part of the Illinois Guardianship and Mental Health Advocacy Commission. The state guardian can serve as guardian and guard-

139. Id. ch. 91½, § 3-907 (Supp. 1978).
140. Id.
141. Id. § 1-8 (1963).
142. Id. ch. 3, § 113 (1963).
143. Id. ch. 91½, § 4-207 (Supp. 1978).
144. Id.
145. Id. § 4-207(b).
146. Id.
147. Id. § 701-35.
148. Id. § 703.
ian ad litem for persons without other guardianship alternatives.\textsuperscript{149} The state guardian also can assist the court in guardianship proceedings,\textsuperscript{150} supervise guardians,\textsuperscript{151} assist other guardians in filing reports,\textsuperscript{152} and offer guidance and advice to potential wards upon request.\textsuperscript{153} The state guardian is not to be appointed if suitable alternatives are available.\textsuperscript{154} The public guardian also is given responsibility for persons whose estates exceed the small estate maximum established by the Illinois Probate Act who are in need of public guardianship services.\textsuperscript{155} Although there has been much abuse of public and state guardians,\textsuperscript{156} the frequent lack of capable and interested relatives and friends to serve as guardians makes such offices necessary.

**CONCLUSION**

Fifty-two years ago, Justice Brandeis wrote that: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding."\textsuperscript{157} For many years, Illinois courts have relied upon the good intentions of those who have sought to have others declared incompetent and have ignored this warning in utilizing their authority. The legislature has finally paid heed and enacted legislation impressive both in its attention to procedural due process and its substantive limitations on the intrusion of the state into the lives of its citizens. It is hoped that the courts will adopt this concern as their own, and guardianship actions in the future will be accorded the respect and attention which they are due.

\textsuperscript{149} Id. § 730.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} 1979 Ill. Legis. Serv. P.A. 81-795, § 11a-17(b).
\textsuperscript{153} ILL. REV. STAT. ch. 91½, § 733 (Supp. 1978).
\textsuperscript{154} Id. § 731.
\textsuperscript{155} 1979 Ill. Legis. Serv. P.A. 81-1052, § 13-5.
\textsuperscript{156} See generally Levy supra note 12; Mitchell supra note 6; Morris supra note 12.
\textsuperscript{157} Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).