

Limitations on Individual Rights in California Incompetency Proceedings

I. INTRODUCTION

As an old man Sophocles was taken to court by his son; the charge, incompetency. The playwright rested his defense on his recent literary output, reciting passages of his work to the jurors. Evidently his poetry was testimony enough to convince the Athenian tribunal of his competence. The case was dismissed, the complainant fined, and the defendant allowed to depart in honor and triumph; justice (poetic) had prevailed.¹

As the above passage indicates, the law of incompetency has a long history. Nevertheless, that history has been an uneventful one, for the law in present-day California regarding incompetency and guardianship² is remarkably similar to that of the ancients. It is not surprising that much of it is ill-adapted to the needs of twentieth century society.

The considerable discretionary powers of judicial officials in guardianship proceedings have undoubtedly had much to do with the longevity of the institution, allowing it the breathing room required to adapt to contemporary circumstances. The normative

¹E. HAMILTON, *THE GREEK WAY* (1930).

²The terms "incompetency proceedings" and "guardianship proceedings," and "incompetent" and "ward," are used interchangeably throughout the article.

The statutory provisions concerning guardianship of incompetent persons in California are found in CAL. PROB. CODE § 1460 *et seq.* (West 1956 and West Supp. 1974). The California Legislature added a new division, Division 5, to the Probate Code in 1957, creating and defining the office of conservator and the concept of conservatorship in an attempt to give increased flexibility to traditional guardianship. CAL. PROB. CODE § 1701 *et seq.* (West Supp. 1974). For the purposes of this article, however, guardianship and conservatorship are sufficiently similar that the term guardianship shall refer to conservatorship, unless otherwise noted. The statutory citations are to the guardianship statutes. For a discussion of the differences between guardianship and conservatorship, see Lord, *Conservatorship v. Guardianship*, 33 L.A. BAR BULL. 5 (1957) [hereinafter cited as Lord]; CALIFORNIA CONTINUING EDUCATION OF THE BAR: CALIFORNIA CONSERVATORSHIPS, *Appendix* (1968) [hereinafter cited as C.E.B.]. See REPORT OF SENATE INTERIM JUDICIARY COMMITTEE 1957, 1 APPENDIX TO CALIF. SENATE 487 (Reg. Sess. 1957) [hereinafter cited as JUDICIARY COMMITTEE] for a statement of the Legislature's purposes in enacting the conservatorship section of the Probate Code.

effect of contemporary ideologies and community standards on the judicial exercise of these discretionary powers has enabled the institution of guardianship to respond to the needs of its contemporary society with at least the modicum of success necessary for the institution to survive. But its endurance record should not lure us into a passive acceptance of the existing institution and its law.

This article attempts to point out the short-comings of incompetency legislation in California, and suggest ways in which the law might be restructured in order to protect the interests of both the incompetent and the society at large. The first part of the article is devoted to an examination of the development, function and scope of guardianship, and an evaluation of the institution as a protective device for the mentally impaired. In the second part of the article, current law and practice in California is discussed in light of the protection afforded to individual rights. Finally, certain constitutional objections are raised to the infringement on protected rights which is occasioned by a determination of incompetency.

II. THE DEVELOPMENT AND NATURE OF GUARDIANSHIP AS AN EXPRESSION OF THE PARENS PATRIAE POWERS OF THE STATE

A. GUARDIANSHIP IN HISTORICAL PERSPECTIVE

Social and legal institutions designed to protect certain helpless individuals have existed throughout history.³ Guardianship is such an institution, and is imposed on those individuals who are deemed by the state to be incapable of managing their own affairs. The institution is primarily financial in nature⁴ and is not to be confused with civil commitment of the mentally ill.⁵

³See generally, 4 R. POUND, JURISPRUDENCE 311-39 (1959).

⁴*In re Coburn*, 165 Cal. 202, 216, 131 P. 352, 358 (1913); *In re Des Granges*, 102 Cal. App. 592, 596, 283 P. 103, 105 (1929); see generally, Types of Guardianship, *infra* Part III.A.

⁵A determination of incompetency should not be confused with a determination of insanity or mental impairment requiring hospitalization. *Kellogg v. Cochran*, 87 Cal. 192, 197, 25 P. 677, 678 (1890); *In re Zanetti*, 34 Cal. 2d 136, 143, 208 P.2d 657, 660 (1949); *Hsu v. Mt. Zion Hospital*, 259 Cal. App. 2d 562, 572-73, 66 Cal. Rptr. 659, 664-65 (1968). Unlike civil commitment, guardianship does not contemplate confinement. *In re Zanetti*, 34 Cal. 2d 136, 143, 208 P.2d 657, 660 (1949). Furthermore, incompetency proceedings are of much earlier origin. For a phenomenological treatment of the history of madness, recreating the social perspective of the seventeenth century which sought to deal with the mentally ill by, for the first time, confining them in asylums, see M. FOUCAULT, MADNESS AND CIVILIZATION (1965). Even in colonial America, it was not uncommon that legislation designed to protect the estates of insane persons was enacted before any governmental concern was expressed for the personal welfare of the mentally disabled. THE MENTALLY DISABLED AND THE LAW 250 (Brakel & Rock eds. 1971) [hereinafter cited as Brakel].

Typically, the duty and right of exercising this protective power has been vested in the effective governing unit of the society in question. In early Rome the family filled the role of protector. The XII Tables, the oldest body of Roman Law (*circa* 450 B.C.), provides for the appointment of *curators* to manage the affairs of madmen and children who had reached puberty but were not yet twenty-six. With respect to madmen, the words of the XII Tables are: "If a man is mad, or a spendthrift, and has no guardian, let his agnates and men of his *gens* have power over him and his money."⁶ The common law origins of guardianship can be traced to medieval England, where the lord of the manor functioned as the guardian of idiots and lunatics,⁷ a position eventually assumed by the king⁸ and his chancellor,⁹ as *parens patriae*.¹⁰ In the United States, each state, as sovereign, assumed the responsibility for the mentally impaired within its territory; jurisdiction over the person and property was as-

In California, the statutory provisions relating to guardianship are found in the Probate Code, while those relating to civil commitment are contained within the Welfare and Institutions Code, under the Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE § 5000 *et seq.* (West 1972 and West Supp. 1974). The terminology of the two acts is similar (they both use the term "conservatorship") and should not be confused.

⁶W. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 552-53 (1876).

⁷Feudal wardship of the mentally impaired extended to idiots — those who were born with a severe mental handicap, or who developed one early in childhood; and lunatics — those who became incompetent after attaining majority. Wardship over an idiot meant a right to the rents and profits during his life, after furnishing him an allowance for support. In the case of a lunatic, the lord was given no rights to the profits of the lands during his custody, but was responsible for maintaining the property of the incompetent and for collecting the rents and profits against the day when the lunatic might be restored to competency. Wynn, *A Vaccum in Our Law: Management of Property of Quasi-Incompetent persons*, 95 TRUSTS & ESTATES 879 (1956) [hereinafter cited as Wynn]; Annot., 33 A.L.R.2d 1145, 1146-47 (1954).

⁸In 1324 a statute was enacted (17 Edw. II, Ch. 9, 10) in which the rights of duties of wardship were surrendered to the King. However, it is said this act merely confirmed a right recognized earlier in the reign of Edward I. 1 F. POLLOCK & F. MATTLAND, THE HISTORY OF ENGLISH LAW 464 (2d ed. 1898); Annot., 33 A.L.R.2d 1145, 1146-47 (1954).

⁹In cases of idiocy and lunacy, the chancellor acted as a special servant to the king, appointed for the purpose of the king's sign manual, and not as a court of chancery. American courts have disagreed as to whether, because of this fact, jurisdiction over incompetents is inherent in general equity jurisdiction. Annot., 33 A.L.R.2d 1145, 1146 (1954); *see Sullivan v. Dunne*, 198 Cal. 183, 189, 224 P. 343, 345 (1926) where the court states that guardianships were in the general jurisdiction of the courts of chancery.

¹⁰The term is derived from the notion that the king's role is one of a parent to his country. Of this role, Blackstone says: "The king, as *parens patriae*, has the general superintendence of all charities." 3 W. BLACKSTONE, COMMENTARIES 427 (1783). In *Kent v. United States*, 383 U.S. 541, 555 (1966), the Supreme Court describes the role of the state as *parens patriae* in terms of its being a "parental" as opposed to an "adversary" role. *See also In re Gault*, 387 U.S. 1, 16 (1967), where the Supreme Court states that the meaning of the phrase is "murky."

sumed by the courts of equity.¹¹

In California, the authority to make determinations of incompetency and to appoint guardians is vested in the superior courts.¹² Their jurisdiction is twofold, with one aspect terminating upon the establishment of incompetency and appointment of a guardian, and the other continuing for the duration of the guardianship.¹³

Children and the mentally impaired have always been the main classes for whom the state has exercised its *parens patriae* powers. While the category of children has found an easy definition in age, no such criterion has existed to delimit the boundaries of mental infirmity. In California, the statutory criteria for determining who belongs to the class of "incompetent persons" are set forth in Section 1460 of the Probate Code, which provides, in pertinent part:

As used in this division of this code, the phrase "incompetent person," "incompetent," or "mentally incompetent," shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.¹⁴

At present, the assertion of the paternalistic power of the state to decide what is in the best interests of its mentally impaired citizens affects the incompetent person in two ways. First of all, upon the determination of incompetency, he is prohibited from exercising certain rights which other adult citizens are normally free to exercise, such as the right to contract and convey,¹⁵ and the right to pursue certain professions.¹⁶ Secondly, upon the determination of incompetency, a guardianship is imposed,¹⁷ whereby another individual (the guardian) is authorized to act in the incompetent's stead as an

¹¹Brakel, *supra* note 5.

¹²CAL. PROB. CODE § 1460 (West Supp. 1974).

¹³Browne v. Superior Court of San Francisco, 16 Cal. 2d 593, 107 P.2d 1 (1940).

¹⁴CAL. PROB. CODE § 1460 (West Supp. 1974).

¹⁵CAL. CIV. CODE § 40 (West 1954); Hsu v. Mt. Zion Hospital, 259 Cal. App. 2d 562, 573, n.5, 66 Cal. Rptr. 659, 665, n.5 (1968).

¹⁶See, e.g., CAL. BUS. & PROF. CODE § 6007 (West 1964) (member of California Bar enrolled as inoperative member upon adjudication of incompetency); CAL. BUS. & PROF. CODE § 23102 (West 1964) (license of alcoholic beverage licensee suspended or revoked upon adjudication of incompetency); CAL. BUS. & PROF. CODE § 9028 (West 1964) (license of social worker suspended or revoked upon adjudication of incompetency); 31 OPS. CAL. ATTY. GEN. 186 (1958) (physician suspended from practice upon adjudication of incompetency).

¹⁷CAL. PROB. CODE § 1462 (West 1956).

See Murphy, *Incompetence and Paternalism*, forthcoming in ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE, for a philosophic argument that however plausible it may be to regard a judgment of incompetence as a necessary condition for justified paternalistic intervention, a judgment of incompetence ought never to be regarded as a sufficient condition for such intervention.

officer of the court¹⁸ for the purpose of performing certain acts which the incompetent can no longer legally perform.

Although the California Supreme Court has declared that incompetency proceedings are designed for the protection of the incompetent from others,¹⁹ they are clearly designed to protect the interests of society as well.²⁰ While guardianship is primarily a financial institution, the scope of rights curtailed is not limited to those concerning the management of property. Indeed, the protection of society is the only plausible rationale for the curtailment of rights such as the right to engage in a particular licensed profession.

Even in the economic sphere the purpose of guardianship is broader than mere protection of the incompetent. In his protective role, the guardian protects the ward from others who may want to take advantage of him, and conserves the estate and manages the assets. He protects society, in turn, by keeping the ward from becoming a public charge. Moreover, he resolves the problem posed by the existence of a propertied individual who is not allowed to perform certain legal acts in the face of situations demanding the performance of those acts.²¹ The value to a highly commercial society of finality in business transactions is, naturally, very great.²² The

¹⁸*City of Downey v. Johnson*, 263 Cal. App. 2d 775, 69 Cal. Rptr. 830 (1968).

¹⁹*In re Zanetti*, 34 Cal. 2d 136, 143, 208 P.2d 657, 660 (1949).

²⁰See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943), for a systematic study of legal phenomena as social phenomena in an effort to ascertain what social interests have pressed or are now pressing for recognition and satisfaction and how far they have been or are now recognized and secured. Applying Pound's analysis, three social interests are asserted in guardianship — first, the social interest in the general security expressed in the interest of society in the security of acquisition and the security of transactions; second, the social interest in conservation of social resources including the human assets of society expressed by the *parens patriae* power of the state over infants, lunatics and idiots; and third, the social interest in the individual life which has been recognized in three forms in common law or in legislation, *i.e.*, individual self-assertion, individual opportunity, and individual conditions of life. The interest in free self-assertion includes physical, mental and economic activity, its most important phase being the social interest in freedom of the individual will — the claim or interest, or policy recognizing it, that the individual will shall not be subjected arbitrarily to the will of others. Pound points out that the interest in the general security was the dominant concern of the nineteenth century, and that the interest in individual life is emerging as the most important social interest of the twentieth century. This seems to indicate that this is a propitious time to question the compromise of individual interests under guardianship law.

²¹A contractual act may be challenged on the grounds of incompetency when no adjudication of incompetency has been made. For a thorough discussion of the proof required to render a contractual act void or voidable in this type of situation, see Weihofen, *Mental Incompetency to Contract or Convey*, 39 SO. CAL. L. REV. 211 (1966) [hereinafter cited as Weihofen].

²²"The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." Strong, J., in *Murray v. Charleston*, 96 U.S. 432, 449 (1877).

institution of guardianship provides the requisite certainty to financial transactions involving an incompetent or his property,²³ so that their commercial usefulness will not be impaired. In addition, potentially significant amounts of property or capital are not withheld from the flow of commerce and the activity of the marketplace.

B. THE SCOPE AND APPROPRIATENESS OF GUARDIANSHIP TODAY

Any evaluation of guardianship as a protective institution must begin with an inquiry as to whether it protects those people who do, in fact, need its protection. The inescapable conclusion is that while many people do benefit from guardianship, a great many do not. Those who do not benefit fall within two discernable groups, those who need some form of protection and assistance in managing their affairs, but do not receive it under the current law, and those for whom guardianship is established, but whose circumstances do not warrant it.

1. THE PROBLEM OF THE UNAVAILABLE GUARDIANSHIP

The first group — those persons in need of assistance yet not receiving it — is made up of two subgroups. These include the “de facto incompetent,” who for some reason has not been adjudicated incompetent, but who would be so adjudicated if brought to court; and the “quasi-incompetent,” who, while not sufficiently impaired to be determined incompetent by law, nevertheless needs assistance in managing his property.

Any one of a variety of factors could lead a permanently or severely impaired individual to avoid guardianship if possible. The rigidity of guardianship as a financial device,²⁴ the impersonality of

²³In California an adjudication of incompetency fixes the status of the person as an incompetent until the guardianship is terminated. A judicial determination of incompetency is an adjudication in rem. As such it is conclusive notice to all the world, and is binding on all persons, even though they may only have constructive notice of it. *Kellogg v. Cochran*, 87 Cal. 192, 195, 25 P. 677, 678 (1890); *Hellman Commercial Trust & Savings Bank v. Alden*, 206 Cal. 592, 604, 275 P. 794, 800 (1929). *Weihofer* notes that the brief and summary character of most incompetency hearings gives reason to question whether a determination based on such typically minimal hearings should be conclusive of the person's condition at some later time, pointing out that in some states (other than California) an adjudication of incompetency raises only a rebuttable presumption of incompetency at a time subsequent to the adjudication. *Weihofer*, *supra* note 21, at 212-13.

²⁴[A] guardian must petition the court for instructions or for authority to make sales or investments at practically every turn. In a great many cases, this burdens the courts with perfunctory review of acts which an experienced and qualified guardian is perfectly competent to undertake without court approval.

JUDICIARY COMMITTEE, *supra* note 2, at 488. The kinds of transactions and investments which a guardian can make under such restrictions are obviously extremely limited.

banks or other large institutions which may be appointed as guardian, and the general stigma²⁵ and cost²⁶ associated with the institution may all make guardianship so unattractive that opposition by the de facto incompetent is likely.

Legislation has attempted to resolve some of these problems in California. The problem of cost is solved for the welfare recipient or the very poor by the offices of public guardianship (should the individual be lucky enough to live in a county which has one).²⁷ Provisions now exist for the initiation of proceedings by the incompetent himself, should he so desire,²⁸ and for the option of petitioning for a conservatorship rather than a guardianship, which, though almost exactly the same as a guardianship, substitutes the more palatable label "conservatee" for that of "incompetent."²⁹

²⁵Discussing the disadvantages of guardianship, one author commented:

There had long been a feeling on the part of many attorneys and trust officers that many situations existed in which a guardian should be appointed to care for the person and protect property of individuals who were not in a position to care for themselves or their property, but where no action was taken because of objection to the words "incompetent" and "incompetency". The writer personally has experienced cases in which members of the family would shrink from taking such a step when it was explained that it would be necessary to have the person adjudicated incompetent.

Lord, *supra* note 2, at 5-6.

²⁶Wynn, *supra* note 7, at 880.

²⁷CAL. WELF. & INST. CODE § 8000 *et seq.* (West 1972 and West Supp. 1974). On the other hand, the person with the small but significant estate has no alternative but to bear the costs should he be adjudicated incompetent.

²⁸CAL. PROB. CODE § 1754 (West Supp. 1974) (limited to conservatorships). Under both conservatorship and guardianship the proposed ward may nominate a guardian, subject to the court's approval. CAL. PROB. CODE §§ 1752, 1753, 1463 (West Supp. 1974).

²⁹While the grounds for appointment of a conservator are substantially the same as for a guardian, *see* CAL. PROB. CODE § 1751 (West Supp. 1974), no formal adjudication of incompetency per se is necessary in conservatorship proceedings. In explaining the purpose of the conservatorship legislation, the State Bar stated:

A great many elderly or physically or mentally ill persons are reluctant to ask that a guardian be appointed to conduct their affairs because of the label of 'incompetent' which attaches to them under the present law. . . . The proposed legislation, by calling the person requiring assistance a 'conservatee,' and the person appointed by the court to assist him a 'conservator,' and by eliminating all reference to 'incompetency' seeks to overcome the reluctance to use the protection which should be available under the law.

JUDICIARY COMMITTEE, *supra* note 2, at 487. However, the apparent reluctance of judges and attorneys to use conservatorship in certain California counties seriously undermines the value of the law. Zillgitt, *Planning for Incompetency and Possibilities and Practice under the Conservatorship Law*, 37 SO. CALIF. L. REV. 181, 205-08 (1964) [hereinafter cited as Zillgitt] (comparing the use of conservatorship in various California counties). While under the conservatorship law the conservator may be granted additional powers in administering the estate, CAL. PROB. CODE § 1853 (West Supp. 1974), even in those jurisdictions in which conservatorship is commonly used, these "additional powers" are infrequently granted. Zillgitt, *supra*.

If he can avoid an incompetency hearing, the de facto incompetent can turn to various alternatives, such as the inter vivos trust, power of attorney, contract for lifetime personal care, annuity, or transfer of property to another.³⁰ The inter vivos trust is probably the most universally attractive, and certainly much safer than the power of attorney, but its feasibility requires a large estate.³¹ It is the middle income citizen who bears the brunt of the law's inadequacies in this respect, limited as he is to choices he cannot afford, or probably does not want.

Under Probate Code Section 1462, guardianship is mandatory upon a determination of incompetency.³² Thus if an individual has not carefully planned for his future incompetency, his estate will be automatically tied up in guardianship upon a determination of his incompetence. The inadequacies of guardianship in certain situations indicates that the judge should consider alternative protective devices, and institute whichever would best respond to the incompetent's needs.³³

³⁰For a survey of alternatives to guardianship, see generally, Zillgitt, *supra* note 29, at 182-85; C.E.B., *supra* note 2, at 6-11; Weaver, *An Analysis of Estate Planning Devices to Meet the Contingency of Incompetency* in MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 144 (Allen, Ferster & Weihofen eds. 1968). Weaver's article is based in part on interviews conducted under the Mental Competency Study, a three-year empirical research project conducted by The George Washington University Institute of Law, Psychiatry and Criminology, under a grant from the National Institute of Mental Health (MH-01038). Eleven jurisdictions were selected for intensive empirical study: Austin, Texas; Baltimore, Maryland; Boston, Massachusetts; Buffalo, New York; Cincinnati, Ohio; Denver, Colorado; Durham, North Carolina; Los Angeles, California; Newark, New Jersey; New York City, New York; and the District of Columbia. In addition, studies were conducted in a number of rural communities in each of the states noted above. MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY (Allen, Ferster & Weihofen eds. 1968) [hereinafter cited as COMPETENCY STUDY] is the report of the Mental Competency Study.

³¹Wynn, *supra* note 7, at 881-82; Zillgitt, *supra* note 29, at 183-85.

³²CAL. PROB. CODE § 1462 (West 1956).

³³UNIFORM PROBATE CODE § 5-409 provides for the establishment of various protective arrangements as alternatives to full guardianship or conservatorship, and for the judicial authorization of single transactions.

(a) If it is established in a proper proceeding that a basis exists as described in Section 5-401 for affecting the property and affairs of a person the Court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in Section 5-401 for affecting the property and affairs of a person the Court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction

The quasi-incompetent, or "not-quite-incompetent incompetent,"³⁴ may be the man who cannot sign a check because of physical disability,³⁵ or, perhaps, an individual, who, though otherwise alert, cannot adequately deal with creditors or the ordinary business transactions of every day life. Unless the quasi-incompetent can afford the legal fees necessary for setting up alternative devices, his problems will be left in the hands of social welfare agencies and the like.

2. THE PROBLEM OF THE UNWARRANTED GUARDIANSHIP

The second group of persons who do not benefit from the protection of the guardianship law are those (a) for whom guardianship was not legally warranted at the time it was established; or those (b) who, in fact, regained competency during the pendency of the guardianship but have been unable to achieve judicial restoration to capacity. This group challenges the sympathies to an even greater extent than those who are not given sufficient protection and assistance in the management of their property. Consideration of those factual situations which may lead to an unwarranted guardianship conjures up a veritable parade of horrors, from the railroading of a perfectly competent individual into guardianship by greedy heirs to the exploitation of a former mental patient by family members who successfully prevent his restoration to capacity. Whether they are indi-

relating to the protected person's financial affairs or involving his estate if the Court determines that the transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the Court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The Court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the Court of all matters done pursuant to the order of appointment.

Comment: It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternatives to full conservatorship. Under present law, a guardianship often must be established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

³⁴McAvinchey, *The Not-Quite-Incompetent Incompetent*, 95 TRUSTS & ESTATES 872 (1956).

³⁵Provision exists for the appointment of a "special" (temporary) guardian of the estate, CAL. PROB. CODE §§ 1640-46 (West Supp. 1974). However, appointment of a special guardian is made only after a petition for ordinary guardianship has been filed, and endures only until the time of the guardianship hearing. See *infra* note 77 and accompanying text.

vidually the victims of unscrupulous relatives, jealous business associates, or merely apathetic courts, the people for whom guardianship is imposed when it is unwarranted are universally the victims of the law's inadequate protection of individual rights. The vagueness of the standards, the breadth of judicial discretion, and the deficiency of procedural safeguards³⁶ account for the ineffective implementation of these rights in guardianship proceedings.

III. CURRENT CALIFORNIA LAW

A. TYPES OF GUARDIANSHIP

Section 1462 of the Probate Code provides:

If, upon the hearing, it appears to the court that the person in question is insane or incompetent, the court must appoint a guardian of his person and estate, or person or estate.³⁷

On the face of the statute, three types of guardianship are available in California — guardianship of the person, guardianship of the estate,³⁸ and guardianship of the person and estate. In practice, however, guardianship solely of the person is never utilized.³⁹ The emphasis traditionally placed upon guardianship as a financial device for management of an estate is reflected by this fact.

The establishment of guardianship of the person in conjunction with guardianship of the estate poses special problems. Given the current practice of non-utilization of guardianship solely for the person, the inability to manage one's property is a prerequisite to the establishment of a guardianship of the person. This is not a legally or logically necessary prerequisite; nor does it necessarily lead to beneficial results.

The proper scope of a guardianship of a person and estate with respect to its purported protection of the person is a question left unanswered by current law. First, the purpose of this type of guardianship is not discussed by the courts with reference to the personal,

³⁶See generally, Current Practice and Procedure, *infra* Part III.D.

³⁷CAL. PROB. CODE § 1462 (West 1956).

³⁸In a few jurisdictions — not including California — it has been held that a guardian of the estate alone may not be appointed. Annot., 9 A.L.R.3d 774, 791 (1966).

³⁹Navin, *Guardianship and Incompetency*, COMPETENCY STUDY, *supra* note 30, at 95. This particular finding was based on data from eight jurisdictions — California, Texas, North Carolina, Colorado, New York, Ohio, Massachusetts and the District of Columbia.

UNIFORM PROBATE CODE, Article V, embodies separate systems of protection for the person (guardianship) and the property (conservatorship) of mental incompetents. §§ 5-301 to 313 provide for "guardianship" for the care of a person who is unable to care for himself. §§ 5-401 to 431 provide for protective proceedings, including "conservatorship", for disabled persons who are unable to manage their property.

as distinguished from the proprietary, interests at stake. Broad statements to the effect that the purpose of the statute is the "protection of the incompetent from others" are the customary fare.⁴⁰ Second, the judicial opinions which discuss situations that will justify guardianship consistently emphasize the relative ability of the person in question to manage his financial affairs, rather than his ability to manage or take care of himself, even in those cases where a guardianship of both the person and estate is established.⁴¹ No statutory or judicially created standards exist for determining when a guardianship of the person should be imposed in addition to a guardianship of the estate, such determinations being left to the court to be made on an ad hoc basis. The obfuscation of the interests at stake and the paucity of delineation between those situations justifying guardianships of the person and estate and those justifying guardianships solely of the estate encourages haphazard implementation of the law with respect to the form of guardianship which is chosen.

An associated problem is the adequacy of the judicial supervision of the guardian's performance as protector of the person of his ward. Other than his duty to act in the best interests of the ward, the appropriate powers and duties of a guardian of the person are unclear.⁴² The statute merely states that the guardian has the care and custody of the person of his ward.⁴³ Effective supervision of the guardian's performance in this capacity is problematic at best for the practical difficulties of such supervision are enormous. Short of removal,⁴⁴ the code does not provide procedures for regulation of a guardian's activities in this area. The difficulties entailed in establishing sufficient cause for removal of a guardian⁴⁵ severely limit the

⁴⁰*In re Zanetti*, 34 Cal. 2d 136, 143, 208 P.2d 657, 660 (1949).

⁴¹*In re Coburn*, 165 Cal. 202, 216-17, 131 P. 352, 358 (1913).

The main purpose of the statute is the protection of property . . . and we think the legislative view was that the inability to take care of himself necessarily results from the determination that the person is 'insane, or from any cause incompetent to manage his property.' In other words, the care of one's self means, not merely attention to the physical needs of the body, but that control of one's actions and conduct which is exercised by a normal mind.

⁴²The sole case directly on point is *Browne v. Superior Court*, 16 Cal. 2d 593, 600-01, 107 P.2d 1, 4 (1940), in which the court stated: "The guardian has the custody and care of the ward, but the ward is not his prisoner. He may limit her activities in a reasonable manner, for her own benefit, but cannot, without good reason, deny her such freedom as is essential to her welfare."

⁴³CAL. PROB. CODE § 1500 (West Supp. 1974); see *Clark v. State Bar*, 39 Cal. 2d 161, 246 P.2d 1 (1952).

⁴⁴CAL. PROB. CODE § 1580 (West Supp. 1974).

⁴⁵A guardian may not be removed for cause other than those provided by CAL. PROB. CODE § 1580 (West Supp. 1974), and the burden rests on the moving party to establish that the guardian should be removed. Whether sufficient cause exists for a guardian's removal is a matter in the discretion of the probate court. *In re Guidry*, 196 Cal. App. 2d 426, 16 Cal. Rptr. 579 (1961); *In re Davis*, 253 Cal. App. 2d 754, 61 Cal. Rptr. 297 (1967).

effectiveness of removal as a remedy for misfeasance or nonfeasance by the guardian.

In contrast, the duties and powers of a guardian with respect to his role as manager of the estate are more easily defined. Activities of the guardian in this area are fully controlled by statute, and are of such a nature as to be susceptible to monitoring by the court on a continuous and effective basis.⁴⁶

B. SITUATIONS JUSTIFYING APPOINTMENT OF A GUARDIAN

The exclusive grounds for the appointment of a guardian are a finding of insanity or incompetency as defined under the Probate Code.⁴⁷ A California court has stated:

It is a fundamental principle, based upon the plainest dictates of justice, that, before a person can be deprived of his liberty and his property on account of his mental incompetency, he must be brought within the terms of the statute, and the evidence must show that his mind is so far gone and so weak and feeble that he does not realize and comprehend the value and prudent management of his property, and is not sufficiently normal to care for it in the usual acceptance of that term.⁴⁸

The evidence supporting a determination of incompetency must be sufficient to overcome the general presumption that a person is of sound mind until proven otherwise.⁴⁹

The overriding criterion utilized by the courts in arriving at a determination of incompetency is the management competency of the alleged incompetent.⁵⁰ However, as the following discussion

⁴⁶CAL. PROB. CODE § 1500 *et seq.* (West 1956 and West Supp. 1974) (Powers and Duties); CAL. PROB. CODE § 1435.1 *et seq.* (West 1956 and West Supp. 1974) (Management, Control, and Disposition of Community Real Property and Homestead Property of Insane or Incompetent Persons); CAL. PROB. CODE § 1480 *et seq.* (West 1956 and West Supp. 1974) (Oaths, Bonds and Letters); CAL. PROB. CODE § 1529 *et seq.* (West 1956 and West Supp. 1974) (Sales, Mortgages, Leases and Conveyances); CAL. PROB. CODE § 1550 *et seq.* (West 1956 and West Supp. 1974) (Inventory and Accounting).

⁴⁷*In re Schulmeyer*, 171 Cal. 340, 342, 153 P. 233, 234 (1915).

⁴⁸*In re Coburn*, 11 Cal. App. 604, 606, 105 P. 924, 925 (1909).

⁴⁹*In re Wilson*, 117 Cal. 262, 270, 49 P. 172, 174 (1897); *Wilson v. Sampson*, 91 Cal. App. 2d 453, 459, 205 P.2d 753, 756 (1949). If the allegations of the petition are sufficient to inform to the court that it should interfere for the protection of the alleged incompetent, the duty devolves upon the court to inform itself by holding a hearing and taking testimony. *In re McConnell*, 26 Cal. App. 2d 102, 104, 78 P.2d 1043, 1044 (1938). The petitioner may be any relative or friend. CAL. PROB. CODE § 1461 (West Supp. 1974). However, the Mental Competency Study found that the petitioner is usually a relative. See COMPETENCY STUDY, *supra* note 30, at 238. The conduct of the alleged incompetent at the hearing is usually considered very persuasive. *In re Walters*, 37 Cal. 2d 239, 249, 231 P.2d 473, 479 (1951); *In re Schulmeyer*, 171 Cal. 340, 344, 153 P. 233, 235 (1915).

⁵⁰*In re Coburn*, 165 Cal. 202, 216-17, 131 P. 352, 358 (1913).

indicates, there is no clear-cut test for management competency.⁵¹

Although it is not stressed per se, the amount of property involved is an important factor in determining whether the evidence is sufficient to support a finding of incompetency⁵² to the extent it affects the alleged incompetent's ability to manage it.⁵³ The degree of mental infirmity required for the appointment of a guardian is likewise regarded as a function of the alleged incompetent's ability to manage his estate, and is the basis for the statutory definition of an "incompetent person."⁵⁴ Though it might appear otherwise from the statute, the ability to care for one's person is also subsumed under the management competency test.⁵⁵

While the statute provides for the appointment of a guardian upon a finding of "insanity,"⁵⁶ in practice, there is no separate category of guardianship for insane as opposed to incompetent persons.⁵⁷ Moreover, a determination of insanity for purposes other than guardianship proceedings does not automatically warrant the imposition of a guardianship.⁵⁸ The meaning of the term "insanity" possesses a number of definitive and exclusive variants, involving different legal issues.⁵⁹ Its use in one legal situation does not imply its use in a

⁵¹For a constitutional argument that the guardianship statute is unconstitutional-ly vague, see *infra* Part V.A.(3).

⁵²3 CONDEE, CALIFORNIA PRACTICE: PROBATE COURT PRACTICE § 2111 (2d ed. 1964) [hereinafter cited as CONDEE]:

Incompetency from a probate point of view is a relative term. A simple, weak-minded man on a small pension may be able to manage his affairs after a fashion and nothing in his conduct warrants the appointment of a guardian of either his person or estate. If the same man was worth a million dollars he might obviously be incompetent to manage his affairs and under these circumstances might not even be able to properly care for his person.

⁵³The terms "manage" and "affairs" in the statutory definition of incompetency are the open-ended terms which allow for consideration to be given to the amount of money involved. CAL. PROB. CODE § 1460 (West Supp. 1974). See text accompanying note 14, *supra*.

⁵⁴See text accompanying note 14, *supra*.

⁵⁵*In re Coburn*, 165 Cal. 202, 216-17, 131 P. 352, 358 (1913).

⁵⁶CAL. PROB. CODE § 1462 (West 1956).

⁵⁷*In re Des Granges*, 102 Cal. App. 592, 598-600, 283 P. 103, 106 (1929) (medical testimony that the ward was sane held insufficient to effect restoration to capacity, even though the guardianship was initially occasioned by a finding of insanity by an out-of-state court, the rationale of the California court being that the issue was not only the ward's sanity but also her capacity to manage her person and her affairs). In the cases which rely on the insanity of the individual as justification of guardianship, the insanity is discussed with reference to whether its effect is sufficient to bring the individual within the definition of an incompetent person. See *Wilson v. Sampson*, 91 Cal. App. 2d 453, 459, 205 P.2d 753, 756 (1949).

⁵⁸*In re Zanetti*, 34 Cal. 2d 136, 141-43, 208 P.2d 657, 659-60 (1949); *In re Carniglia*, 139 Cal. App. 629, 631 (1934); *Hsu v. Mt. Zion Hospital*, 259 Cal. App. 2d 562, 572-73, 66 Cal. Rptr. 659, 664-65 (1968).

⁵⁹Some of the variants of the term "insanity" and the possibility of its use in different situations are noted by the California Supreme Court in *In re Zanetti*,

different legal situation.⁶⁰

Severe mental impairment resulting from mental illness usually justifies the appointment of a guardian.⁶¹ A guardian will also be appointed for "those who are afflicted with less serious derangements of the mind" than insanity,⁶² when mental deterioration is found to have rendered them unfit for the management of their properties, and a "likely victim to the wiles of designing persons."⁶³ Susceptibility to influence or deception is of major concern to the courts, and is often at issue where elderly people are concerned.⁶⁴ Old age alone is not sufficient cause to justify guardianship.⁶⁵ But associated problems such as loss of memory,⁶⁶ severely damaging

34 Cal. 2d 136, 141, 208 P.2d 657, 659 (1949):

(1) Insanity or incompetency with relation to capacity to contract (Civ. Code, § § 38-40); (2) insanity or incompetency with relation to capacity to make testamentary disposition (Prob. Code, § 20; Estate of Wortall (1942), 53 Cal. App. 2d 243, 127 P.2d 593; Estate of Baker (1917), 176 Cal. 430, 436, 168 P. 881); (3) insanity with relation to capacity to commit crime (Pen. Code, § 26); (4) insanity as "mental illness" which warrants confinement under provisions of Welfare and Institutions Code, division 6; and (5) insanity or incompetency pursuant to which, under Probate Code, section 1460, letters of guardianship are issued. "Insanity" may and does mean a variety of different things. Depending on the pertinent statute, a variety of issues of fact can be the subject of litigation. And, depending on which statute is invoked, the parties to the litigation are different and the results obtained are to different ends.

⁶⁰ A determination of incompetency does not warrant commitment to an institution, *Sullivan v. Dunne*, 198 Cal. 183, 194, 244 P. 343, 347 (1926); and, despite commitment, a patient's power to contract is left unimpaired, CAL. WELF. & INST. CODE § 5005 (West 1972); *Fetterley v. Randall*, 92 Cal. App. 411, 416, 268 P. 434, 436 (1928). Conversely, discharge from a mental institution does not in itself warrant discharge of a guardian for an incompetent person. *In re Des Granges*, 102 Cal. App. 592, 283 P. 103 (1929); *Guardianship of Gordon*, 56 Cal. App. 2d 523, 527, 132 P.2d 824, 826 (1943).

⁶¹ See generally, *Mental Condition Which Will Justify the Appointment of Guardian, Committee, or Conservator of the Estate for an Incompetent or Spendthrift*, Annot., 9 A.L.R.3d 774, 792 (1966).

⁶² *Hellman Commercial Trust & Savings Bank v. Alden*, 206 Cal. 592, 604, 275 P. 794, 800 (1929).

⁶³ *In re Coburn*, 165 Cal. 202, 220, 131 P. 352, 359-60 (1913).

⁶⁴ *In re Walters*, 37 Cal. 2d 239, 231 P.2d 473 (1951) (appt. upheld); *In re McConnell*, 26 Cal. App. 2d 102, 106, 78 P.2d 1043, 1045 (1938) (appt. upheld); *In re Cassidy*, 95 Cal. App. 641, 645, 273 P. 69, 71 (1928) (appt. upheld); *In re Towson*, 124 Cal. App. 598, 602, 12 P.2d 1003, 1004 (1932) (appt. upheld); *In re Arms*, 63 Cal. App. 2d 677, 678, 147 P.2d 409 (1944) (appt. denied); *In re Watson*, 176 Cal. 342, 344, 168 P. 341, 342 (1917) (appt. denied).

⁶⁵ *In re Arms*, 63 Cal. App. 2d 677, 678, 47 P.2d 409, 410 (1944).

⁶⁶ *In re Peterson*, 84 Cal. App. 2d 541, 546, 191 P.2d 98, 101 (1948); *In re Coburn*, 165 Cal. 202, 215, 131 P. 352, 358 (1913). But see *In re Baldrige's Estate*, 122 Cal. App. 2d 752, 266 P.2d 103 (1954), where the trial court's finding that an eighty-year-old woman was incompetent by reason of old age, physical illness, and infirmity to take care of her property, was reversed where there was evidence that she had an active interest in her home, had a will of her own, handled money, paid bills and worked in her garden; that she was very smart, clever and well-informed; that other than the suggestion of poor memory

brain hemorrhage,⁶⁷ mental weakness,⁶⁸ and arterio-sclerotic dementia⁶⁹ are considered extremely important by the courts. Another cause of incompetency which is not uncommon is alcoholism.⁷⁰ Physical deterioration, although sometimes taken into consideration, is not itself in issue in guardianship proceedings.⁷¹

It is clear that mere improvidence or imprudence will not render one incompetent, and something more than poor business judgment must be shown to establish incompetency.⁷² Furthermore, the facts that the estate of the alleged incompetent might be made more productive and that the contending claims of various heirs might be better harmonized by keeping the estate intact during the alleged incompetent's lifetime do not justify guardianship.⁷³ On the other hand, if a disposition "which might lead to the wasting of an estate" is found, a guardianship may be imposed as a precautionary measure,⁷⁴ though no loss or damage to the estate need to have actually been suffered.⁷⁵ To establish a wasteful disposition it is not necessary that the individual be impaired at all times, but merely that the problem is recurrent.⁷⁶

The cases do not adequately distinguish between situations where the impairment is permanent, and situations where recovery is possible.⁷⁷ The time for judging alleged incompetency is the time of

there was nothing in the testimony of the witnesses indicating she was of unsound mind; that the only error in business judgment the record showed was to lend \$25,000 without security to someone she had known for 20 to 30 years to go into a business venture with her daughter.

⁶⁷*Sullivan v. Dunne*, 198 Cal. 183, 191, 244 P. 343, 346 (1926).

⁶⁸*In re Cassidy*, 95 Cal. App. 641, 644, 273 P. 69, 71 (1928).

⁶⁹*In re McConnell*, 26 Cal. App. 2d 102, 105, 78 P.2d 1043, 1044 (1938); *In re Walters*, 37 Cal. 2d 239, 250, 231 P.2d 473, 479 (1951).

⁷⁰*Guardianship of Gordon*, 56 Cal. App. 2d 523, 528, 132 P.2d 824, 827 (1943); *Estate of Hubbard*, 97 Cal. App. 2d 321, 325, 217 P.2d 744, 747 (1950) (the test is not whether the alleged incompetent is always drunk, but whether he has a "fixed habit of drunkenness").

⁷¹*In re Cassidy*, 95 Cal. App. 641, 644, 273 P. 69, 71 (1928); *In re Watson*, 176 Cal. 342, 345, 168 P. 341, 343 (1917); *In re Coburn*, 165 Cal. 202, 216, 131 P. 352, 358 (1913). See also, Fraser, *Guardianship of the Person*, 45 IOWA L. REV. 239, 240 (1960) for a discussion of the rationale of this rule.

⁷²*In re Waite*, 14 Cal. 2d 727, 731, 97 P.2d 238, 240 (1939) (evidence held insufficient to support a finding of incompetency despite medical testimony to the effect that the alleged incompetent possessed an "intelligence defect" and "lack of judgment," where the court examined the facts from which these conclusions were derived and stated that a disappointing marriage to a man much younger in years, and an arrangement with a man to manage and care for her ranch and act as her chauffeur in return for the half interest in her ranch were not substantial evidence of her incompetency); *In re Baldrige's Estate*, 122 Cal. App. 2d 752, 755, 266 P.2d 103, 105 (1954).

⁷³*In re Watson*, 176 Cal. 342, 345, 168 P. 341, 343 (1917).

⁷⁴*Estate of Hubbard*, 97 Cal. App. 2d 321, 325, 217 P.2d 744, 747 (1950); *Guardianship of Gordon*, 56 Cal. App. 523, 528, 132 P.2d 824, 827 (1943).

⁷⁵*In re Cassidy*, 95 Cal. App. 641, 645, 273 P. 69, 71 (1928).

⁷⁶*Estate of Hubbard*, 97 Cal. App. 2d 321, 325, 217 P.2d 744, 747 (1950).

⁷⁷In the opinion of the San Francisco Probate Commissioner no such distinction

the hearing.⁷⁸ However, in light of the difficulties of effecting restoration to capacity, and the stigma suffered by a former incompetent if he does succeed in restoration, vigilant judicial scrutiny of the proposed ward's prognosis is warranted in those cases where recovery is possible or likely.

C. RESTORATION TO CAPACITY

Restoration to capacity is often a difficult undertaking and rarely occurs.⁷⁹ It has been suggested that the order of appointment for a guardian includes the phrase "until death do you part."⁸⁰ To be restored to capacity, the fact of the incompetent's restoration must be judicially determined.⁸¹ Proceedings for restoration are initiated by a verified petition to the court, the petitioner being the incompetent himself, the guardian, or any friend or relative.⁸² If the guardian opposes restoration, the ward may face serious problems in obtaining adequate representation.⁸³ Moreover, at the restoration

is necessary since restoration is available to the incompetent who regains competency. Telephone interview, December 3, 1973 [hereinafter cited as Interview No. 1].

Temporary conservatorships are now available under CAL. PROB. CODE § 2201 *et seq.* (West Supp. 1974). The procedure was designed to provide "for the appointment of a temporary conservator of person or estate in circumstances requiring urgency." JUDICIARY COMMITTEE, *supra* note 2. Zillgitt sees the temporary conservatorship to be of the most immediate value in cases where a business man has been seriously injured in an accident and needs temporary assistance in managing his property. Zillgitt, *supra* note 29, at 204. The law does not seem to be designed, however, for the longer, albeit temporary, period of incompetency. A temporary guardian can only be appointed after the filing of a petition for appointment of an ordinary conservator or guardian, and the duration of the appointment lasts "pending the final determination of the court upon the petition." CAL. PROB. CODE § 2201 (West Supp. 1974). Moreover, under § 2201, the ordinary requirements of notice, may be dispensed with at the judge's discretion. For a general discussion of temporary conservatorships, see C.E.B., *supra* note 2, at 62-3.

⁷⁸*In re Watson*, 176 Cal. 342, 345, 168 P. 341, 343 (1917). However, evidence of conduct tending to show mental condition a reasonable time before the hearing will not be considered too remote to be admissible. *In re Walters*, 37 Cal. 2d 239, 249, 231 P.2d 473, 479 (1951); *In re Coburn*, 165 Cal. 202, 213, 131 P. 352, 357 (1913). The trial court has broad discretion with respect to the character of such testimony and the period of time over which it may extend. *In re Walters*, 37 Cal. 2d 239, 249, 231 P.2d 473, 479 (1951).

⁷⁹Finding of the Mental Competency Study. See COMPETENCY STUDY, *supra* note 30, at 247. See also Interview No. 1, *supra* note 77; and telephone interview with Probate File Administrator of Sacramento, December 3, 1973 [hereinafter cited as Interview No. 2].

⁸⁰COMPETENCY STUDY, *supra* note 30, at 247.

⁸¹CAL. PROB. CODE § 1470 (West 1956).

⁸²CAL. PROB. CODE § 1470 (West 1956).

⁸³Serious problems may face the ward if appointment of a guardian *ad litem* is desired because of antagonism on the part of the guardian towards the restoration effort, since obtaining attractive attorney's fees for the guardian *ad litem* is uncertain at best. In cases where the estate is large, the court may order that fees be advanced to the ward or the guardian *ad litem* of the ward to pay necessary

proceedings, the burden of proof is on the ward to show that he is no longer incompetent.⁸⁴ This can be a very heavy burden.⁸⁵ The Lanterman-Petris-Short Act, enacted in 1967,⁸⁶ has remedied this problem to some extent with respect to hospitalization of the mentally ill. It places the burden of proof on the conservator (to be distinguished from a conservator under the Probate Code) to establish the need for continuation of the hospitalization.⁸⁷ In addition, hospitalization is no longer allowed in California on an indefinite basis, but terminates automatically after one year at which time the need for it must be reproven by the conservator to the satisfaction of the court.⁸⁸ In enacting the Lanterman-Petris-Short Act, the California Legislature declared that it was their intent "to safeguard individual rights through judicial review."⁸⁹ Unfortunately, the individual rights of incompetents have not received comparable attention, despite the fact that the degree of mental impairment of an L-P-S conservatee is often much greater than that of an incompetent person.⁹⁰

expenses in connection with the litigation. However, these orders usually specify that none of the money so advanced is to be used as a retainer or payment of attorney's fees. If the ward is unsuccessful in his attempt to be restored to capacity, the court can be petitioned for an allowance of attorney's fees. If the judge believes (1) the petition was filed in good faith, and (2) the services were for the benefit of the ward, he may order the guardian to pay the attorney a "reasonable" fee; however, the court is not required to make such an allowance. If, on the other hand, the ward is successful, the attorney representing him can look to him for his fees, CONDEE, *supra* note 52, at §§ 2129-30.

⁸⁴The petition for restoration must allege that the ward is then sane or competent. CAL. PROB. CODE § 1470 (West 1956). While there is no statutory or case law bearing directly on the issue of the allocation of the burden of proof, in light of the requirement that the fact of mental restoration be plead, and the "pleading rule," it must be concluded that the burden of proof in restoration proceedings lies with the ward. Under the pleading rule, a party has the burden of proving each fact, the existence or nonexistence of which is essential to the claim for relief or defense being asserted. CAL. EV. CODE § 500 (West 1966).

⁸⁵A well-known study was conducted in which eight sane people gained secret admission as patients to a number of different hospitals. Immediately upon admission to the psychiatric ward, the pseudopatients ceased simulating any symptoms of abnormality; however, they were never detected. The author of the study concluded that "[t]he normal are not detectably sane". Each was discharged with a diagnosis of schizophrenia "in remission". The author pointed out that "once labeled schizophrenic, the pseudopatient was stuck with that label. If the patient was to be discharged, he must naturally be 'in remission'; but he was not sane, nor, in the institution's view had he ever been sane." Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250, 252 (1973).

⁸⁶CAL. WELF. & INST. CODE § 5000 *et seq.* (West 1972 and West Supp. 1974).

⁸⁷CAL. WELF. & INST. CODE § 5361 (West Supp. 1974).

⁸⁸CAL. WELF. & INST. CODE § 5361 (West Supp. 1974).

⁸⁹CAL. WELF. & INST. CODE § 5001 (West Supp. 1974).

⁹⁰For detention under the Lanterman-Petris-Short Act, a person must be "a danger to others, or to himself or gravely disabled as a result of a mental disorder." CAL. WELF. & INST. CODE § 5150 (West Supp. 1974).

D. CURRENT PRACTICE AND PROCEDURE

Incompetency proceedings are marked by the great breadth of judicial discretion granted the judge, a traditional aspect of *parens patriae* powers.⁹¹ The exercise of these discretionary powers is tempered by few statutory constraints — the language of the statute is exceedingly vague⁹² and the minimal safeguards which exist are loosely enforced. Thus under the law as it presently exists, the individual rights of the alleged incompetent may be subject to undue encroachment and abuse.⁹³

In the area of notice, despite comprehensive and carefully designed legislation,⁹⁴ lax implementation of procedural safeguards has been upheld.⁹⁵ Moreover, the judge may, in his discretion, dispense with all notice requirements when appointing a temporary or special guardian.⁹⁶

The proposed ward is required by statute to be present at the hearing, unless his presence would be detrimental to him and this fact is attested to by a physician in an affidavit or certificate.⁹⁷ However, failure to produce the required certificate when the alleged incompetent is absent has been held not to deprive the court of its jurisdiction.⁹⁸ Undue discretion in this area may lead to the unfortunate situation⁹⁹ extant in many jurisdictions where the petitioner

⁹¹Sullivan v. Dunne, 198 Cal. 183, 189, 244 P. 343, 345 (1926). See e.g., *In re McConnell*, 26 Cal. App. 2d 102, 104, 78 P.2d 1043, 1044 (1938) (jurisdiction to hear petitioner's case upheld even though the petition may not meet the standards imposed upon complaints at law); *Guardianship of Mosier*, 246 Cal. App. 2d 164, 177, 54 Cal. Rptr. 447, 454 (1966) (broad discretion in appointment of guardian is vested in trial judge).

⁹²See text accompanying note 14, *supra*.

⁹³See Constitutional Objections, *infra* Part IV.

⁹⁴See CAL. PROB. CODE § 1461 (West Supp. 1974) for the basic notice requirements. Moreover, the Legislature has recently expanded the notice requirements to ensure that notice given to the alleged incompetent be truly meaningful. CAL. PROB. CODE § 1461.5 (West Supp. 1974) (added in 1973). Under this new section, the alleged incompetent must be informed by the court of the nature and purpose of the proceedings, the effect thereof on his basic rights, and the identity of the petitioner. Also, the court must consult with him with regard to his opinion concerning the appointment of a guardian.

⁹⁵*In re Peterson*, 84 Cal. App. 2d 541, 543-44, 191 P.2d 98, 99-100 (1948).

⁹⁶CAL. PROB. CODE § 1640 (West Supp. 1974). In addition, the special notice requirements of § 1461.5, *supra* note 94, do not apply if the alleged incompetent is unable to attend the hearing and his inability is certified pursuant to CAL. PROB. CODE § 1461. CAL. PROB. CODE § 1461.5 (West Supp. 1974).

⁹⁷CAL. PROB. CODE § 1461 (West Supp. 1974).

⁹⁸*In re Peterson*, 84 Cal. App. 2d 541, 543-44, 9 P.2d 98, 99-100 (1948); cf. *Guardianship of Mosier*, 246 Cal. App. 2d 164, 175-76, 54 Cal. Rptr. 447, 453-54 (1966).

⁹⁹The California Supreme Court implied their concern in this area when it stated: "It is difficult to conceive of a situation in which a party has a greater right to, or need for, his own testimony than in the type of proceeding (*i.e.*, guardianship) considered here." *In re Waite*, 14 Cal. 2d 727, 730, 97 P.2d 238, 239 (1939).

is customarily absent at the hearings.¹⁰⁰

In practice, the alleged incompetent is almost never represented by either retained or appointed counsel.¹⁰¹ In California, the law is silent with respect to either the necessity of the appointment of counsel or notice to the alleged incompetent of his right to counsel.¹⁰² In the civil commitment area, on the other hand, the Lanterman-Petris-Short Act requires appointed counsel for the conservatee whenever his status is being determined.¹⁰³ Thus once again it appears that the rights of the seriously impaired receive more adequate protection than those of the less seriously impaired.

The alleged incompetent may be called as a witness by the petitioner over his own objection.¹⁰⁴ This has been held not to be a violation of the Fifth Amendment's protection against compulsory self incrimination on the theory that the privilege applies only in criminal proceedings, and not in proceedings for the appointment of a guardian.¹⁰⁵

Because most guardianship proceedings are uncontested,¹⁰⁶ and because most alleged incompetents are without counsel,¹⁰⁷ the safeguards implicitly contained in the adversary process do not exist. Consequently, the impetus for a thorough review of the issues may be seriously diminished. For these reasons, the proper exercise of judicial discretion is of unparalleled importance at these proceedings. However, crowded court dockets¹⁰⁸ have mitigated against the proper

¹⁰⁰ COMPETENCY STUDY, *supra* note 30, at 240.

¹⁰¹ *Id.* at 241.

¹⁰² While CAL. PROB. CODE § 1461.5 (West Supp. 1974) requires the court to notify the alleged incompetent of the effect of an adjudication of incompetency on his basic rights, it does not go so far as to require the court to notify him of his right to counsel. In contrast, appointment of counsel is required for the alleged incompetent under the UNIFORM PROBATE CODE §§ 5-303(b), 5-407(c), unless the individual has retained counsel.

Ironically, the estate of the incompetent is liable for attorney's fees for services rendered to the petitioner where the matter has been contested and a guardian appointed. *In re Bundy*, 44 Cal. App. 466, 467-68, 186 P. 811, 812 (1919).

¹⁰³ CAL. WELF. & INST. CODE § 5365 (West Supp. 1974).

¹⁰⁴ *In re Coburn*, 165 Cal. 202, 217, 131 P. 352, 358 (1913), the court reasoning that in requiring the alleged incompetent's presence at the hearing the code seems to contemplate his examination.

¹⁰⁵ *Id.* Moreover, under CAL. EV. CODE § 776 (West 1968), the alleged incompetent could be called as an adverse party by the petitioner and examined as if under cross-examination.

¹⁰⁶ Interview No. 1, *supra* note 77; Interview No. 2, *supra* note 79; *In re Young*, 38 Cal. App. 2d 588, 591, 101 P.2d 770, 771-72 (1940).

¹⁰⁷ See *supra* note 101.

¹⁰⁸ The ever-growing sector of old people in our society, who inevitably suffer from some form of mental deterioration if they live long enough, has vastly increased the number of people who may require the protection of guardianship. See COMPETENCY STUDY, *supra* note 30, at ix-x. Even though the chances of a long physical life have been greatly increased by the advances of modern science, the odds that an individual will not suffer from mental deterioration in

exercise of this discretion. A nationwide empirical study of guardianship proceedings reveals that the review of the issues is, in practice, far from adequate, and that the average case may take only a minute or two.¹⁰⁹ In California, investigation of the case is often delegated to a Probate Commissioner, whose inclinations may tend towards appointment of a guardian in questionable cases.

Confusion of terminology and problems of cross-disciplinary communication are pervasive any time the mental status of an individual is being adjudicated, and incompetency proceedings are no exception.¹¹⁰ The lack of clear-cut standards for management competency,¹¹¹ whereby the responsibility of judicious implementation of the law is left almost wholly up to the judge, renders the proceedings particularly vulnerable to these problems since it may cause substantial reliance to be placed on medical testimony, warranted or not. This emphasis on medical testimony may becloud the larger issue of competency¹¹² which ultimately involves a determination of an individual's legal responsibility, and is a judgment properly left to the legal rather than the medical profession.¹¹³ Undue reliance on medical testimony merely shifts the comprehensive responsibilities of the state's *parens patriae* powers to the testifying physician where the hazards of arbitrariness are only increased.¹¹⁴

old age have not been significantly lowered. Zillgitt, *supra* note 29, at 181. Furthermore, the emergence of a welfare state and the fragmentation of the family unit have left a large number of elderly people living virtually alone and unassisted, though they may possess sufficient funds to require knowledgeable management.

¹⁰⁹ COMPETENCY STUDY, *supra* note 30, at ix.

¹¹⁰ The Mental Competency Study Staff, COMPETENCY STUDY, *supra* note 30, at 36, recorded the following interview with a California psychiatrist, who stated that he simply refuses to apply "legal criteria" when asked to testify at incompetency proceedings: "I simply tell the court whether a man is psychiatrically sane or not . . . many lawyers don't agree with me. They ask me, 'What does that have to do with whether he is competent?' I tell them that insanity and incompetency amount to the same thing. I have trouble with some lawyers on this."

¹¹¹ See generally, Situations Justifying Guardianship, *supra* Part III.B.

¹¹² *In re Waite*, 14 Cal. 2d 727, 731, 97 P.2d 238, 239 (1939) (medical opinions must be tested by a consideration of the facts from which those opinions are derived in light of the statutory definition of incompetency).

¹¹³ For an analysis of some of the alarming implications of the substitution of health values for moral and political values, in the context of civil commitment, see T. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963).

¹¹⁴ While the emphasis on medical testimony may be undue, the reverse situation may also occur. In *Guardianship of Levi*, 52 Cal. 2d 832, 833-34, 127 P.2d 15, 16 (1942), an adjudication of incompetency was upheld, even though the court's determination was based solely on the testimony of lay witnesses. In contrast, the UNIFORM PROBATE CODE § 5-303(b) requires a medical examination of the alleged incompetent whenever the court is considering imposing a guardianship of the person. In the case of a conservatorship of the estate (distinguished from a guardianship of the person under the Uniform Probate Code), UNIFORM PROBATE CODE § 5-407(c) provides:

If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic

IV. CONSTITUTIONAL OBJECTIONS TO GUARDIANSHIP LAW

Developments in constitutional law during the last fifteen years reflect the emergence of an intense and unprecedented concern among members of the legal profession for the protection of the rights of the disadvantaged. In a series of recent cases, safeguards have been provided for the rights of a number of previously neglected groups: destitute criminal¹¹⁵ and civil litigants,¹¹⁶ welfare claimants,¹¹⁷ juvenile offenders,¹¹⁸ mental patients,¹¹⁹ and drug addicts.¹²⁰ Nonetheless, the issue of individual rights in the context of guardianship proceedings has been passed over. The cases which are most clearly apposite to the guardianship situation are those concerning the rights of juveniles and mental patients, since in both these areas the doctrine of *parens patriae* has, until recently, been used as an excuse for the lack of procedural safeguards.¹²¹

In guardianship proceedings, the lack of sufficient procedural safeguards warrants similar efforts. As the Supreme Court stated in *In re Gault*: "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."¹²²

intoxication, the Court may direct that the person to be protected be examined by a physician designated by the Court, preferably a physician who is not connected with any institution in which the person is a patient or detained.

¹¹⁵ *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Mayer v. Chicago*, 404 U.S. 189 (1971).

¹¹⁶ *E.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971). *But see* *United States v. Kras*, 409 U.S. 434 (1973).

¹¹⁷ *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wheeler v. Montgomery*, 397 U.S. 280 (1970). *But see* *Ortwein v. Schwab*, 410 U.S. 656 (1973).

¹¹⁸ *E.g.*, *Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970). *But see* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

¹¹⁹ *E.g.*, *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated* (on procedural grounds), ___ U.S. ___, 94 S. Ct. 713 (1974) (*per curiam*).

¹²⁰ *E.g.*, *Robinson v. California*, 370 U.S. 660 (1962).

¹²¹ In *In re Gault*, 387 U.S. 1, 16 (1967), the Supreme Court was highly critical of the constitutional and theoretical bases of juvenile justice administration, particularly with respect to the traditional reliance on the doctrine of *parens patriae*. It noted: "The Latin phrase (*parens patriae*) proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."

¹²² 387 U.S. at 20 (1967).

In *parens patriae* proceedings it is often difficult to ascertain at what point the state's powers will be delimited to preserve individual rights since in these cases the state's interest in protecting the individual is balanced against the individual's

A. APPLICABILITY OF DUE PROCESS TO GUARDIANSHIP PROCEEDINGS

Traditionally, stringent procedural safeguards have rarely been required in non-criminal proceedings. However, this tradition has been all but forgotten, and more stringent procedural safeguards have been required by the Supreme Court in a number of areas heretofore regarded as purely civil.¹²³ Thus the civil nature of incompetency proceedings does not preclude constitutional objections to the inadequate procedural safeguards which the proceedings afford.¹²⁴

To determine whether due process requirements apply to guardianship proceedings it is necessary to look to the nature of the individual interest at stake "to see if the interest is within the Fourteenth Amendment's protection of liberty and property."¹²⁵ In discussing the parameters of the protection of procedural due process in *Board of Regents v. Roth*, the Supreme Court stated that the liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . . and generally

right to assert his self-interest. See, e.g., *In re Gault*, 387 U.S. 1 (1967). Similar issues are arising with the emergence of a welfare state — called the "new *parens patriae* state" — as the rights of governmental beneficiaries are increasingly threatened by the erosion of their independence, especially in programs operating with a large degree of discretion. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). Furthermore, as the public welfare role of the state is broadened from one of assistance to one of improvement, and the therapeutic state comes into its own, the issues of individual rights will become even more complex. See generally, N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 45-49, 352-410 (1971). In addition, expanded agency planning, where decision making is no longer controlled by elected legislatures, increased economic regulation, and the nearly universal receipt of government largess, are all similarly capable of diminishing the individual citizen's rights. See Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

¹²³ E.g., *Specht v. Patterson*, 386 U.S. 605 (1967) (commitment under a state sex offender's act); *Kennedy v. Mondoza-Martinez*, 372 U.S. 144 (1963) (forfeiture of citizenship); *Kent v. United States*, 383 U.S. 541 (1966) (waiver of jurisdiction by juvenile court); *In re Gault*, 387 U.S. 1 (1967) (delinquency adjudicatory proceedings); *In re Winship*, 397 U.S. 358 (1970) (delinquency adjudicatory proceedings). Also, in a number of recent cases the Supreme Court has mandated rudimentary due process in situations heretofore wholly unprotected by procedural safeguards. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1969) (termination of welfare benefits); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wage garnishment); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin).

¹²⁴ In *Kent*, 383 U.S. 541, 555 (1966), the Supreme Court specifically stated that the designation of juvenile proceedings as "civil" rather than "criminal" did not obviate the necessity for procedural safeguards, commenting that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."

¹²⁵ *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). The Court also noted that only in "rare and extraordinary situations has the Court held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing." *Id.* at 570, n.7.

to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."¹²⁶ The deprivation of a person's right to contract and convey, which occurs upon a determination of incompetency,¹²⁷ clearly constitutes a deprivation of liberty protected by the Fourteenth Amendment. Likewise, a stigma which attaches to a determination of incompetency infringes upon personal rights of liberty¹²⁸ in that it forecloses a person's freedom to take advantage of employment opportunities and seriously damages a person's "standing and associations in his community."¹²⁹ Restrictions on the practice of licensed professions by an incompetent constitute the deprivation of a valuable property right,¹³⁰ as does the transfer of the incompetent's property into the hands of the guardian.

Once it is determined that the nature of the proceedings requires procedural due process, one looks to the weight of the interests at stake to determine the type of safeguards which will be required in a particular situation.¹³¹ The Court utilized the balancing test in *Goldberg v. Kelly*, where the termination of welfare benefits was held to require rudimentary due process: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends on whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."¹³² The

¹²⁶ *Id.* at 572, citing *Meyer v. Nebraska*, 262 U.S. 391, 399 (1923).

¹²⁷ See *supra* note 15.

¹²⁸ See *supra* notes 25, 29. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), where the Supreme Court held that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

¹²⁹ *Board of Regents v. Roth*, 408 U.S. at 573 (1972). In *Snead v. Department of Social Services*, 355 F. Supp. 764, 771 (S.D.N.Y. 1973), citing *Board of Regents v. Roth*, 408 U.S. at 573 (1972), the court held that the forced leave of absence of a civil service employee because of mental unfitness affected the plaintiff-employee's constitutionally protected interest in liberty on the grounds that "a finding of mental illness severely diminishes a person's 'freedom to take advantage of other employment opportunities'."

¹³⁰ *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 592, 84 P. 39, 40 (1908). See *supra* note 16. See also *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963), where the Supreme Court held that the right to practice a profession is not "a matter of grace and favor," citing *Ex parte Garland*, 71 U.S. 333, 379 (1866), and that the requirements of procedural due process, including the need for confrontation, must be met before a person can be excluded from his occupation. 373 U.S. at 104 (1963).

¹³¹ *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); *Boddie v. Connecticut*, 401 U.S. 371, 387 (1971).

¹³² 397 U.S. at 263 (1970), citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1950) (Frankfurter, J., concurring), and *Cafeteria & Restaurant Workers Union, etc. v. McElroy*, 367 U.S. 886, 895 (1961). The balancing test, per se, was first announced in *McElroy, id.*, cited in *Kelly*, 397 U.S. at 263

rudimentary safeguards of fair hearing and notice have been commonly required in cases dealing with the deprivation of property rights.¹³³ However, where a threat of incarceration exists, notably in the areas of juvenile delinquency and civil commitment, safeguards traditionally reserved for criminal proceedings have been mandated.¹³⁴ This balancing or tailoring process must be applied to

(1970), where the Court said: "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *See also* *Hannah v. Larche*, 363 U.S. 420, 442-44 (1960); Newman, *The Process of Prescribing Due Process*, 49 CALIF. L. REV. 215, 228 (1961).

¹³³ *E.g.*, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972). *But see* *Board of Regents v. Roth*, 408 U.S. 564 (1972) where the Court held that the decision not to rehire an untenured professor did not constitute deprivation of a property right protected by the Fourteenth Amendment, because he did not have a legitimate claim of entitlement to the employment, and thus the requirements or procedural due process did not apply.

¹³⁴ In *Gault*, 387 U.S. 1 (1967), Justice Fortas, writing for the Court, weighed the failure of the juvenile court to achieve its goals of rehabilitation, and non-stigmatization and the awesome prospect of incarceration against the governmental interest in providing the juvenile with "individualized treatment" in a non-adversary proceeding, and concluded that fundamental fairness required the imposition of the following safeguards in delinquency adjudicatory proceedings: adequate notice of specific charges; advisement of right to counsel and appointment of counsel in the case of indigency; privilege against self-incrimination; and opportunity for confrontation and cross-examination. Four years later, however, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), Justice Blackmun, in a plurality opinion, balanced the juvenile's interest in the alleged constitutional right to a jury trial against the state's interest in informal procedure and rehabilitation, and concluded that the jury trial was neither a particularly efficacious device for curing the ills of the juvenile system, nor a necessary prerequisite for a fair trial. *See also* *In re Winship*, 398 U.S. 358 (1970).

The Supreme Court has not yet faced the ultimate due process minimums question in a civil commitment case. However, in *Jackson v. Indiana*, 406 U.S. 715, 737 (1972), the Court indicated its concern in this area: "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power [to commit persons found to be mentally ill] have not been more frequently litigated." While some courts have held to the contrary, *see e.g.*, *Rose v. Haugh*, 259 Iowa 1344, 147 N.W.2d 865 (1967) (procedural due process held not applicable to persons restrained as insane); *In Matter of Coates*, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74 (1961) (absence of procedural safeguards before commitment held not violative of due process because of availability of safeguards in habeas corpus proceeding which could be brought subsequent to commitment); *Logan v. Arafeh*, 346 F. Supp. 1265 (D. Conn. 1972) (emergency detention up to forty-five days before hearing on commitment held not violative of due process because, *inter alia*, commitment is therapeutic rather than penal), stringent procedural safeguards have been mandated for civil commitment proceedings in a number of recent decisions. *See e.g.*, *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964); *Dixon v. Attorney General of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, — U.S. —, 94 S. Ct. 713 (1974) (*per curiam*). The common rationale of these decisions was that the deprivation of liberty resulting from involuntary commitment mandated stringent safeguards. In *Holm v. State*, 404 P.2d 740, 742 (Wyo., 1965) (Wyoming Mental Health Act provision that

guardianship proceedings to see to what extent procedural safeguards need to be expanded to afford the procedural due process demanded by the interests at stake.

1. RIGHT TO COUNSEL

Notification of right to counsel and appointment of counsel when not retained are presently not provided to the alleged incompetent under the guardianship law in California.¹³⁵ When mandating these rights in the juvenile context, the Court in *Gault* stated: "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."¹³⁶ The Court so concluded despite objections to the effect that the parent and probation officer may be relied upon to protect the child's interests.¹³⁷

Relying heavily on *Gault*, the 10th Circuit extended the right to have counsel appointed or retained in involuntary civil commitment proceedings.¹³⁸ While the criminal overtones of *Gault* were absent in

court should not, in proceeding for involuntary hospitalization, be bound by rules of evidence held void), the Wyoming Supreme Court stated:

No matter how commendable the motives back of legislation for the mentally ill may be, it still remains the fundamental law of the land that a person is not to be deprived of his liberty — whether by involuntary hospitalization or some other kind of incarceration — without due process of law.

In *Heryford*, 396 F.2d at 396 (10th Cir. 1968), the court emphasized the issue of possible incarceration:

It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent — which commands observation of the constitutional safeguards of due process.

The Denton court, 383 S.W.2d at 682 (Ky. 1964), on the other hand, spoke in broader terms: "[W]hen a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution."

¹³⁵ See text *supra* notes 101, 102.

¹³⁶ 387 U.S. at 36 (1967).

¹³⁷ *Id.* at 35-6.

¹³⁸ *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); accord, *Dixon v. Attorney General*, 325 F. Supp. 966, 974 (M.D. Pa. 1971). The *Heryford* court, 396 F.2d at 396 (10th Cir. 1968), maintained that when

... the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. Certainly, this duty is not discharged when, as here, the prosecuting attorney undertakes to "prosecute the application (for commitment) on behalf of the state," and the

the commitment case, in both cases the "awesome prospect of incarceration" existed.¹³⁹ In *Lessard v. Schmidt*, a three-judge district court examined the justifications permitting civil commitment without the stringent safeguards required in criminal proceedings, and held that the individual subject to involuntary civil commitment proceedings has the right to counsel, including court-appointed counsel if he is financially unable to retain a lawyer.¹⁴⁰ Citing the 10th Circuit case, the *Lessard* court found that whenever the state acts in a *parens patriae* capacity, it has the "inescapable duty" to provide legal counsel at every step of the proceedings.¹⁴¹

The court in *Lessard* found the loss of certain civil rights to be determinative in requiring the imposition of stringent procedural safeguards. These included the restriction on licenses required to engage in certain professions, limitations on the making of contracts, and the stigma associated with an adjudication of mental illness.¹⁴² It is apparent that these two considerations, the potential loss of important civil rights¹⁴³ and the consequent need for counsel for the

proposed patient is not otherwise represented by counsel. . . . Nor is it sufficient that the Wyoming statute permissively provides that the proposed patient "may be represented by counsel." Fourteenth Amendment due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights and accorded each of them unless knowingly and understandingly waived.

¹³⁹ *Heryford v. Parker*, 396 F.2d at 395-96 (10th Cir. 1968).

¹⁴⁰ The court specifically held that appointment of a guardian *ad litem* cannot satisfy the constitutional requirement of appointed counsel, pointing out that guardian and representative attorney occupy separate roles. The guardian *ad litem* acts in, what he deems to be, the best interests of his ward, while the representative attorney functions as an advocate of the prospective patient. 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972), *vacated*, — U.S. —, 94 S. Ct. 713 (1974). In a per curiam opinion, the Supreme Court held that the injunctive order of the district court was not sufficiently specific under FED. R. CIV. P. 65(d), vacating the judgment and remanding the case to the district court. *See generally*, Note, *Lessard v. Schmidt: Due Process and Involuntary Civil Commitment*, 68 NW. U. L. REV. 585 (1973).

¹⁴¹ *Id.* at 1098 (E.D. Wis. 1972), *citing* *Heryford v. Parker*, 396 F.2d at 396 (10th Cir. 1968). The court qualified this statement slightly later in the opinion, requiring the assistance of counsel as soon after proceedings are begun as is realistically feasible. 349 F. Supp. at 1099 (E.D. Wis. 1972).

¹⁴² *Id.* at 1089.

¹⁴³ While guardianship does not contemplate confinement, *see In re Zanetti*, 34 Cal. 2d at 143, 208 P.2d at 660-61 (1949), it obviously deprives the incompetent of his liberty, as defined by the Supreme Court in *Board of Regents v. Roth*, *see text supra*, at note 126. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Supreme Court extended the right to appointed counsel to all criminal proceedings, whether felony, misdemeanor, or petty-offense, noting that "[t]he assistance of counsel is often a requisite to the very existence of fair trial." *Id.* at 31. While Justice Douglas, writing for the majority, declined consideration of the right to appointed counsel in cases where there was no prospect of imprisonment, because petitioner in the instant case was in fact sentenced to jail, *id.* at 37, Justice Powell, in a concurring opinion, suggested that counsel should be appointed even in cases where no confinement was contemplated. He went so far as to state, "When the deprivation of property rights and interest is of sufficient

impaired individual,¹⁴⁴ are fully applicable in the guardianship situation.

2. BURDEN OF PROOF IN RESTORATION PROCEEDINGS AND PERIODIC REVIEW

The allocation of the burden of proof in restoration proceedings and the lack of periodic review by the court are also subject to constitutional objections on the grounds of procedural due process. The practical difficulties of achieving restoration¹⁴⁵ and the significance of the individual rights involved, clearly outweigh the interests of the state in protecting the individual and society at large, and in minimizing its own inconvenience. The result is an open violation of the dictates of the fundamental fairness requirement of due process.

First, it is unfair to place the burden of showing restored capacity on the alleged incompetent simply because there has been a prior adjudication of incompetency.¹⁴⁶ Second, the Supreme Court has

consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process." *Id.* at 48. Eschewing the mechanistic application of procedural safeguards, he argued that under the principle of fundamental fairness it would be illogical to require appointed counsel where a nominal jail sentence is contemplated and yet not require it in " 'non-jail' petty-offense cases which may result in far more serious consequences than a few hours or days of incarceration." *Id.* at 51. Among the "serious consequences" he discussed were the stigma attached to a drunken-driving conviction, losing one's driver's license, and disqualification for a licensed profession. *Id.* at 48. That the civil rights lost upon an adjudication of incompetency are at least as serious as the ones Justice Powell mentioned is self-evident.

¹⁴⁴ The "inescapable duty" language of *Heryford* and *Lessard*, see *supra* notes 138, 141, implies the recognition by the courts of the especial importance of counsel in *parens patriae* proceedings, where the state's right to act in the best interests of the impaired individual may conflict with the individual's right to assert his own will and desires.

¹⁴⁵ See generally, *Restoration to Capacity*, *supra* Part III.C.

¹⁴⁶ An adjudication of incompetency is based on the determination of the status of the incompetent at the time of the adjudication. The deprivation of rights based on a determination of status has never been favored by the courts. *Cross v. Harris*, 418 F.2d 1095, 1102 (D.C. Cir. 1969), citing the classic statement of Mr. Justice Jackson, sitting as Circuit Justice in *Williams v. United States*, 184 F.2d 280, 282-83 (2d Cir. 1950): "Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it." In discussing the extent to which the Constitution can tolerate preventive detention, i.e., detention for status, the *Harris* Court argued that "[d]etention for any significant period of time would have to be attended by periodic review." 418 F.2d at 1102 (D.C. Cir. 1969). The Court noted: "Since any such detention would be based on present status rather than the commission of a past act, regular procedures for review would be essential to assure that a basis for commitment continued to exist." *Id.* at 1102, n.46. Similarly, in the area of guardianship, regular procedures for review are needed to assure that a basis for guardianship continues to exist. That no such procedures exist, and that, furthermore, the burden is on the incompetent to refute the past adjudication when the protective goals of guardianship are in no way furthered by this rule is manifestly unfair. The Court in *Harris* aptly stated: "Predicting future behavior and

held that a court cannot deprive an individual of procedural due process merely because of expense or judicial inconvenience.¹⁴⁷ Third, the California legislature has specifically recognized the importance and necessity of periodic review in status adjudications of mental infirmity in the analagous area of civil commitment.¹⁴⁸ Thus to hold that the same necessities do not operate in the field of mental incompetency would be totally inconsistent with the stated intent of the legislature.¹⁴⁹

3. VAGUENESS

Sections 1460¹⁵⁰ and 1462¹⁵¹ of the Probate Code, requiring guardianship upon a finding of "incompetency,"¹⁵² may be challenged as being unconstitutionally vague. The child of Due Process, the void-for-vagueness doctrine¹⁵³ may be regarded "as a practical instrument mediating between, on the one hand, all of the organs of public coercion of a state and, on the other, the institution of federal protection of the individual's private interests."¹⁵⁴ The central features of the vagueness principle were recently reiterated by the Supreme Court: "It is established that a law fails to meet the requirements of the Due Process Clause if it's so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."¹⁵⁵ The

evaluating its consequences is a uniquely difficult, if not impossible task." *Id.* at 1107.

¹⁴⁷ *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

¹⁴⁸ In the declaration of legislative intent of the Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE § 5000 *et seq.* (West 1972 and West Supp. 1974), it is provided that: "The provisions of this part shall be construed to promote the legislative intent . . . to safeguard individual rights through judicial review." CAL. WELF. & INST. CODE § 5001 (West 1972). See *supra* notes 86-90, and accompanying text.

¹⁴⁹ Recognizing that legislative intent is not the same as constitutional protection, the stated intent of the legislature with regard to judicial review and individual rights should be considered, nevertheless, in balancing the state's interests in allocating the burden of proof to the incompetent against the individual's interest in periodic review by the court.

¹⁵⁰ CAL. PROB. CODE § 1460 (West Supp. 1974).

¹⁵¹ CAL. PROB. CODE § 1462 (West 1956).

¹⁵² See text accompanying note 14, *supra*.

¹⁵³ See generally, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

¹⁵⁴ *Id.* at 81. The author continues:

The doctrine determines, in effect, to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens and, second, makes virtually ineffacious the federal judicial machinery established for the vindication of those rights.

¹⁵⁵ *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-3 (1966).

The most famous formulation of the vagueness doctrine was enunciated by the Supreme Court in 1926, in *Connally v. General Construction Co.*, 269 U.S.

guardianship statute clearly fails to provide adequate guidelines for the reasoned application of the law.¹⁵⁶ That guardians are, in fact, not appointed "for almost any unsuccessful person" can be credited only to the restrained exercise of sound judicial discretion.¹⁵⁷

Since the demise of substantive due process,¹⁵⁸ the vagueness doctrine has been confined primarily to the criminal setting.¹⁵⁹ However, in 1966 in *Giaccio v. Pennsylvania*, the Supreme Court upheld a vagueness challenge in a "civil" context, eschewing arbitrary civil-criminal distinctions when the deprivation of protected rights of liberty and property results from the imposition of a state statute.¹⁶⁰ Similarly, in *Gonzalez v. Maillard*, a three-judge federal district court dispensed with the state's claim that the traditional vagueness arguments imported from criminal cases are not applicable to juvenile statutes because the juvenile courts administer "civil" justice under the doctrine of *parens patriae*.¹⁶¹ Again it must be emphasized that in the face of the serious deprivation of liberty which occurs upon a

385, 391, when it held an Oklahoma statute void-for-vagueness because the statute was "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

¹⁵⁶ Arbitrary and discriminatory enforcement of the laws has been a major concern of the Supreme Court in vagueness cases. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In *Grayned*, *id.* at 108-9, the Court stated: "A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

¹⁵⁷ See CONDEE, *supra* note 52, at § 2289, for his comments on the "amazingly broad" language of CAL. PROB. CODE § 1751 (West Supp. 1974) setting forth the conditions for the appointment of a conservator, which conditions are virtually the same as those defining an incompetent person in CAL. PROB. CODE § 1460 (West Supp. 1974). See also text accompanying note 91, *supra*.

Subsequent court interpretation of a statute does not compensate for a constitutionally vague statute. *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). Thus the considerable body of case law on what situations will justify guardianship do not make up for the statute's inadequacies. In any case, the case law is so unclear with respect to the standards it purports to provide that it does not, in fact, cure the vagueness problems of guardianship law. See *Situations Justifying Guardianship*, *supra* Part III.B.

¹⁵⁸ But see *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); *Cleveland Board of Education v. LaFleur*, — U.S. —, 94 S. Ct. 791 (1974).

¹⁵⁹ See Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 756, n.72 (1972) [hereinafter referred to as *Statutory Vagueness*].

¹⁶⁰ *Giaccio v. Pennsylvania*, 382 U.S. 399, 402. See generally, Note, *Constitutional Law: Supreme Court Holds Pennsylvania Statute Imposing Costs On an Acquitted Defendant Void for Vagueness*, 1966 DUKE L.J. 792.

¹⁶¹ No. 50424 (N.D. Cal., Feb. 9, 1971), *appeal docketed*, 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 Term; renumbered No. 70-120, 1971-72 Term). The *Gonzalez* court found CAL. WELF. & INST. CODE § 601 (West 1966) unconstitutionally vague, in a case concerning eight juveniles arrested on the ground that they were "in danger of leading a lewd and dangerous life" within the meaning of § 601. See *Statutory Vagueness*, *supra* note 158, at 745, 754-56 and n. 63-72 (1973).

determination of incompetency, any traditional immunity from constitutional requirements under the doctrine of *parens patriae* should be rejected in recognition of the threat posed to protected rights by the seemingly benign paternalism intrinsic to guardianship proceedings.

V. CONCLUSION

To prevent the unwarranted imposition of guardianship the law must be restructured to provide adequate protection of individual rights. By evaluating the law in terms of its constitutionality, it becomes clear that the protection it affords does not comport with that degree of protection mandated by due process. The parental role of the state in guardianship proceedings is no excuse for the unwarranted encroachment of individual rights. The potential for abuse of the law most surely exists, and demands a remedy.

C. L. Pickering