

Thursday's Child: Legal Problems of Families With a Mentally Retarded Member*

Monday's child is fair of face,
Tuesday's child is full of grace,
Wednesday's child is full of woe,
Thursday's child has far to go, . . .¹

I. INTRODUCTION

A. SIZE OF POPULATION

Mental retardation is a major national health, social and economic problem. It afflicts twice as many individuals as blindness, polio, cerebral palsy, and rheumatic heart disease combined.² The generally accepted estimate of the size of the mentally retarded population in the United States is 3 percent.³ In 1967, 3 percent of the population equalled 6 million people, an amount as large as the combined populations of Maine, Oregon, Mississippi, North Dakota, and Wyoming.⁴ The number of mentally retarded in California is estimated to be 540,000.⁵

The statistics show that mental retardation affects a significant number of people in the United States and in California. Because of the number of people affected it is important that lawyers be familiar with the concept of mental retardation and with the legal problems encountered by families with a mentally retarded member.

*Terry Ross, Staff Attorney, California Association for the Retarded must be given special acknowledgement for the information and encouragement which he provided.

¹Folk saying.

²U.S. PRESIDENT'S PANEL ON MENTAL RETARDATION, A PROPOSED PROGRAM FOR NATIONAL ACTION TO COMBAT MENTAL RETARDATION 1 (1962) [hereinafter cited A PROPOSED PROGRAM FOR NATIONAL ACTION].

³*Id.*

⁴U.S. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, REPORT 1 (1967). [hereinafter cited as REPORT].

⁵CALIFORNIA STUDY COMMISSION ON MENTAL RETARDATION, THE UNDEVELOPED RESOURCE; A PLAN FOR THE MENTALLY RETARDED IN CALIFORNIA 18 (1965) [hereinafter cited as THE UNDEVELOPED RESOURCE].

B. DEFINITION AND DISTINCTIONS

According to a non-technical definition, "the mentally retarded are children and adults who, as a result of inadequately developed intelligence, are significantly impaired in their ability to learn and to adapt to the demands of society."⁶ Mental retardation should be distinguished from mental illness. Some distinguish it on the basis that mental retardation is not a disease, but a condition from which one does not recover.⁷ Others note that mental retardation and mental illness cannot be separated with precision and that the mentally retarded are as susceptible to mental illness as others.⁸

Although it is recognized that I.Q. is an imprecise index, it is still useful as a rough gauge of the major gradations of mental retardation.⁹ The generally accepted classification is that proposed by the American Association for Mental Deficiency:

Borderline I.Q.	70-84
Mildly Retarded I.Q.	55-69
Moderately Retarded I.Q.	40-54
Severely Retarded I.Q.	25-39
Profoundly Retarded I.Q.	0-24 ¹⁰

When mental retardation is mentioned, the tendency of most persons is to think of only the severely or moderately retarded. This is probably due to the fact that severe or moderate mental retardation is a more readily recognizable condition. However, the distribution of the mentally retarded population belies this. It is: mildly retarded — 89 percent; moderately retarded — 6 percent; severely retarded — 3.5 percent; and profoundly retarded — 1.5 percent.¹¹ It is important for a lawyer to remember this distribution because the chances are greatest that he or she will be dealing with a mildly retarded individual whose needs and capabilities are different and therefore should be distinguished from the more severely retarded person. A mildly retarded person may, with special educational and vocational assistance, be capable of providing for his basic needs of food, clothing and shelter, and of exercising the rights of citizenship. A lawyer should be aware of the retarded person's capabilities so that his independence and self-reliance are not diminished unnecessarily. A mildly retarded adult's special needs may be only for some sort of property management if he owns considerable property. A more

⁶A PROPOSED PROGRAM FOR NATIONAL ACTION, *supra* note 2 at 1.

⁷Haggerty, Kane, and Udall, *An Essay on the Legal Rights of the Mentally Retarded*, 6 FAM. L.Q. 59, 65 (1972).

⁸Kay, Farnham, Karren, Knakal, and Diamond, *Legal Planning for the Mentally Retarded: The California Experience*, 60 CALIF. L. REV. 438, 441 (1972).

⁹Roos, *Mentally Retarded Citizens: Challenge for the 1970's*, 23 SYRACUSE L. REV. 1059, 1070 (1972).

¹⁰THE UNDEVELOPED RESOURCE, *supra* note 5 at 17.

¹¹REPORT, *supra* note 4 at 1.

severely retarded person, however, will probably be incapable of providing for his basic needs and may need a wider range of special services such as guardianship and residential care.

C. SPECIAL PROBLEMS

Families who have a mentally retarded member may encounter special problems. Retarded persons often have more health problems than other persons. The resulting cost of medical care may overload the family's budget. The retarded person, because of inadequate intelligence and slow physical development, may require more attention and care than the family is able to give. Providing for the educational needs of retarded children may be a problem. Retarded children are excluded from regular classes and must fit into special educational programs. The need for control over and care of retarded adults must be considered. A retarded adult may not be mentally capable of managing his property and providing for his basic needs even though he may be legally capable of such acts.

D. SCOPE OF ARTICLE

This article will discuss various legal solutions to the problems previously mentioned. Section II lists and discusses sources of help for supplementing the resources of the family. Section III discusses the use of guardianship or conservatorship as a solution to the problem of providing for legal control and care of retarded adults. Section IV discusses the availability of special educational programs for the mentally retarded.

The discussion is limited to California law. The criminal law problems of the mentally retarded will not be covered in detail because there are other writings which discuss them. Briefly, some of the problems are: 1) the condition of retardation is often not recognized by police, attorneys and judges; 2) the *M'Naughten* test for criminal responsibility excludes retardation; and 3) the disposition alternatives upon conviction are inadequate.¹² The problem of civil liability of the mentally retarded will also be excluded from discussion. Briefly, the problem is whether retardation affects one's liability for wrongs committed.¹³

¹²For example: Allen, *Retarded Offender: Unrecognized in Court and Untreated in Prison*, 32 FED. PROB. 22 (Sept. 1968); Bennett and Matthews, *The Dilemma of Mental Disability and the Criminal Law*, 54 A.B.A.J. 467 (1968); Gary, *Help for the Retarded Delinquent*, 19 JUVENILE CT. JUDGES J. 20 (Spring 1968); Haggerty, Kane and Udall, *An Essay on the Legal Rights of the Mentally Retarded*, 6 FAM. L.Q. 59 (1972); Rowan, *Retarded Offender*, 46 FLA. B.J. 338 (1972); U.S. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 31 (1963).

¹³ROSS, THE EFFECT OF GUARDIANSHIP ON THE CIVIL RIGHTS OF THE MENTALLY RETARDED (Calif. Assn. for the Retarded, 1972, unpublished).

II. WHEN THE FAMILY'S RESOURCES ARE INADEQUATE

A. INTRODUCTION

Families with a retarded member often need outside assistance because of the special problems and stress put on the family's resources. The family's financial and/or emotional resources may become so strained that outside help is necessary in order to keep the family functioning.

Sources of assistance include state hospitals, regional centers, foster home care, and Aid to the Needy Disabled. These sources will be discussed in this section.

B. STATE HOSPITALS

1. *PRE-1965*

Prior to 1965, parents could obtain financial aid from the state only by applying for admission of their child to a state hospital. As a result the hospitals had lengthy waiting lists, while public and private community-based services were not used to full advantage.¹⁴ In 1963 the Department of Mental Hygiene determined that less than half of the children on waiting lists required care in a state hospital.¹⁵

2. *POST-1965*

The California legislature, after studying the problem of lengthy hospital waiting lists, decided that state responsibility should be shifted from the time of hospital admission to the time when expert diagnosis established the fact that special care was needed that the family could not provide.¹⁶ A limited program of regional centers was authorized in 1965 to provide this care.¹⁷

3. *THE LANTERMAN MENTAL RETARDATION SERVICES ACT*

The role of state hospitals as a resource for aid to the retarded has undergone considerable change. The Lanterman Mental Retardation Services Act, passed in 1969, gave control of hospital admissions to the regional centers.¹⁸ After July 1, 1971, no mentally retarded person is to be admitted to a state hospital except by referral from a

¹⁴CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON WAYS AND MEANS, SUBCOMMITTEE ON MENTAL HEALTH SERVICES, A REDEFINITION OF STATE RESPONSIBILITY FOR CALIFORNIA'S MENTALLY RETARDED (Assembly Interim Committee Reports 1963-65, vol. 21, #10).

¹⁵*Id.*

¹⁶*Id.*

¹⁷CAL. HEALTH & SAFETY CODE § 415 (West 1970).

¹⁸CAL. HEALTH & SAFETY CODE § 38103 (West Supp. 1972).

regional center.¹⁹ Judicial commitments are the only other avenue of hospital admission.²⁰ They are now limited to situations where mentally retarded persons constitute a danger to themselves or others.²¹

The role of the state hospital under the Lanterman Act is upon referral by the regional center to provide:

1. Short-term respite care, emergency care, professional training, demonstration projects, and specialized medical care.
2. Specialized limited-term programs for rehabilitation, socialization, and vocational training.
3. Medical supervision and full-time nursing care for the profoundly retarded, the non-ambulatory, and other individuals with special needs.²²

4. RIGHTS OF STATE HOSPITAL PATIENTS

There has been recent legislation to protect the rights of mentally retarded persons in state hospitals. This was accomplished by amending the bill of rights for mental hospital patients to include mentally retarded.²³ These rights include the right: a) to wear one's own clothes; b) to keep and use one's own personal possessions including toilet articles; c) to keep and spend a reasonable sum of one's own money for canteen expenses and small purchases; d) to have access to individual storage space for one's private use; e) to see visitors each day; f) to have reasonable access to telephones, both to make and receive confidential calls; g) to have ready access to letter writing materials including stamps, and to mail and receive unopened correspondence; h) to refuse shock treatment; i) to refuse lobotomy; and j) other rights as specified by regulation.²⁴

5. PROCEDURAL PROTECTIONS

Adult mentally retarded state hospital patients now have the right to petition by writ of *habeas corpus* for a hearing for release from the hospital.²⁵

Any adult mentally retarded patient or a person acting on his behalf may make a request for release to any member of the hospital treatment staff or to a regional center employee. The employee receiving the request must promptly provide a form for the requesting

¹⁹*Id.*

²⁰*Id.* Mentally retarded persons may still be admitted to state hospitals under the Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE § 5000 *et seq.* (West 1972).

²¹CAL. HEALTH & SAFETY CODE § 38002 (West Supp. 1972). For a discussion of the impact of the Lanterman Act on hospital admission see Kay, *et al*, *supra* note 8 at 513-525.

²²HUMAN RESOURCES AGENCY, STATE OF CALIFORNIA, LANTERMAN MENTAL RETARDATION SERVICES ACT 12 (1971).

²³Ch. 1055 (1972) Cal. Stats. ____.

²⁴*Id.*

²⁵CAL. HEALTH & SAFETY CODE § 38120 (West Supp. 1972).

person to sign. This form is given to the state hospital medical director who must inform the superior court of the request.²⁶ Any person who intentionally violates this procedure is guilty of a misdemeanor.²⁷

The court must either release the adult or order an evidentiary hearing to be held within two days after the petition is filed.²⁸ The adult requesting release has a right to an attorney. The court will appoint an attorney if he does not have one.²⁹

If the court finds the adult is not mentally retarded or that he is mentally retarded and is able to provide safely for his basic personal needs for food, shelter, and clothing, he must be immediately released. If the court finds the person is mentally retarded and is unable to provide safely for his basic needs, but that a responsible person or a regional center or other agency is willing and able to provide such care, the court must release the mentally retarded adult to such responsible person or agency.³⁰

The *habeas corpus* proceeding has some problems which should be solved. For example, there is some dispute about whether this proceeding applies to both voluntary and involuntary (judicial) commitments. A judge in Los Angeles has recently said that he will hear only petitions from mentally retarded who were involuntarily committed.³¹ Also, it is not clear how often one may request a hearing for release.³² The statute is silent on this point. There is a possibility that a person would request a hearing week after week.³³ Finally, there may be a conflict between the *habeas corpus* remedy and the requirement of parental, guardian or conservatorship consent to post-hospital placement by a regional center.³⁴ This conflict would arise if the court released a mentally retarded adult to a regional center against the wishes of a parent, guardian or conservator.³⁵

C. REGIONAL CENTERS

Regional centers were first established in 1965 as discussed above.³⁶ The role of the regional centers has been greatly expanded

²⁶*Id.*

²⁷*Id.*

²⁸CAL. HEALTH & SAFETY CODE § 38121 (West Supp. 1972).

²⁹*Id.*

³⁰*Id.*

³¹Telephone interview with Terry Ross, Staff Attorney to California Association for the Retarded, Dec. 19, 1972.

³²*Id.*

³³CAL. HEALTH & SAFETY CODE § 38120-38121 (West Supp. 1972)

³⁴CAL. HEALTH & SAFETY CODE § 38105 (West. Supp. 1972), amended by Ch. 1081 (1972) Cal. Stats. _____.

³⁵It is hoped that the provision will be amended in the 1973 legislative session to deal with these problems. Ross interview, *supra* note 31.

³⁶See *supra* note 17 and accompanying discussion.

with the enactment of the Lanterman Mental Retardation Services Act in 1969.³⁷ The Lanterman Act provides for the establishment of a statewide network of regional diagnostic, counseling and service centers for mentally retarded persons and their families, easily accessible to every family throughout the state. The regional center functions are: 1) to provide fixed points of referral in the community for the mentally retarded and their families; 2) to establish ongoing points of contact for entry for services and return as the need may appear; 3) to provide a link between the mentally retarded and services in the community, including state-operated services, to the end that the mentally retarded and their families may have access to the facilities best suited to them throughout the life of the retarded person; 4) to offer alternatives to state hospital placement; and 5) to encourage the placement of persons from the state hospital.³⁸

As noted above, the regional centers now control hospital admissions except for judicial commitments.³⁹ Persons discharged from a state hospital are now referred to a regional center.⁴⁰

The Lanterman Act has had the effect of making the regional centers the focal point for state aid for families with a retarded member. The regional center accepts a retarded person as a client and then assesses the needs of that person and purchases the services necessary to meet the retarded person's needs.⁴¹

D. FAMILY CARE HOMES

Since the establishment of regional centers there has been increased emphasis on providing services for the mentally retarded within the community. When out-of-home residential care is needed the regional centers now place persons in family care homes instead of state hospitals.⁴²

Some families who are willing to provide foster care for retarded children and adults have encountered zoning problems. Many cities have zoning regulations limiting the number of unrelated persons who can live together in a residential zone. These regulations often mean that a family who is willing to care for more than one or two retarded persons is prohibited from doing so.

Recent legislation partially solves this problem. Under this law, licensed family care homes, foster homes, or group homes serving six or fewer mentally handicapped persons "shall be a permitted use in

³⁷CAL. HEALTH & SAFETY CODE § 38000 (West Supp. 1972).

³⁸CAL. HEALTH & SAFETY CODE § 38100 (West Supp. 1972).

³⁹CAL. HEALTH & SAFETY CODE § 38103 (West Supp. 1972).

⁴⁰*Id.*

⁴¹Interview with Ralph Levy, Director, Alta California Regional Center, Sacramento, Oct. 4, 1972.

⁴²*Id.*

residential zones for single-family dwellings."⁴³ The law provides that a city or county may still require a conditional use permit.⁴⁴ The problem is only partially solved because so long as conditional use permits are allowed, there is still a possibility that the permit may not be granted.⁴⁵

The case of *Defoe v. San Francisco Planning Commission* which is now before the California Court of Appeal, 1st District, may have great impact on the zoning problem.⁴⁶ Two of the appellants, Richard and Ruth Defoe, are retarded children for whom placement in San Francisco in a licensed family care home was sought. After a social worker searched in vain for almost two years for a licensed family home with room to accommodate the Defoe children, they were placed in licensed family homes in Sonoma County. Their natural mother who lives in San Francisco must travel over 100 miles to see them.⁴⁷ Other appellants, Mabel Sisk, Ruby Johnson, Freddie Mae Garrison, and Mr. and Mrs. Milton Farris, are residents of the City and County of San Francisco who reside in districts zoned R-1-D and R-1. These appellants applied to the California Department of Mental Hygiene for a Family Home license authorizing care for up to six mentally retarded children. They were refused such licenses for care for up to six because the San Francisco Department of City Planning refused to give zoning clearance for boarding of more than two mentally retarded children in areas zoned R-1-D or R-1.⁴⁸ The San Francisco City Planning Department interpreted the San Francisco City Planning Code as permitting no more than two mentally retarded children to be boarded in a home in zones R-1-D or R-1.⁴⁹

Appellants argue that state law has occupied the field of licensing and regulating the home care of mentally retarded persons. They contend that because of state preemption of the field, San Francisco's interpretation of the City Planning Code which conflicts with the state law is an invalid exercise of local police power.⁵⁰ It remains to be seen whether this argument is accepted and what impact it will have on the previously discussed recent state legislation.⁵¹

⁴³Ch. 1127 (1972) Cal. Stats. ____.

⁴⁴*Id.*

⁴⁵D. HAGMAN, J. LARSON, AND C. MARTIN, CALIFORNIA ZONING PRACTICE 291-311 (Cal. C.E.B. 1969)

⁴⁶Appellants' Opening Brief, *Defoe v. San Francisco Planning Commission*, 1 Civil No. 30789 (filed Jan. 14, 1972).

⁴⁷*Id.* at 3.

⁴⁸*Id.* at 5.

⁴⁹*Id.*

⁵⁰*Id.* at 10.

⁵¹*See supra* note 43.

E. AID TO THE NEEDY DISABLED

Upon reaching age 18, a retarded person may qualify for Aid to the Needy Disabled (ATD).⁵² ATD eligibility is based on need and a major physical handicap or mental impairment which appears reasonably certain to continue throughout a lifetime without substantial improvement, and the impairment substantially precludes the person from engaging in useful occupations within his or her competence such as a job or homemaking.⁵³ Employment in a sheltered workshop is not considered a "useful occupation" for ATD eligibility.⁵⁴ The important qualifications for aid for the mentally retarded person are that he must: 1) be 18 years of age or older; 2) be disabled; and 3) be needy.⁵⁵

F. FAMILY FINANCIAL RESPONSIBILITY

The resources listed above provide aid to families who need it because of the existence of a mentally retarded family member. There are some requirements for family contributions for the services provided by the state. These requirements, as well as income tax deductions for such payments, will be discussed.

1. REGIONAL CENTERS

The Lanterman Act which provides for state purchasing through the regional centers of needed services for the mentally retarded has a parental contribution requirement.⁵⁶ Parents of minors who are receiving services purchased by the regional center are required to contribute to the cost of those services. The amount paid depends upon their ability to pay, but not in excess of the cost of caring for a normal child at home.⁵⁷ The parental contribution requirement is interpreted by the California Human Resources Agency to apply only to those children who are receiving out-of-home placement.⁵⁸ Parents of children who receive services purchased by a regional center for other than out-of-home residential care are not required to contribute.⁵⁹

⁵²CAL. WELF. & INST. CODE § 13501 (West 1972).

⁵³*Id.*

⁵⁴*Id.* Sheltered workshops provide jobs within a sheltered (i.e., closely supervised) environment for those adults who are so retarded that they would be unable to function in the regular work world.

⁵⁵CAL. WELF. & INST. CODE § 13550 (West 1972).

⁵⁶CAL. HEALTH & SAFETY CODE § 38257 (West Supp. 1972).

⁵⁷*Id.*

⁵⁸LANTERMAN MENTAL RETARDATION SERVICES ACT 6, *supra* note 22.

⁵⁹Levy interview, *supra* note 41.

2. AID TO THE NEEDY DISABLED

The Aid to the Needy Disabled program has special provisions on family financial responsibility for ATD recipients. If the mentally retarded ATD recipient does not reside with his or her parents, they are not legally liable for his or her support or medical care.⁶⁰ The Welfare and Institutions Code specifically states that no demand shall be made upon any relative to support or contribute toward the support of any applicant or recipient of Aid to the Needy Disabled.⁶¹

However, if the ATD recipient lives with his parents, the parents must provide the normal household needs of the recipient which do not add appreciably to the amount of expenses the family would incur if the recipient were not present in the home.⁶² If the parents have an annual net income of less than \$15,000, the recipient residing with his parents will receive a housing allowance as part of his ATD grant.⁶³

3. INCOME TAX DEDUCTION

Some mentally retarded children do not receive services from the state. Parents of those children and parents of those who receive state services and contribute to the cost should be aware of the Internal Revenue Code deduction for medical expenses.⁶⁴

The IRS Regulations on medical deductions provide that the total cost of meals, lodging, and ordinary education furnished a mentally retarded child attending a special school is deductible as a medical expense. Two conditions must be met: 1) there must be available at the institution medical care *or* resources for alleviating a mental or physical handicap, and 2) the availability of such medical care or resources must be the principal reason for the presence of the individual there.⁶⁵

The mentally retarded person must be a dependent of the parent in order for the parent to claim this deduction.⁶⁶ Amounts paid by the state toward room, board, and tuition for a child in a school for the mentally retarded are not considered in determining support of a dependent.⁶⁷ The amounts paid by the taxpayer above the state contribution are deductible as medical expenses.⁶⁸

⁶⁰CAL. WELF. & INST. CODE § 13600 (West 1972).

⁶¹*Id.*

⁶²CAL. WELF. & INST. CODE § 13601 (West 1972).

⁶³*Id.*

⁶⁴INT. REV. CODE OF 1954 § 213. Note that the deduction is allowed only for medical expenses which exceed 3% of the taxpayer's adjusted gross income.

⁶⁵TREAS. REG. § 1.213-1(e)(1)(v)(a).

⁶⁶INT. REV. CODE OF 1954 § 213.

⁶⁷1971-2 CUM. BULL. 114.

⁶⁸*Id.*

The IRS Regulations specifically state "the cost of care and supervision or of treatment and training, of a mentally retarded or physically handicapped individual at an institution is within the meaning of the term 'medical care.'"⁶⁹ Revenue Ruling 69-499 has stated that the cost of maintaining a mentally retarded child in a specially selected home, to aid in his adjustment from institutional living to community living, qualifies as a medical expense.⁷⁰ The medical expense deduction has been denied in situations in which the school the child attends is not a special school for the mentally retarded.⁷¹

III. GUARDIANSHIP OR CONSERVATORSHIP

In two situations families should consider instituting guardianship or conservatorship proceedings. First, the parents may want to maintain legal control over the mentally retarded person after he reaches age 18.⁷² Second, the parents may want to provide for someone to be responsible for the care of their mentally retarded child after their deaths.

A. WHILE THE PARENTS ARE ALIVE

Parents of minor children are the natural guardians of their children. Upon reaching age 18, the mentally retarded person is legally an adult and therefore is no longer subject to parental control.⁷³ If the retarded adult and his parents disagree about where the retarded person should live, the parents have no legal authority to compel him to live where they want.

The need for a guardian or conservator for a mentally retarded adult may arise where intelligent consent is required for a particular act. The statute regulating admission to a state hospital requires that the person consenting be of "competent" mind.⁷⁴ A mentally retarded adult's own consent may not be accepted because his mental deficiency may mean that he is not of "competent" mind. The same problem occurs in residential placement through a regional center.⁷⁵

Consent to medical treatment and surgery is another problem.

⁶⁹TREAS. REG. § 1.213-1(e)(1)(v)(a).

⁷⁰1969-2 CUM. BULL. 39.

⁷¹E.F. Glaze, 20 TCM 1276 (Dec. 25, 004(M)), T.C. Memo 1961-244 allowed no medical deduction for sending child to private military school which provided no special treatment or training for mental retardation. *See also* M. Feinberg, 25 TCM 777 (Dec. 28, 013(M)), T.C. Memo 1966-145.

⁷²*See*, Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAWYER 133 (1972), for a discussion of guardianship which suggests that some form of advocacy be adopted to safeguard the rights of the retarded because the parents may not have the motivation and the capability to represent the best interests of the retarded person.

⁷³CAL. CIV. CODE § 25 (West Supp. 1972).

⁷⁴CAL. WELF. & INST. CODE § 6000 (West 1972).

⁷⁵Ch. 1081 (1972) Cal. Stats. _____.

Physicians are required to have the patient's intelligent or knowing consent prior to performing surgery in order to protect themselves from malpractice suits.⁷⁶ If the patient is a retarded minor the consent of the parent is often accepted.⁷⁷ However, if the patient is a mentally retarded adult, physicians are less likely to accept the consent of a parent who has not been appointed guardian or conservator.⁷⁸ Even where a parent has been appointed guardian or conservator of his adult mentally retarded child, there may be situations in which physicians will require a court order before operating.⁷⁹

Guardianship or conservatorship will increase the parents' legal capacity to exercise control over an adult mentally retarded person. A parent who has been appointed guardian or conservator has the legal authority to choose the residence of his ward or conservatee.⁸⁰ Problems of the adult mentally retarded person's incapacity to give intelligent or knowing consent may be resolved by substituting the consent of a duly appointed guardian or conservator.

B. CARE AFTER PARENTS' DEATH

The question of who will care for the retarded person after the parents are gone has been a crucial concern to families with a mentally retarded member. Someone will be needed to take over the responsibilities that the parents have been exercising as natural guardian or guardian or conservator of the mentally retarded person.

C. AVAILABLE ALTERNATIVES

California adopted a public guardianship statute as a response to the much expressed need for someone to be responsible for the mentally retarded person when the parents are unable to rely on a friend or relative to assume the burden upon their death.⁸¹ The Director of Public Health can be appointed as either guardian or

⁷⁶D. LOUISELL AND H. WILLIAMS, *MEDICAL MALPRACTICE* 582.2 (1972).

⁷⁷W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 102-3 (4th ed. 1971).

⁷⁸Ch. 1055 (1972) Cal. Stats. _____ authorizes Regional Centers to consent to medical, dental, or surgical treatment for mentally retarded persons who have no parent, guardian or conservator or who do have one but the person authorized to consent does not respond within a reasonable time.

⁷⁹Note, *Transplantation — Incompetent Donors: Was the First Step or the Last Taken in Strunk v. Strunk?* 58 CALIF. L. REV. 754 (1970). *Strunk v. Strunk*, 445 S.W.2d 145, 35 A.L.R. 3d 683 (1969). In *Strunk* the court held that consent of a committee, the functions of which were similar to those of a guardian, was inadequate to authorize a kidney transplant from an adult mentally retarded person to his brother.

⁸⁰CAL. PROB. CODE § 1500, § 1851 (West Supp. 1972).

⁸¹Kay, *et al*, *supra* note 8 at 496-510 describes the development of the public guardianship program. See also Dinkelspiel, *Recent Legislative Acts for the Benefit of the Mentally Retarded*, 44 CAL. STATE BAR J. 219 (1969).

conservator of the person and/or estate of a mentally retarded person. The retarded person must be eligible for the services of a regional center or be a state hospital patient who was admitted or committed from a county served by a regional center.⁸² The Director of Public Health can be nominated in writing by: 1) the mentally retarded person; 2) a parent, relative or friend; or 3) the guardian or conservator of the person and/or estate of the mentally retarded person.⁸³ The nomination must give the effective date and it can be made to take effect in the future.⁸⁴

The guardianship or conservatorship services are actually performed by the regional centers.⁸⁵ The statute requires the guardian or conservator: 1) to maintain close contact with the mentally retarded person no matter where the person lives in California; 2) to act as a wise parent would act in caring for his mentally retarded child; and 3) to encourage maximum self-reliance of the retarded person.⁸⁶

The most useful type of guardianship for families of the mentally retarded is Section 1460 of the Probate Code which relates to the appointment of a guardian for the person and/or estate of an incompetent person.⁸⁷ An incompetent person is a person who is unable to properly manage and take care of himself or his property, and therefore is likely to be deceived or imposed upon by artful or designing persons.⁸⁸ A guardian has the responsibility of care and custody of the person of his ward and/or the management of his estate, and has the power to fix the residence of the ward at any place within the state.⁸⁹

The family may wish to consider conservatorship as an alternative to guardianship. A conservator may be appointed for the person and/or estate of any adult who is unable to properly care for himself or his property or who is likely to be deceived or imposed upon by

⁸²CAL. HEALTH & SAFETY CODE § 416 (West 1970). After July 1, 1973 all references to Director of Public Health will be changed to Director of Health, Ch. 1593 (1971) Cal. Stats. 3209.

⁸³CAL. HEALTH & SAFETY CODE § 416.5 (West 1970).

⁸⁴*Id.*

⁸⁵CAL. HEALTH & SAFETY CODE § 416.19 (West 1970).

⁸⁶CAL. HEALTH & SAFETY CODE § 416.17 (West 1970).

⁸⁷There are two other provisions on guardianship for the mentally retarded in California: CAL. WELF. & INST. CODE § 7284 (West 1972) provides for appointment of the Dept. of Mental Hygiene as guardian for any incompetent who has been admitted or committed, prior to July 1, 1971, to a state hospital for the mentally disordered or the mentally retarded. CAL. HEALTH & SAFETY CODE § 38150 (West Supp. 1972), as amended by Ch. 1081 (1972) Cal. Stats. _____.

CAL. WELF. & INST. CODE § 8006 (West 1972) provides for the appointment of the county public guardian as guardian of the person and/or estate.

⁸⁸CAL. PROB. CODE § 1460 (West Supp. 1972).

⁸⁹CAL. PROB. CODE § 1500 (West Supp. 1972).

artful or designing persons.⁹⁰ A conservator of the person has the care, custody and control of the conservatee and may fix the residence of the conservatee at any place in California.⁹¹

D. CHOICE BETWEEN GUARDIANSHIP OR CONSERVATORSHIP

The public guardianship program was designed to meet the needs of the mentally retarded who have no parents, relatives or friends to assume the guardianship burden. The present policy of the Department of Public Health is to refuse to accept appointment as public guardian while a parent or guardian is still alive.⁹² This policy is based on the belief that the parents should continue to participate in the planning for their retarded children so long as they are alive and able.⁹³

Because the public guardian functions are performed by persons in an employment capacity, it is likely that there will be some turn-over in the person who actually performs as guardian or conservator. If the goal of guardianship or conservatorship is to have someone act in place of a parent, it is probably preferable to use the regular guardianship or conservatorship provisions rather than public guardianship. There is much less possibility of change in the person performing as guardian or conservator when the appointment is made by name under Cal. Probate Code § 1460 or § 1751 as compared to an appointment of the office of the Director of Public Health.

In choosing between guardianship or conservatorship, consideration should be given to the abilities of the retarded person because the legal effect on the retarded person differs. A conservatorship may be preferable to guardianship when the person is only mildly retarded.

California conservatorship law has provisions for allowing the conservatee control over some of his affairs. The conservatee's wages are subject to his control unless the court orders otherwise.⁹⁴ The conservator may petition the court to pay the conservatee an allowance for his personal use and subject to his control.⁹⁵ There is no comparable provision for payment of an allowance to a ward.

The effect of conservatorship upon the legal rights of a conservatee is less severe than guardianship. This is because the appointment of a conservator is generally not a legal adjudication of incom-

⁹⁰CAL. PROB. CODE § 1751 (West Supp. 1972).

⁹¹CAL. PROB. CODE § 1851 (West Supp. 1972).

⁹²Kay, *et al*, *supra* note 8 at 510.

⁹³*Id.*

⁹⁴CAL. PROB. CODE § 1910 (West Supp. 1972).

⁹⁵CAL. PROB. CODE § 1861 (West Supp. 1972).

petence.⁹⁶ An appointment of a guardian under Probate Code 1460 is an adjudication of incompetence.⁹⁷

Appointment of a guardian affects the exercise of the mentally retarded person's civil rights because it is an adjudication of incompetence.⁹⁸ A mentally retarded ward has no power to contract.⁹⁹ All contracts made by a mentally retarded ward are void.¹⁰⁰ Guardianship is evidence of but does not conclusively establish a mentally retarded ward's incapacity to make a will,¹⁰¹ marry, obtain a driver's license, or vote.¹⁰² Guardianship has no effect on the determination of the civil liability of a mentally retarded person.¹⁰³

IV. EDUCATION

A. INTRODUCTION

Access to educational facilities has in the past been one of the most frustrating and heartbreaking problems for families with retarded children. Exclusion from public schools was often the first crisis when the family's resources became inadequate.¹⁰⁴ California has been a leader among the states in providing special education, but California still does not provide special education for all who need it.

This section will discuss: 1) the existing state provisions on education for the mentally retarded;¹⁰⁵ 2) the inadequacies of the present California educational structure; and 3) the right to education litigation in California and elsewhere.

B. CALIFORNIA PROVISIONS ON EDUCATION FOR THE MENTALLY RETARDED

California laws provide four types of special education for the mentally retarded. They are: 1) classes for the educable mentally retarded (EMR); 2) classes for the trainable mentally retarded (TMR); 3) Development Centers for Handicapped Minors; 4) tuition grants when there are no appropriate special education facilities.

California has had mandatory special education for the "educable"

⁹⁶W. JOHNSTONE AND G. ZILLGITT, *CALIFORNIA CONSERVATORSHIPS* (Cal. C.E.B. 1968). See pp. 11-17 for a discussion of the effect of conservatorship on the conservatee.

⁹⁷CAL. PROB. CODE § 1460 (West. Supp. 1972).

⁹⁸Ross, *supra* note 13.

⁹⁹CAL. CIV. CODE § 40 (West Supp. 1972).

¹⁰⁰Gibson v. Westoby, 115 Cal. App. 2d 273, 251 P.2d 1003 (1953).

¹⁰¹*In re Johnson's Estate*, 200 Cal. 299, 252 P. 1049 (1927).

¹⁰²Hsu v. Mt. Zion Hospital, 259 Cal. App. 2d 562, 66 Cal. Rptr. 659 (1968).

¹⁰³Campbell v. Bradbury, 179 Cal. 364, 176 P. 685 (1919).

¹⁰⁴Interview with Margie W. Spencer, parent of a retarded child and teacher of trainable mentally retarded classes, Los Angeles County Schools, Dec. 23, 1972.

¹⁰⁵See, Koch and Okada, *Educational Services for the Mentally Retarded Individual in California*, 23 SYRACUSE L. REV. 1075 (1972).

mentally retarded since 1947 and for "trainable" mentally retarded since 1964.¹⁰⁶ Educable mentally retarded are those with I.Q.'s primarily between 50 and 70 who may be expected to benefit from special educational facilities designed to make them economically useful and socially adjusted.¹⁰⁷ The school districts must provide EMR classes for those educable mentally retarded between the ages of 6 and 16 years.¹⁰⁸

Education is mandatory for trainable mentally retarded minors 6 to 18 years old.¹⁰⁹ TMR classes are for those who do not qualify for EMR classes and "who may be expected to benefit from special educational facilities designed to educate and train them to further their individual acceptance, social adjustment, and economic usefulness in their homes and within a sheltered environment . . ."¹¹⁰ The TMR classes serve the more severely retarded with IQ's primarily between 50 and 25.¹¹¹

To qualify for trainable mentally retarded classes the minor must be:

1. Ambulatory to the extent and in such physical condition that no undue risk to himself or hazard to others is involved in his daily work and play activities.
2. Capable of being trained in toilet habits so he can develop control over his body functions.
3. Able to communicate to the extent that he can make his wants known and to understand simple directions.
4. Developed socially to the extent that his behavior does not endanger himself and the physical well being of other members of the group.
5. Emotionally stable to the extent that group stimulation will not intensify his problems unduly, that he can react to learning and/or training situations, and that his presence is not inimical to the welfare of other children.¹¹²

If a child does not meet these TMR admission tests he must look to permissive programs (i.e., not state mandated) for his education.

Development Centers for Handicapped Minors were authorized in 1959.¹¹³ They are to serve physically handicapped and mentally retarded minors between 3 and 21 years of age who are ineligible for TMR classes or other special education.¹¹⁴

The eligibility requirements for admission to development centers

¹⁰⁶ THE UNDEVELOPED RESOURCE, *supra* note 5 at 57.

¹⁰⁷ CAL. EDUC. CODE § 6901 (West 1969), § 6902 (West Supp. 1972).

¹⁰⁸ CAL. EDUC. CODE § 6902 (West Supp. 1972).

¹⁰⁹ CAL. EDUC. CODE § 6903 (West Supp. 1972).

¹¹⁰ *Id.*

¹¹¹ Koch & Okada, *supra* note 105 at 1078.

¹¹² 5 CAL. ADMIN. CODE § 3441.

¹¹³ CAL. EDUC. CODE § 16645.2 (West 1969).

¹¹⁴ *Id.*

are that the minor is found:

1. to be ineligible for enrollment in a regular day class,
2. to be ineligible for enrollment in special education programs, maintained, or authorized to be maintained by a school district or county superintendent of schools,
3. to have one or more of the following conditions:
 - A) serious impairment of locomotion;
 - B) severe orthopedic condition;
 - C) other severe disabling conditions which have as their origin mental retardation and/or physical impairment;
 - D) severe mental retardation.¹¹⁵

California has a system of providing tuition grants to parents when there are no appropriate special education facilities available to a mentally retarded minor, a severely retarded minor, or a multihandicapped minor.¹¹⁶ The grant is for tuition for an adequate public or private school.¹¹⁷

C. INADEQUACIES OF CALIFORNIA LAW

The only special education classes for the mentally retarded which are state mandated are TMR and EMR classes. The Education Code does not mandate that school districts provide Development Centers.¹¹⁸

Even those eligible for mandatory EMR and TMR public education may not be receiving that education. In 1970-71 there were 344 persons on waiting lists for mandatory TMR classes in 23 school districts.¹¹⁹ Those minors on waiting lists are effectively denied a free public education. They are ineligible for tuition grants because the district has special education facilities and services, and they are ineligible for Development Centers because they are eligible for enrollment in special education.¹²⁰

State funding for Development Centers is inadequate.¹²¹ Development Centers have been established in only 29 of California's 58 counties.¹²² The existing centers have long waiting lists.¹²³ It is estimated that as of August 1, 1972 the number of persons on waiting

¹¹⁵ 5 CAL. ADMIN. CODE § 18103(c).

¹¹⁶ CAL. EDUC. CODE § 6870 (West Supp. 1972).

¹¹⁷ CAL. EDUC. CODE § 6871 (West Supp. 1972). The amount of the grant is not to exceed the sum per unit of average daily attendance of the regular state apportionment.

¹¹⁸ CAL. EDUC. CODE § 16645.2 (West 1969).

¹¹⁹ DIVISION OF SPECIAL EDUCATION, DEPT. OF EDUCATION, D-2 REPORT, PUPILS ON WAITING LISTS FOR ENROLLMENT IN SPECIAL EDUCATION PROGRAMS (Table 71-W1).

¹²⁰ CAL. EDUC. CODE § 6871 (West Supp. 1972), 5 CAL. ADMIN. CODE § 18103(c)(2).

¹²¹ California Assn. for the Retarded v. California Dept. of Education, to be filed in Superior Court for San Francisco County, June 1973.

¹²² *Id.*

¹²³ *Id.*

lists was well over 1,000.¹²⁴ Mentally handicapped persons on waiting lists for Development Centers are considered ineligible for tuition grants by a policy of the California Department of Education.¹²⁵ Severely retarded and multi-handicapped minors who reside in areas where no Development Center exists would qualify for tuition grants. It is suspected that few parents receive the tuition grants because they do not know about them or because there are no adequate private or public facilities to serve them.¹²⁶

D. RIGHT TO EDUCATION LITIGATION

As discussed above, there are certain mentally retarded minors in California who are not receiving a free public education. The California Association for the Retarded has filed a class action to require the State of California to provide free public education to those mentally retarded and multihandicapped minors who are presently unserved by public education.¹²⁷

One legal theory of the suit is Education Code § 6920 which states: "Every mentally retarded, physically handicapped, or multiply handicapped minor as defined in Section 6870, is entitled to training or education free of charge in the public schools of this state."¹²⁸ Plaintiffs contend that depriving the class of handicapped minors on waiting lists for Development Centers and the class of handicapped minors in unserved areas of education is a violation of Education Code § 6920. Another legal theory of the suit is that the existence of waiting lists of those eligible for TMR classes violates Education Code § 6903.1. This provides: "Mentally retarded minors identified pursuant to Section 6903 shall participate in a special day class program for mentally retarded minors."¹²⁹

The constitutional arguments are that the exclusion of the aforementioned classes of TMR and multihandicapped children from education violates the equal protection provisions of the California and United States Constitutions.¹³⁰ The U.S. Supreme Court recently ruled that education is not a fundamental right.¹³¹ Therefore the traditional equal protection review standard will apply. The Cali-

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Interview with Terry Ross, Staff Attorney, Calif. Assn. for the Retarded, October 6, 1972.

¹²⁷ Calif. Assn. for the Retarded v. California Dept. of Education, *supra* note 121. The class of plaintiffs is all handicapped persons, aged 3-21 years, who are not served by public education.

¹²⁸ CAL. EDUC. CODE § 6920 (West 1969).

¹²⁹ CAL. EDUC. CODE § 6903.1 (West Supp. 1972).

¹³⁰ U.S. CONST. AMEND. XIV, § 1; CAL. CONST. ART. I, § 11 and § 21.

¹³¹ San Antonio Independent School District v. Rodriguez, ___U.S. ___, 93 S. Ct. 1278 (1973).

ifornia educational system must be shown to bear some rational relationship to a legitimate state purpose.¹³²

The present method of allocating state resources can be attacked by an economic comparison of the overall cost to the state of educating versus not educating the mentally retarded. The state saves money by educating a child as opposed to letting him become a ward of the state. According to Dr. Marvin A. Wirtz, Deputy Commissioner of the U.S. Office of Education Division for the Disadvantaged and Handicapped, the savings are as follows:

Assuming that it costs \$1,000 to educate a retarded child and he is kept in school for twelve years, this would be an expenditure of \$12,000 on the part of the taxpayers. If, however, he entered a State institution at age 15 and stayed there until he was sixty-five, he would have spent fifty years in an institution with an average cost of \$2,000 a year based on current spending. This would be an expenditure of \$100,000 or a net difference of \$88,000 in cost. Add to this the fact that if the person were trained to work in a sheltered workshop and work for poverty wages for a period of time that he finished school until he was sixty-five, which we might assume is forty-five years, he would have earned \$90,000. If this is added to the \$88,000 already saved, there is a net saving of about \$178,000 on one individual.¹³³

The right to education for the mentally retarded has been a recently litigated issue in other states.¹³⁴ For example, *Pennsylvania Association for Retarded Children v. Commonwealth of Pa.* was a class action brought in the federal courts on due process and equal protection grounds.¹³⁵ The suit was resolved by a consent agreement following expert testimony on the need for and the value of education for the mentally retarded.¹³⁶ The court acknowledged in approving the consent agreement, that every mentally retarded child is capable of benefiting from education and training.¹³⁷ The consent agreement stated that the Commonwealth will provide access to a free public program of education and training appropriate to their capacities for every retarded person between the ages of 6 and 21 years.¹³⁸

While reviewing the consent agreement the court considered an attack upon its jurisdiction by one of the defendants. The court

¹³² *Id.*

¹³³ Murdock, *supra* note 72 at 165.

¹³⁴ See Murdock, *supra* note 72 at 165-171; Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972); Weintraub and Abeson, *Appropriate Education for all Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037 (1972); Shapp, *The Right to an Education for the Retarded in Pennsylvania*, 23 SYRACUSE L. REV. 1085 (1972); Kubetz, *Educational Equality for the Mentally Retarded*, 23 SYRACUSE L. REV. 1141 (1972).

¹³⁵ 343 F. Supp. 279 (E.D. Pa. 1972) (earlier opinion, 334 F. Supp. 1257).

¹³⁶ *Id.* at 285.

¹³⁷ *Id.* at 296.

¹³⁸ *Id.* at 314

upheld its jurisdiction and held that a colorable constitutional claim under both the due process and the equal protection clauses had been established.¹³⁹

In *Mills v. Board of Education of District of Columbia*,¹⁴⁰ it was unequivocally held that the exclusion of mentally retarded and certain other classes of children from public schools denied equal educational opportunity (the equal protection clause in its application to public school education) in contravention of the due process clause of the 5th Amendment.¹⁴¹ This decision was reached under the traditional equal protection test.¹⁴² In response to the justification of insufficient funds, the court said:

If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.¹⁴³

The *Mills* reasoning could equally apply to California. Although *Mills* is not precedent for California, it is hoped that the California courts will find it persuasive.

V. CONCLUSION

It appears that California is moving from an age of charity to an age of rights and services for the mentally retarded. The Declaration of the Rights of Mentally Retarded Persons recently adopted by the United Nations General Assembly¹⁴⁴ is an eloquent statement of the goal toward which California and the nation should strive:

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should

¹³⁹ *Id.* at 295 and 297.

¹⁴⁰ *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.C. 1972). In addition to the mentally retarded, the classes were children labeled emotionally disturbed, physically handicapped, hyperactive, and behavior problems.

¹⁴¹ *Id.* at 875.

¹⁴² There is some ambiguity about which equal protection test was used.

¹⁴³ 348 F. Supp. at 876.

¹⁴⁴ G.A. Res. 2856 (XXVI Session), adopted Dec. 20, 1971.

receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.

5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal wellbeing and interests.

6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offense, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. The procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.¹⁴⁵

Gaining rights, however, is not the end of the matter. Many families and probably many lawyers are unaware of what the law now provides and requires in the area of rights and services for the retarded. It is hoped that this article will help to spread the message.

Barbara C. Spencer

¹⁴⁵ *Id.*