NOTES

GUARDIANSHIP FOR THE ADULT: A NEED FOR DUE PROCESS PROTECTIONS IN VERMONT

INTRODUCTION

Although the federal courts have recognized the due process rights of individuals subject to juvenile and civil commitment proceedings,[1] they have not yet considered the due process rights of

1. *In re* Gault, 387 U.S. 1 (1967) launched the extension of procedural due process rights to juvenile proceedings by affording the safeguards of notice, representation by counsel retained or appointed, confrontation and cross-examination, and the privilege against self-incrimination. Subsequent Supreme Court decisions defined the limits of *Gault's* procedural reach. *In re* Winship, 397 U.S. 358 (1970) held that the guilt of a juvenile delinquent must be proved beyond a reasonable doubt rather than by a preponderance of the evidence. And McKeiver v. Pennsylvania, 403 U.S. 528 (1971) decided that juveniles do not have a constitutional right to a jury trial in the juvenile court system.

In the civil commitment area, the course charted by the Supreme Court is less clear. There is currently pending before the Supreme Court a case that raises the "question of whether Georgia's statute permitting parents to give the consent that makes children's admission to state mental hospitals 'voluntary' violates the Due Process Clause of the Fourteenth Amendment." Parham v. J.L. and J.R., No. 75-1690, 46 U.S.L.W. 3383 (1977). The case has been scheduled for reargument during the 1978 term.

Earlier Supreme Court cases dealing with commitment have arisen in the context of criminal commitments. *See* Humphrey v. Cady, 405 U.S. 504 (1972) in which the Supreme Court remanded for further proceedings a case challenging the constitutionality of the sentencing procedures under Wisconsin's Sex Crimes Act; Specht v. Patterson, 386 U.S. 605 (1967), holding that full due process rights must be extended to an individual convicted for indecent liberties and sentenced under the Sex Offenders Act; Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), in which the Court upheld a statute providing some procedural protections to individuals committed as sexual psychopaths. Applying these cases to the civil commitment area, Laurence Tribe has concluded that *Specht* "declared that state commitment proceedings, whether civil or criminal, are subject to procedural due process." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 517 n.20 (1978) [hereinafter cited as TRIBE]. Nevertheless, none of the following civil commitment cases has used *Specht* as a basis for its analysis in finding the need for due process rights. *See In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973) requiring proof beyond a reasonable doubt; French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977) requiring notice, the privilege against self-incrimination, and proof by clear and convincing evidence; Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974), requiring notice, the right to have counsel appointed, confrontation and cross-examination, and proof of incompetence beyond a reasonable doubt.

In addition to finding a need for procedural safeguards, lower federal courts have also held that legislative schemes for civil commitment must accomplish their objectives without unduly infringing the rights of the individuals subject to them. A person can be civilly

adults involved in guardianship proceedings.[2] This disparity is remarkable because guardianship proceedings may result in substantial deprivations of liberty and property.

On being declared a ward in Vermont, an individual loses his right to choose his place of residence and type of lifestyle. His freedom to come and go as he likes, to make basic decisions about the conduct of his life and the care of his person is subject to the guardian's discretion.[3] The appointment of a guardian also deprives the individual of his ability to control the disposition of his property[4] and of his legal capacity to enter into contracts and to sue or be sued.[5] More important, it brands him with the stigma of being declared incompetent. On becoming a ward, an individual is divested of his autonomy, his opportunity for self-determination, and his self-esteem.[6]

Although the consequences of appointing a guardian are profound, guardianship laws in many states are uniformly applied regardless of the individual's competence or abilities. This is true of Vermont's statutory scheme: the guardian invariably assumes con-

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committed only if no less restrictive means of providing treatment and rehabilitation are available. Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966); Lessard v. Schmidt, 349 F. Supp. at 1096.

2. Federal and Vermont decisions concerning guardianship proceedings do not involve the due process rights of the potential adult ward. *See generally* McAuliffe v. Carlson, 386 F. Supp. 1245 (D. Conn. 1975), *rev'd* 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976), which involved a challenge to the conservator's use of the ward's funds; *In re* Guardianship of Boe, 322 F. Supp. 872 (D.D.C. 1971), which determined whether a person whose age is eighteen requires a guardian; Hudgens v. Cook Indus., Inc., 310 F. Supp. 32 (N.D. Okla. 1970), which involved a collateral attack on the appointment of a guardian to defeat diversity jurisdiction. *In re* Mears, 124 Vt. 131, 198 A.2d 27 (1964), which involved the validity of the waiver of counsel by a guardian *ad litem*; *In re* Collette's Estate, 122 Vt. 231, 167 A.2d 361 (1961), which was an accounting proceeding; *In re* Hanrahan's Will, 109 Vt. 108, 194 A. 471 (1937), which dealt with the appointment of a temporary guardian by a Massachusetts court for a person who was arguably a resident of Vermont.

3. *See* VT. STAT. ANN. tit. 14, § 2692 (1974). For the complete text, see note 12 *infra*.

4. *Id.* §§ 2798, 2842 & 2690. For the relevant text, see notes 13 & 15 *infra*.

5. *Id.* §§ 2690, 2799. For relevant text, see notes 14 & 15 *infra*.

6. When an adult has a guardian appointed, he loses the independence of an adult and acquires the dependence characteristic of a child. The distinction between what it means to be an adult and what it means to be a child was expressed by Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 645 (1977) [hereinafter cited as *Medical Care*]: "To be a *child* is to be at risk, dependent, and without capacity or authority to decide what is 'best' for oneself. To be an *adult* is to be a risktaker, independent, and with capacity and authority to decide and do what is 'best' for oneself."

trol of both the individual's person and property despite that individual's ability to continue making certain kinds of decisions himself.[7]

In other areas of the law, statutory proceedings depriving individuals of their liberty and property have been challenged on procedural and substantive due process grounds.[8] This note asks whether and to what extent Vermont's guardianship statutes are vulnerable to these due process claims. Section I describes Vermont's guardianship scheme and compares it with the provisions of the Uniform Probate Code. Section II focuses on the due process requirement that certain *procedural* safeguards be afforded to protect the individual from unwarranted deprivations of liberty. This section analyzes the need for the rights of notice, confrontation and cross-examination, representation by counsel retained or appointed, proof of incompetence by a standard greater than a preponderance of the evidence, and the right to be tried by a jury. Section III discusses the *substantive* due process requirement that a legislative scheme affecting important individual rights accomplish its objective without unduly infringing the interests of those it affects. It concludes that Vermont's guardianship scheme fails to meet constitutional requirements in three respects: 1) it inadequately tailors the powers of the guardian to the individual's needs; 2) it makes no provision for considering the availability of less restrictive alternatives to the appointment of a guardian; and 3) it fails to provide the potential ward with the opportunity to rebut legislative presumptions of incompetence.

SECTION I. A COMPARISON OF VERMONT'S GUARDIANSHIP LAWS AND THE UNIFORM PROBATE CODE.

Vermont's guardianship statutes can be divided into two categories: those that define the guardian's powers and those that pre-

7. In Vermont, the guardian of a person who has only a physical disability has the same power as the guardian of a person who is mentally incompetent. VT. STAT. ANN. tit. 14, §§ 2671, 2692 (1974). The guardian also always assumes control of both the ward's person and property. *Id.* This is true of other jurisdictions as well. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 280-88 (Table 8.3) (rev. ed. S. Brakel and R. Rock 1971) [hereinafter cited as AMERICAN BAR FOUND.].

8. *See generally* text accompanying note 1 *supra*.

scribe the procedures used to appoint a guardian. A comparison of Vermont's statutory plan with the provisions of the Uniform Probate Code (UPC)[9] provides the construct for identifying the strengths and weaknesses of Vermont's guardianship scheme.

A. The Guardian's Powers

In Vermont, the extent of the guardian's powers varies with the type of guardianship proceeding. Vermont has three types: appointment of a legal representative by the department of social welfare; voluntary appointment of a guardian; and involuntary appointment of a guardian.[10] For the purposes of this note, the most important

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9. By 1975 at least ten states had adopted the guardianship provisions of the Uniform Probate Code (UPC). Effland, *Caring for the Elderly Under the Uniform Probate Code*, 17 ARIZ. L. REV. 373, 375 (1975).

10. For a discussion of the involuntary appointment of a guardian, see text accompanying notes 11-38 *infra*. The other two types are the voluntary appointment of a guardian and the appointment of a legal representative.

The voluntary proceedings are initiated by the ward himself. VT. STAT. ANN. tit. 14, § 2671 (1974) (text set out below). Despite the seemingly benign nature of the proceedings, the consequences of appointing a guardian in this case are as serious as those in involuntary proceedings. Upon appointment, the guardian can exercise complete dominion over the ward's person and property. *Id.* § 2692, see text set out at note 12 *infra*. The result is the same regardless of the reason the ward requested the appointment. Although the statutes recognize physical infirmity alone as a reason for seeking the help of a guardian, *id.* § 2671, they fail to provide any means of adjusting the powers of the guardian to the individual ward's needs. A physically infirm person is treated the same as a mentally incompetent individual.

The third type of guardianship proceeding is the involuntary appointment of a legal representative to control assets provided by the department of social welfare. *Id.* § 2672 (text set out below). In this situation, the powers of the legal representative are limited to the control of transactions involving the welfare funds. The legal representative has no power over the ward's person or over other real or personal property the ward may have. VT. STAT. ANN. tit. 14, § 2672 (1974) (Legal representative; appointment; duties) contains the following provisions:

> (a) When the commissioner of social welfare believes that an applicant for, or recipient of financial assistance from the department of social welfare is incapable of prudently expending the assistance, he may apply to the probate court for the district in which the applicant or recipient resides for the appointment of a legal representative for the applicant or recipient. . . .
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> (b) The legal representative shall have the same rights, powers and duties as a guardian appointed for a person residing within the state, except that he shall not have the custody of the person or members of the family dependent upon the person for support, nor any rights in assets not provided by the department of social welfare.

Id. § 2671 (Guardian of infirm person appointed on his application) states that:

> A person, not a minor, who deems himself unfitted by reason of infirmity,

of these is the involuntary appointment of a guardian. This is an action brought by a relative or other interested party who believes the individual needs a guardian.[11] In this situation, the guardian's powers are substantial because he is responsible for the complete care and custody not only of the ward's person and property but also of the ward's dependents.[12] The guardian can choose where the ward lives and make all decisions concerning his personal care. In addition, the guardian can sell the ward's personalty and realty and agree to partition his land.[13] He may also sue and recover debts on

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age or other mental or physical disability, for the prudent management of his affairs, may apply to the probate court for the district in which he resides, for the appointment of a guardian over him . . . . Such guardian and his ward shall each have the same rights, powers and duties and be each subject to the same conditions and liabilities as in case of proceedings for appointment of a guardian for a person mentally incapable of taking care of himself or his property.

11. *Id.* § 2683 (Guardian for mentally incapable person) states that:

On the application of a relative or friend of an insane person, or of a person mentally incapable of taking care of himself or his property, or on the application of the commissioner of social welfare, the probate court may appoint a guardian of that person.

12. *Id.* § 2692 (Extent of guardian's control) states:

Until they are legally discharged, guardians of spendthrifts, insane, absconding persons and of persons mentally incapable of taking care of themselves or their property, shall have the possession and management of the estates of their wards, and the care and custody of such members of the families of their wards as are dependent upon such wards for support, education or employment, unless such members have other guardians. If the ward is an insane person, spendthrift or a person mentally incapable of taking care of himself or his property, the guardian thereof shall have the care and custody of his person and furnish him suitable employment.

13. *Id.* § 2798 (Guardian may sell personalty and support ward) states that:

When it is necessary or for the interest of his ward, the guardian shall sell his personal estate. Out of the proceeds, and the income of his real estate, if sufficient, such guardian shall pay the necessary expenses of the maintenance and education of his ward.

Id. § 2842 (Realty to be taken when personalty exhausted) states that:

The personal estate of the ward shall be first used for the payment of his debts. If the personal estate and the income of his real estate are not sufficient, such expenses and debts shall be paid out of the real estate, when sold, according to law.

Id. § 2802 (Partition of estate of which ward has an undivided interest) provides that:

When a ward is joint tenant or tenant in common with others, his guardian may agree with the other joint tenants or tenants in common, to make partition of the lands so held. When such agreement is made in writing and filed in court, the probate court may appoint commissioners to make such

the individual's behalf, settle accounts and claims against the ward, and waive the ward's right to notice in proceedings which affect his interests.[14] When the guardian becomes the ward's official representative, the individual loses his legal capacity to enter into contracts and to buy or sell real or personal property.[15] By law, public

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partition, and the partition shall be returned to, filed and docketed in the court. . . . [S]uch partition shall be binding on the ward, his heirs and assigns and on the parties to the agreement.—Amended 1971, No. 179 (Adj. Sess.), § 9, eff. July 1, 1972.

14. *Id.* § 2799 (Powers of guardian) which states that:

> A guardian appointed by probate court, as provided in this chapter, in the name and right of his ward, may receive, sue for and recover, debts and demands due to the ward. He may maintain and defend actions or suits when necessary for the recovery or protection of the property or person of his ward, settle accounts, demands, claims and actions at law or in equity by or against his ward, including actions for injuries to the person or property of such ward and compound for, release and discharge the same in such terms as he deems just and beneficial to his ward.

Id. § 201 (Cum. Supp. 1978) (Notice; method and time of giving), which is set out below:

> (a) If notice of a hearing on any account or petition is required under this title and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:
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> (1) by mailing a copy thereof at least ten days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;
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> (2) by delivering a copy thereof to the person being notified personally at least ten days before the time set for the hearing; or
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> (3) if the address, or identity of any interested person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for three consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least ten days before the time set for the hearing. . . .
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> (d) A person, including a guardian, guardian ad litem, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.—Added 1975, No. 240 (Adj. Sess.), § 6.

15. *Id.* § 2690 (Guardian to give notice that ward's contracts and transfers will be void), which states that:

> As soon as may be after his appointment, the guardian of a person mentally incapable of taking care of himself or his property or a spendthrift or absconding person shall give notice of the appointment, and that contracts made by his ward will be held void, by posting a notice in three public places in the town where the ward or his wife or children reside. Contracts, gifts, sales or transfers of real or personal estate made by the ward after the appointment of such guardian, shall be void.

notice of the individual's loss of legal capacity must be posted in three places in the town where the ward lives.[16]

Unlike Vermont, Uniform Probate Code jurisdictions adjust the guardian's powers to the individual ward's needs. Instead of invariably vesting the guardian with control of both the individual's person and property, UPC jurisdictions distinguish between the appointment of a *guardian* to care for the ward's person[17] and a *conservator* to manage his property.[18] The court is empowered to appoint either a conservator or a guardian or both and to vest their respective powers in one person or two.[19]

A UPC guardian is responsible for the control and custody of the individual's person.[20] He can establish the ward's place of resi-

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16. *Id.*

17. UNIFORM PROBATE CODE § 5-303 (Procedure for Court Appointment of a Guardian of an Incapacitated Person):

> (a) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.
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> (b) Upon the filing of a petition, the Court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an appropriate official or attorney to represent him in the proceeding who shall have the powers and duties of a guardian ad litem. . . . The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the Court-appointed physician and the visitor [, and to trial by jury]. The issue may be determined at a closed hearing [without a jury] if the person alleged to be incapacitated or his counsel so requests.

18. *Id.* § 5-410 (Who May Be Appointed Conservator; Priorities.):

> (a) The Court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:
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> (1) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;
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> (2) an individual or corporation nominated by the protected person if he is 14 or more years of age and has, in the opinion of the Court, sufficient mental capacity to make an intelligent choice . . . .

19. *Id.* §§ 5-401, 5-312 & comments. For partial text see notes 20 & 34 *infra*.

20. *Id.* § 5-312 (General Powers and Duties of Guardian.):

> (a) A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without

dence, provide for his personal care and, absent the appointment of a conservator, can control the individual's personal property to the extent necessary to pay for the ward's expenses.[21] In contrast to Vermont's statutes, the Uniform Probate Code requires the guardian to account to the court for the ward's personal condition.[22]

The powers of a UPC conservator are essentially the same as those that a Vermont guardian has over his ward's property: the

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qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the Court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this state.

(2) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

(4) If no conservator for the estate of the ward has been appointed, he may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward;. . .

(5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the Court or court rule. . . .

COMMENT

The guardian is responsible for the care of the person of his ward. . . . Where there are no protective proceedings, the guardian also has limited authority over the property of the ward. . . . The same person, of course, may serve as guardian and conservator.

21. *Id.*

22. *Id.* VT. STAT. ANN. tit. 14, § 2802 (1974) requires court supervision of certain transactions concerning the ward's estate. See note 13 *supra* for the complete text. The statutes concerning care of the ward's person lack comparable provisions. *Id.* §§ 2671, 2683, 2692. See notes 10-12 *supra* for the relevant texts.

ability to buy, sell and transfer real and personal property.[23] As in Vermont, UPC jurisdictions require an accounting to the court for certain transactions;[24] but unlike Vermont, a ward in a UPC juris-

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23. UNIFORM PROBATE CODE § 5-424 (Powers of Conservator in Administration.):

> (a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. . . .
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> (b) A conservator has power without Court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.
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> (c) A conservator . . . may act without Court authorization or confirmation to:
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> (1) collect, hold and retain assets of the estate. . . ;
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> (2) receive additions to the estate;
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> (3) continue or participate in the operation of any business or other enterprise;
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> (4) acquire an undivided interest in an estate asset. . . ;
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> (5) invest and reinvest estate assets. . . ;
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> (7) acquire or dispose of an estate asset. . . ;
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> (9) subdivide, develop, or dedicate land to public use. . . ;
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> (10) enter for any purpose into a lease as lessor or lessee. . . ;
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> (13) vote a security, in person or by general or limited proxy. . . ;
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> (16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship. . . ;
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> (17) insure the assets of the estate against damage or loss. . . ;
>
> (18) borrow money to be repaid from estate assets or otherwise. . . ;
>
> (19) pay or contest any claim; to settle a claim by or against the estate or the protected person. . . ;
>
> (22) pay any sum distributable to a protected person or his dependent without liability to the conservator. . . ;
>
> (24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets. . . .

24. Although the UPC gives the conservator broad powers to act without court authority, *id.*, the court nevertheless retains the power to impose whatever restrictions on the conservator's power it feels are necessary. *Id.* §§ 5-422, 5-426 (Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable; Exceptions.) (Enlargement or Limitation of Powers of Conservator.):

> Any sale or encumbrance to a conservator, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the Court after notice to interested persons and others as directed by the Court.
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> Subject to the restrictions in Section 5-408(4), the Court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by Sections 5-424 and 5-425, any power which the Court itself could exercise under Sections 5-408(2) and 5-408(3). The Court may, at the time of appointment or later, limit the powers of a conservator otherwise

diction may nominate his conservator.[25]

In UPC jurisdictions the probate court is empowered to appoint a guardian, a conservator or both or to enter any other appropriate order.[26] The court may also increase or decrease the statutorily defined powers of the guardian or conservator as the situation requires.[27] The UPC probate judge can therefore tailor the appointment or other court order to the particular needs of the ward. In comparison, Vermont's statutes do not permit the probate judge to make a flexible response in the appointment of a guardian and the definition of his powers.

B. Guardianship Proceedings

Vermont's involuntary guardianship proceedings may be initiated by the individual's friends, family or other interested parties.[28] Notice of the proceedings must be sent to the potential ward six days before the hearing if the individual is within the state and ten days in advance if he is outside the state.[29] Although it contains information about the time and place of the hearing, the notice does not inform the individual of the accusations against him, of his

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conferred by Sections 5-424 and 5-425, or previously conferred by the Court, and may at any time relieve him of any limitation. If the Court limits any power conferred on the conservator by Section 5-424 or Section 5-425, the limitation shall be endorsed upon his letters of appointment.

25. *Id.* § 5-410. For partial text, see note 18 *supra.*

26. *Id.* § 5-304 (Findings; Order of Appointment.):

> The Court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Alternatively, the Court may dismiss the proceeding or enter any other appropriate order.

27. *Id.* § 5-426. For complete text, see note 24 *supra.*

28. VT. STAT. ANN. tit. 14, § 2683 (1974). For complete text, see note 11 *supra.*

29. *Id.* §§ 2684 (Mentally incapable person and spendthrift; hearing; notice), 201 (Cum. Supp. 1978). For a partial text of § 201, see note 14 *supra.*

> When application is made for the appointment of a guardian under either of sections 2682 or 2683 of this title, the court shall fix a time and place for hearing thereon and cause the applicant to give notice to the person for whom a guardian is requested, by service thereof, at least six days before the time set for hearing, if the person is in the state, and if absent from the state, by service of the notice like a writ of summons at least ten days before the hearing. If a person other than her husband is sought to be appointed guardian of a married woman, a like notice shall be given to the husband.

rights at the hearing or of the consequences of having a guardian appointed.[30]

Vermont's guardianship proceedings also do not provide the individual with the following procedural safeguards: the right to cross-examination and confrontation, to representation by counsel retained or appointed, to a trial by a jury, or to have incompetence proved by a standard of proof greater than a preponderance of the evidence.[31] Interested parties may attend the hearing; but as the individual's presence is not required, the proceedings may be *ex parte*.[32] The ward, however, has the right of appeal from the appointment of a guardian.[33]

The guardianship and conservator proceedings in Uniform Probate Code jurisdictions differ from Vermont's in several important ways.[34] Notice is sent not only to the individual whose competence is in question but also to his spouse, his parents, if any, his adult children or at the very least to one of his closest relatives. Moreover, the notice is sent fourteen rather than six days in advance of the

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30. *Id.* § 201.

31. *Id.* § 2684.

32. *Id.* § 2685 (Decree; appeal) states that:

> On hearing the parties interested, the court shall make decree in the premises as appears just. The person complained of may appeal from such decree without giving bond, but during the pendency thereof, the person so appointed shall act as guardian.

Interested parties or persons are defined, *id.* § 204 (Cum. Supp. 1978) (Interested persons), as:

> Whenever used in this title, "interested person" includes heirs, devisees, legatees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, or ward which may be affected by the proceeding. It also includes persons having priority for appointment as executor or administrator, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and it must be determined, according to particular purposes of, and the matter involved in, any proceeding.

33. *Id.* § 2685. For complete text, see note 32 *supra*.

34. UNIFORM PROBATE CODE, §§ 1-401 (Notice; Method and Time of Giving.), 5-309, 5-405:

> (a) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given;

hearing.[35] In addition, a UPC guardianship proceeding extends to the individual the protection of several due process safeguards: the right to be present; to confront the evidence against him; to cross-

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(1) by mailing a copy thereof at least 14 days before the time set for the hearing by certified, registered or ordinary first class mail. . . ;

(2) by delivering a copy thereof to the person being notified personally at least 14 days before the time set for the hearing; or

(3) if the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for 3 consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least 10 days before the time set for the hearing.

Section 5-309. (Notices in Guardianship Proceedings.)

(a) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or the person alleged to be incapacitated and his spouse, parents and adult children;

(2) any person who is serving as his guardian, conservator or who has his care and custody; and

(3) in case no other person is notified under (1), at least one of his closest adult relatives, if any can be found.

(b) Notice shall be served personally on the alleged incapacitated person, and his spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in Section 1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

Section 5-405. (Notice.)

(a) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents, must be served personally with notice of the proceeding at least 14 days before the date of hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with Section 1-401. Waiver by the person to be protected is not effective unless he attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(b) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under Section 5-406 and to interested persons and other persons as the Court may direct. Except as otherwise provided in (a), notice shall be given in accordance with Section 1-401.

35. *Id.*

examine adverse witnesses; to be represented by counsel retained or appointed; and to be tried by a jury.[36] When only a conservator is to be appointed the proceedings provide fewer safeguards but do include the right to counsel retained or appointed.[37] As in Vermont, UPC jurisdictions permit an appeal from the appointment of a guardian or conservator; but in contrast with Vermont, this appeal process includes the panoply of due process rights provided in the original appointment proceedings.[38]

To summarize, Vermont's guardianship scheme differs from that of the Uniform Probate Code in two significant ways. First, Vermont gives guardians uniform powers regardless of the reasons for appointment. The UPC, on the other hand, adjusts the powers of the guardian or conservator to the particular needs of the individual ward. Second, Vermont's comparatively uncomplicated proceedings afford almost no procedural safeguards. The more complex UPC proceedings extend substantial procedural protections.

The procedural simplicity of Vermont's guardianship proceedings is, in some ways, advantageous to both the individual ward and the state. Free from the additional delays caused by procedural

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36. *Id.* § 5-303. For a partial text, see note 17 *supra*.

37. *Id.* § 5-407(c).

> Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem.

38. *Id.* §§ 5-307 (Removal or Resignation of Guardian; Termination of Incapacity), 5-430 (Termination of Proceeding).

> (a) On petition of the ward or any person interested in his welfare, the Court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the Court may accept his resignation and make any other order which may be appropriate. . .
>
> (c) Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the Court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the Court.
>
> The protected person, his personal representative, the conservator or any other interested person may petition the Court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The Court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship.

complexity, Vermont's proceedings enable the state to provide care promptly. In addition, the statutory definition of the guardian's powers effects consistency and predictability in the court's supervision of the guardian's functions.

But the simplicity of Vermont's scheme has serious drawbacks as well. Most significantly, it fails to provide the individual with sufficient procedural safeguards to ensure that the appointment of a guardian is based on complete and accurate information. Moreover, the statutorily defined powers of the guardian may be disproportionate to the individual's incapacity. An individual's inability to manage his financial affairs should not necessarily also cause him to lose his authority to supervise his own personal care. Yet that result is mandated by Vermont law because the scope of the guardian's power presumes that all wards are completely incompetent.

Because of these weaknesses, two questions must be asked about the constitutional validity of Vermont's statutes: 1) whether the procedural safeguards provided sufficiently protect the ward from an erroneous deprivation of liberty and property; 2) whether the inflexible scope of the guardian's powers unjustifiably restricts the individual's liberty. These challenges are considered in the following sections of this note.

SECTION II. PROCEDURAL DUE PROCESS ANALYSIS

Procedural due process analysis is based on a two-step inquiry.[39] The first step asks whether the interests at stake in the proceeding are protected by the "liberty" and "property" language of the fourteenth amendment of the United States Constitution.[40] When protected interests are at risk, a second inquiry determines which safeguards are required.[41]

A. Liberty and Property Interests

The threshold question is whether the interests jeopardized by guardianship proceedings are embraced by the "liberty" and

39. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
40. *Id.*
41. *Id.*

"property" language of the fourteenth amendment. Traditionally, "property" meant the right to control or possess land or chattels,[42] and "liberty" meant the right to be free from personal restraint.[43] Over time, however, the original meaning of "liberty" has been transformed "from a specific freedom from interference with locomotion to a general right of private autonomy."[44] Included in this expanded notion of "liberty" are the right to privacy[45] and the right to keep a deservedly good reputation.[46]

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42. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 453 (1977) [hereinafter cited as Van Alstyne].

43. Board of Regents v. Roth, 408 U.S. 564, 572 (1972); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411 (1977) [hereinafter cited as Monaghan].

44. Monaghan, *supra* note 43, at 414.

45. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

46. Wisconsin v. Constantineau, 400 U.S. 433 (1971), as narrowed by Paul v. Davis, 424 U.S. 693, 708-09 (1976). Van Alstyne, *supra* note 42, at 479 n.97, has observed that it would be equally logical to characterize reputational interests as property interests in that they are:

> an asset one has simply as a person, an asset one can attempt to exploit commercially to whatever grand or trivial extent one chooses, and an asset that . . . is in no sense dependent in the first instance upon either state law granting it or a constitutional provision establishing it. Even in its best remembered tribute, reputation is spoken of in words that are more reminiscent of a natural property:
>
> Good Name in man and woman,
> dear my lord,
> Is the immediate jewel of
> their souls;
> Who steals my purse steals
> trash; 'tis something,
> nothing;
> 'Twas mine, 'tis his, and has
> been slave to thousands;
> But he that filches from me
> my good name
> Robs me of that which not
> enriches him,
> And makes me poor indeed.

W. SHAKESPEARE, OTHELLO, *Act III*, sc. III, 11.155-161 (London 1622).

The following dictum from Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) sheds additional light on the relationship between liberty and property interests:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right

The appointment of a guardian deprives the individual of his ability to buy, sell or give away his real or personal property and to participate in decisions affecting the distribution of his assets.[47] In addition, the individual is divested of his ability to sue or be sued and to enter into legal relationships.[48]

More significant than these substantial losses of property and legal capacity is the individual's enormous loss of personal autonomy, of his opportunity for self-determination—his ability to control his own fate.[49] On being declared a ward, an individual is deprived of his freedom to come and go as he wishes, to choose his own lifestyle, to decide what is best for himself. He must secure another's approval of the most routine aspects of his daily life.[50] To compound the injury, an adult who is declared a ward suffers the public humiliation of bearing the label "incompetent," a brand which stigmatizes him and diminishes his sense of personal esteem.[51] The consequences of appointing a guardian remove the individual from the community of adult responsibility and deprive him of his ability to express that which is uniquely his—his individuality and his personhood.

The severity of these consequences is especially pronounced when a guardian is appointed for an old person. For the aged, society's judgment of incompetence is likely to be final: his future holds little hope that the infirmity will be removed with the passage of time.[52]

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in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

47. See text accompanying notes 10-16 *supra*.

48. *Id.*

49. *Id.*

50. *Id.*

51. Because the guardian must post public notice of the ward's incompetence, VT. STAT. ANN. tit. 14, § 2690 (1974), the individual cannot bear his humiliation privately. On the subject of the effects of being adjudged mentally incompetent, *see In re* Ballay, 482 F.2d 648, 668-69 (1973). The following statements are particularly illuminating about the public attitude toward mental illness. "In the job market, it is better to be an ex-felon than [an] ex-patient," and "[o]ne of the great difficulties in this field [of mental illness] is brought about by a strong feeling in the public that mental illness is a disgrace to a person so afflicted and to everyone connected with him." *Id.* at 668, n.72.

52. Of the many situations which may lead to the appointment of a guardian for an adult, the socially most significant are those involving the appointment of a guardian for the elderly. Today, the elderly are the fastest growing age group in our society. *See generally* A.

Because the appointment of a guardian causes the individual to suffer significant losses of both liberty and property, guardianship proceedings should provide some due process protections. The second and more difficult question of the inquiry is concerned with which particular safeguards are constitutionally required for guardianship proceedings.

B. Procedural Safeguards

Due process does not require that all safeguards must be provided for every proceeding.[53] Instead, it is a flexible doctrine courts apply by examining the need for each safeguard on an individualized basis.[54] Using a balancing test, courts compare the interests protected by the safeguard with those served by its omission. When the interests to be protected prevail in the balance, the safeguard will be provided.[55] This individualized determination of the need for each safeguard enables the courts to accommodate the tensions otherwise inherent in having to choose between the two very different procedural models that potentially apply to guardianship proceedings: the "full due process" model and the "informal" model.

The full due process model is characterized by the procedural formality reflected in the UPC guardianship proceedings. It provides the individual with such safeguards as, *inter alia,* the right to be present, to cross-examination and confrontation, to representation by counsel retained or appointed, to be judged by a standard

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STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 161 (1975) [hereinafter cited as STONE]; Kreps, *Where is the Money?*, TRIAL, March/April 1974, at 14. In 1969, the over-sixty age group comprised just ten per cent of the population. Regan, *Protective Services for the Elderly: Commitment, Guardianship and Alternatives,* 13 WM. & MARY L. REV. 569 (1972) [hereinafter cited as Regan]. By 1977 the number of people over sixty exceeded thirty-two million. SPECIAL COMMITTEE ON AGING, UNITED STATES SENATE, 95TH CONG., 1ST SESS., PROTECTIVE SERVICES FOR THE ELDERLY 2 (Comm. Print 1977) [hereinafter cited as SENATE REPORT]. Ten to fifteen per cent of the elderly currently need some form of protective care or assistance, and another three or four million may need help if current support by family and friends is no longer available. *Id.* at 3. "[T]ens of thousands of mentally disabled persons are adjudged incompetent and placed under guardianship every year." AMERICAN BAR FOUND., *supra* note 7, at xv.

53. Goss v. Lopez, 419 U.S. 565, 578 (1975).

54. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

55. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Bartley v. Kremens, 402 F. Supp. 1039, 1048 (E.D. Pa. 1975), *vacated and remanded on other grounds,* 431 U.S. 119 (1977).

of proof greater than a preponderance of the evidence, and to be tried by a jury.[56] It is important to realize that the safeguards provided by the full due process model are not mere formalities. Having developed in the context of criminal proceedings,[57] they afford substantial procedural protection to the individual whose liberty is at stake and who must contend with the state as an adversary.[58] It must also be recognized that the full due process model does have its drawbacks. Its emphasis on the adversary, public character of the proceedings increases the individual's sense of facing potential punishment at the hands of the state. Furthermore, its procedural complexity increases both the time needed for the proceedings and their monetary costs.[59]

The informal model, on the other hand, facilitates the state's ability to exercise its *parens patriae*[60] power, to act on the individual's behalf without making him feel he is on trial or being punished. Characteristic of Vermont's current guardianship proceedings, the informal model affords few or no procedural safeguards because the traditional perception of the state as a benefactor has led "logically if not realistically to the rationale that a person protected by the state . . . [does] not need legal safeguards to protect himself from the state."[61] The informal model's procedural simplicity yields the dual advantages of being easy to administer and of

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56. See note 1 *supra*.

57. *Id.*

58. See text accompanying notes 83, 86-88, 102-103, 106-107, 113-115, 120, 121, 145-148 *infra*.

59. See text accompanying notes 90, 111 & 126 *infra*.

60. The source of the state's interest in guardianship proceedings and of its power to impose protective and right-depriving guardianship laws is its right and duty to exercise its *parens patriae* function: to provide for the well-being of those individuals who are unable to care for themselves. *See* Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 Mo. L. Rev. 215, 221 (1975) [hereinafter cited as Horstman]. The historical roots of *parens patriae* reach far back into the development of the common law. As long ago as 700 years, English law adopted the principle that as father of his country (parens patriae), the king had the duty to care for and protect the person and property of people who were mentally incapacitated. Senate Report, *supra* note 52, at 28. Over time, the duty to care for the mentally incompetent was expanded to include the duty to protect the well-being of all individuals. Horstman, *supra* at 221. Today, *parens patriae* considerations underlie juvenile, civil commitment, and guardianship proceedings.

61. Comment, *The "Crime" of Mental Illness: Extension of "Criminal" Procedural Safeguards to Involuntary Civil Commitments*, 66 Nw. U.J. Crim. L. & Crim. 255, 259 (1975) [hereinafter cited as *Crime of Mental Illness*].

emphasizing the protective, non-adversary purposes of the proceedings.[62]

In recent years, however, the courts have increasingly found that the safeguards formerly reserved for criminal proceedings should also apply to civil commitment and juvenile proceedings.[63] In the process they have shifted their emphasis from the state's *parens patriae* role in the proceeding to the individual's potential loss of liberty.[64] Finding themselves torn between the informal and the full due process models, the courts have constructed a third, intermediate model which sufficiently protects the individual's liberty without introducing unnecessary procedural formality and which accommodates the requirements of the proceedings in question.[65] Using a similar method of analysis, this note considers whether the following safeguards should be provided for guardianship proceedings: notice, confrontation and cross-examination, representation by counsel retained or appointed, use of a standard of proof more demanding than preponderance of the evidence, and trial by jury.

1. Notice

The fourteenth amendment of the United States Constitution guarantees that an individual will not be deprived of life, liberty or property without first being afforded notice of the potential deprivation and the opportunity to show why the potential deprivation should not occur.[66] To meet constitutional standards, notice must provide the individual with enough information to understand the charges against him and must be sent in enough time to allow him to prepare an adequate defense.[67]

The notice provisions of Vermont's guardianship statutes are subject to two types of constitutional challenges. First, they are deficient as to *content* because they fail to provide the individual

62. See text accompanying notes 90-93, 152 & 153 *infra*, and text following notes 76 & 81 *infra*.

63. *See* note 1 *supra*.

64. *See generally* cases cited note 1 *supra*.

65. *Id.*

66. Goss v. Lopez, 419 U.S. 565, 579 (1975).

67. *In re* Gault, 387 U.S. 1, 33 (1967).

with enough information to understand the import of the proceedings. In Vermont, notice includes information about the time and place of the guardianship hearing; but it does not say who has initiated the proceedings, what the charges are, what rights the individual has, or what the consequences of having a guardian appointed are.[68] A second challenge to Vermont's notice scheme is that it fails to provide enough *time* to prepare an adequate defense. Vermont allows only six days notice to an individual within the state and ten days notice to one outside the state.[69]

a. Content of the Notice

The content of Vermont's notice is subject to challenge because it does not inform the individual of the charges against him. *In re Gault*[70] struck down a notice scheme which, like Vermont's was limited to information concerning the time and place of a juvenile delinquency proceeding. The Supreme Court held that because the juvenile hearing was a final adjudication on the merits,[71] and because the child's freedom was at stake,[72] notice must describe the "alleged misconduct with particularity,"[73] and must contain the "specific charge or factual allegations to be considered at the hearing."[74]

Guardianship proceedings, like juvenile proceedings, conclude with a final judgment on the merits and may lead to substantial deprivations of liberty. An individual who is not informed of the charges against him may be unaware of the serious consequences of the guardianship proceedings and may fail to prepare a defense himself or enlist the aid of counsel. Even if he does realize the gravity of his situation, inadequate notice will cause the individual to waste valuable time discovering the specifics of the allegations of incompetence.

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68. VT. STAT. ANN. tit. 14, §§ 201 (Cum. Supp. 1978), 2684 (1974). For relevant text of these statutes, see notes 14 & 29 *supra*.

69. *Id.* § 2684.

70. 387 U.S. 1, 31 (1967).

71. *Id.* at 33.

72. *Id.* at 33-34.

73. *Id.* at 33.

74. *Id.*

A second ground for challenge is that Vermont's notice provisions do not inform the individual of the nature and purpose of the hearing.[75] To satisfy this standard, notice should include the following information: the time, place and purpose of the hearing; the due process rights available to the individual; and the possible results of the hearing.[76] The absence of comparable information in Vermont's notice may cause the individual to lose the benefit of available safeguards because he does not know about them. Limited information also impairs his ability to recognize the seriousness of his situation and to exert some influence on the proceedings. As a result, his participation in the hearing will be perfunctory at best and will contribute little to the fact finding process.

On the other hand, administrative considerations favor Vermont's current form of notice because it takes little time to prepare and can be dispatched without delay. Including additional information will increase preparation time and cost and will ultimately delay the proceedings. But problems like these can be solved by improved administrative methods. Vermont, for example, could use preprinted notice forms with variable information limited to the specific allegations of incompetence and the time and date of the hearing. Even if it were impossible to eliminate or reduce the increased burden, the importance of safeguarding the individual's liberties more than justifies the administrative inconvenience caused by adding a few lines of information. One can therefore conclude that the content of Vermont's notice does not meet constitutional standards and that it should provide the individual with the following information: the time, place and date of the hearing; the purpose of the hearing; the name of the person who is bringing the action and on what grounds; the due process rights available to the individual; and the consequences of having a guardian appointed.

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75. French v. Blackburn, 428 F. Supp. 1351, 1357 (M.D.N.C. 1977). Citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the court said "[d]ue process requires that the notice of a hearing be appropriate to the occasion and reasonably calculated to inform the person to whom it is directed of the nature of the proceedings." French v. Blackburn, 428 F. Supp. at 1356.

76. *See* French v. Blackburn, 428 F. Supp. 1351, 1356 (M.D.N.C. 1977).

b. Timing of the Notice

The timing of Vermont's notice is subject to challenge because six days may not be sufficient for the preparation of an adequate defense against the charges of incompetence. When confronted with questions of *timing,* the Supreme Court has often adopted a deferential approach to legislative judgment. In *Lindsey v. Normet,*[77] for example, the Court upheld a summary eviction proceeding in which notice was served two to four days before the hearing, with the possibility of a two day continuance. The Court approved this notice interval because of the limited number of issues to be litigated and because the tenant could institute his own action against the landlord for a full hearing on the merits.[78] Similarly, in *Goldberg v. Kelly,*[79] the Supreme Court upheld seven days notice of a preliminary hearing on the termination of welfare benefits because the pretermination hearing had a limited function and would be followed by a full administrative review.[80]

On the other hand, when presented with a final adjudication on the merits resulting in substantial deprivations of liberty, the Supreme Court did not hesitate to conclude that five days notice was insufficient time to prepare an adequate defense. In *Gault,* the Court required that written notice be given at the "earliest practicable time, and . . . sufficiently in advance of the hearing to permit preparation."[81] Guardianship proceedings also are full adjudications on the merits rather than preliminary proceedings on limited issues. Furthermore, the substantial deprivations of liberty at risk in guardianship proceedings seem to require application of the *Gault* rationale.

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77. 405 U.S. 56 (1972).

78. *Id.* at 64-66. The court concluded that

> [t]enants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary.

Id. at 65.

79. 397 U.S. 254 (1970).

80. *Id.* at 268. The Court cautioned that although it would not find that seven days notice was constitutionally unsound *per se,* "there may be cases where fairness would require that a longer time be given." *Id.*

81. *In re* Gault, 387 U.S. 1, 33 (1967).

Nevertheless, one cannot overlook the fact that a minimal time between notice and hearing permits a speedy resolution of the question of the individual's competence. A swift determination serves both the state's wish to provide needed care with dispatch and the individual's desire to discredit quickly the allegations of incompetence.

Although a swift determination may be desirable, it is of a lower priority than preventing the harm caused by an erroneous decision made in haste.[82] According to *Normet,* "[d]ue process 'requires that there be an opportunity to present every available defense.' "[83] Too brief an interval between notice and hearing severely limits the number and quality of defenses that can be made. More important, too little time may mean there is "in actuality no opportunity to be heard."[84]

Between the time the notice arrives and the date of the guardianship hearing, the individual must acquaint himself with the facts, arrange for witnesses and, possibly, find an attorney and arrange for medical testimony. If the notice arrives on Wednesday for a hearing on Monday, the individual will have only two or three working days to make these arrangements; and his counsel will have even less time to prepare. Without adequate notice, the "opportunity to be heard and interpose a defense [becomes] a promise of empty words."[85] Because guardianship proceedings are adjudications on the merits causing serious losses of personal liberty, and because due process guarantees the opportunity to present an adequate defense, the timing requirement of Vermont's notice provision, like its content, seems to be unconstitutional.

2. *Confrontation and Cross-Examination*

Vermont's guardianship procedure does not provide the rights of cross-examination and confrontation even though the Supreme

82. The *Gault* court found that "even if there were a conceivable purpose served by the deferral [of sending notice] . . ., it would have to yield to the requirements that the child and his parents or guardian be notified, in writing, . . . at the earliest practicable time. . . ." *Id.* at 33.

83. Lindsey v. Normet, 405 U.S. 56, 66 (1972).

84. *Id.* at 85 (Douglas, J., dissenting).

85. *Id.*

Court has extended these rights to situations in which "governmental action seriously injures an individual"[86] and in which the critical evidence is based on individual testimony rather than documentary proof.[87] The rights to confront evidence and to cross-examine witnesses are especially important when the evidence consists "of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy."[88] These safeguards would be invaluable in guardianship proceedings because the critical evidence consists of personal observations of the individual's conduct and opinions of his competence.[89]

Nonetheless, it cannot be ignored that these safeguards threaten both the administrative efficiency of the proceedings and

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86. Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (quoting Greene v. McElroy, 360 U.S. 474, 496-97 (1959)). Even though the appointment of a guardian in Vermont may benefit an individual by providing him with care, it also invariably deprives him of substantial liberty and property rights. These deprivations are the governmental action which seriously injures the individual.

87. *Id.* The Court said:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

88. *Id.*

89. The fact that guardianship proceedings may have been initiated with the best interests of the individual in mind does not obviate the need for procedural safeguards. As Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 479 (1927), observed:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Regan, *supra* note 52, at 609, echoed this concern:

> [A] conflict of interests may lie hidden behind the masks of concern for the welfare of the alleged incompetent and his property. Close relatives, expectant heirs, and state hospitals, acting as interested parties, may petition for appointment as guardian to prevent dissipation of the assets. This laudable goal may in fact benefit the family and heirs more than the ward. Support for the hypothesis that the surrogate management of the aged incompetent is conducted in the specific interest of some person other than the ward has been found in a field study of the management of such estates. The study concluded that "except for young veterans, if the specific interests of the incompetent were protected, it was out of inadvertence not design."

their nonadversarial character. "[C]onfrontation and cross-examination significantly expand the time required for a hearing"[90] and consequently delay the court's resolution of other matters demanding its attention.

More important, the procedural formalities accompanying the exercise of these rights emphasize—indeed create—an adversary relationship between the individual and those seeking to have a guardian appointed. Often the decision to initiate guardianship proceedings is a final attempt to contend with a difficult and unhappy situation.[91] The spectre of adversary proceedings may discourage the family from taking legal action even when it is necessary.[92] Furthermore, procedural formality may compound the alienation the individual experiences when he is subjected to these proceedings.[93]

Although these objections are formidable, they are, finally, not persuasive. Procedural formality serves an important symbolic function because "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony."[94] Moreover, the fear of inducing psychological trauma presupposes that the individual is mentally incompetent.[95] Even if formal procedures do cause trauma, it is of less consequence than the alienation an individual must feel when a guardian is appointed erroneously.[96]

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90. *In re* Ballay, 482 F.2d 648, 656 (1973).

91. SENATE REPORT, *supra* note 52, at 7 stated:

> For families and spouses, especially those without much money, the burden of caring for a disabled older person can be exhausting emotionally, financially, and physically. It is as painful to see a loved one decline as it is difficult to meet their [sic] needs, whether or not assisted by community resources.

92. *See* Bartley v. Kremens, 402 F. Supp. 1039, 1049 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977).

93. SENATE REPORT, *supra* note 52, at 23 reported, "There is evidence that negative as well as positive results occur from intervention, and also from protective services. The presumed beneficiary was often resentful and further alienated."

94. *In re* Gault, 387 U.S. 1, 57 (1967) (quoting Kent v. United States, 383 U.S. 541, 554 (1966)).

95. Bartley v. Kremens, 402 F. Supp. 1039, 1050 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977). The presupposition of incompetence has been referred to as the "vegetable theory" because it assumes that a person who may not be capable of responding to rights guaranteed to other citizens should not receive those rights. *Crime of Mental Illness, supra* note 61, at 264.

96. The argument that procedures should not be provided because they may potentially induce trauma ignores the trauma caused when an individual suddenly becomes the subject of proceedings without knowing why. *Crime of Mental Illness, supra* note 61, at 264.

And finally, the desire to preserve family harmony may be ill-founded in that the need for a court solution to the problem of care suggests that family harmony may not exist.[97]

Vermont's failure to provide the individual with the rights of cross-examination and confrontation deprives him of an essential and effective means of challenging the reliability of evidence entered to prove his incompetence. The right of confrontation will protect him from the use of hearsay evidence such as medical reports and out-of-court statements. Through the use of cross-examination, he will be able to demonstrate that the adverse testimony is untrue or unreliable because it is based on misunderstanding or faulty memory or is motivated by hostility or desire for personal gain. One may conclude that these rights should be provided for guardianship proceedings because their substantial contribution to the reliability of the evidence clearly outweighs the disadvantages of providing them.

3. Representation by Counsel Retained or Appointed

Vermont's guardianship proceedings do not afford either the right to be represented by counsel or the right to have counsel appointed.[98] The failure to provide these safeguards is inconsistent with recent federal court decisions based on the recognition that the right to be heard has little meaning if it does not include the right to be represented by counsel.[99] In these decisions, the courts assessed the need for representation by counsel by applying a two-step inquiry: whether the individual should be afforded the right to be represented by counsel; whether an indigent individual should be afforded the right to have counsel appointed.

a. Representation by Counsel

In re Gault[100] extended the right to be represented by counsel

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97. *See generally* Bartley v. Kremens, 402 F. Supp. 1039, 1050 (1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977).

98. VT. STAT. ANN. tit. 14, §§ 2684, 2685 (1974). For the complete text of these statutes, see notes 29 & 32 *supra*.

99. *In re* Gault, 387 U.S. 1 (1967); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

100. 387 U.S. 1 (1967).

to delinquency proceedings in which the juvenile's freedom may be curtailed.[101] Quoting a National Crime Commission study with approval, the Court determined that without legal assistance, few individuals are able to understand, much less influence, judicial proceedings because even the most informal and well-intentioned proceedings are technical.[102] The *Gault* Court concluded that 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. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' "[103]

In much the same way a potential ward needs the assistance of counsel at every step of guardianship proceedings. Mental competence is very difficult to prove, more difficult than the commission of an act.[104] Few lay persons know how to go about proving their own competence in a dispassionate, orderly way. Furthermore, counsel's skillful marshalling of evidence can effectively overcome presumptions of senility which pervade guardianship hearings involving old persons.[105]

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101. *Id.* at 41.

102. *Id.* at 38 n.65. The quoted report said in part:

> The [National Crime] Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. . . . The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children can not. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge. But with lawyers come records of proceedings; records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability.

103. *Id.* at 36.

104. French v. Blackburn, 428 F. Supp. 1351, 1360 (M.D.N.C. 1977).

105. According to [1976] 1 THE NURSING HOME LAW LETTER (Nat'l Senior Citizens Law Center) 3:

> The concept of senility operates very much to the detriment of elderly persons as a class in incompetency proceedings. Although very little is yet known about the concept of senility, it is clear that it is not a biological dictate of old age. Yet it is often equated both with mental disorder and with old age, so that many elderly persons lose the presumption of capacity which all of us

The individual in guardianship proceedings also needs a lawyer's training to give substance to other due process rights like the right to cross-examine adverse witnesses. Moreover, the presence of counsel is crucial to the disposition stage of the proceedings for several important reasons: 1) counsel can propose alternative individualized treatment plans; 2) counsel can prevent the court from rendering judgment without adequate knowledge of the facts;[106] and 3) counsel's presence increases the likelihood that a guardian will not be appointed.[107]

The substantial objections to the presence of counsel must also be given their due.[108] One can argue that the presence of counsel defeats the therapeutic aims of *parens patriae* hearings because it increases their procedural formality.[109] But guardianship proceedings, in contrast with other *parens patriae* proceedings, do not serve a rehabilitative purpose that the presence of counsel would threaten. Here, deprivation of liberty, not treatment and rehabilitation, is the primary issue in the proceedings. And even if one were to characterize the proceedings as rehabilitative, informality is not essential to rehabilitation. It is a "device that has been used to approach therapy, [but] it is not the only possible device."[110]

A second objection is that the presence of counsel will cause

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should have when they are faced with guardianship proceedings. Yet because of the informality of such proceedings, they simply do not have the means to effectively present evidence in their own behalf should they wish to resist the imposition of protective services.

106. *In re* Gault, 387 U.S. 1, 39 n.65 (1967).

107. *Cf.* Lessard v. Schmidt, 349 F. Supp. 1078, 1099 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974). The *Lessard* court referred to a study of civil commitment cases. Of fifty-five individuals who were the subjects of civil commitment proceedings, eighteen were represented by counsel. Of those eighteen, twelve were discharged by the court; four were committed for less than three months; and two for six months. Of the remaining thirty-seven individuals in the study, thirty-six were committed to mental institutions. Recognizing that other factors could affect the disposition of these cases, the *Lessard* court nevertheless affirmed that there was a " 'certain correlation between a demand by patient's counsel that he be discharged and the eventual outcome.' " *Id.*

108. The discussion that follows does not include the considerations of the increased formality of the proceedings, the emphasis on their adversary character, and the concern with inflicting trauma on the individual already dealt with in the section on the rights to confrontation and cross-examination. See text accompanying notes 90-93 *supra*. The reader should realize, however, that these objections apply to the provision of counsel with equal force.

109. *In re* Gault, 387 U.S. 1, 39 n.65 (1967).

110. *Id.*

additional delay through the thorough use of legal tactics.[111] Although this may very well be true, one must consider whether the costs of this delay outweigh the benefits of providing counsel. In many cases the answer seems to be no. When, as here, the deprivations at stake are serious enough to justify the provision of a range of due process safeguards, fairness demands that counsel be provided to give force to those other protections.[112] In sum, the individual subject to guardianship proceedings seems to have a constitutional right to be represented by counsel.

b. Appointment of Counsel

The second question of the inquiry is whether individuals in guardianship proceedings also have a right to have counsel appointed if they are indigent. Vermont's current guardianship statutes do not provide this right although a claim can be made that they should.

Emphasizing the seriousness of the charges involved and the potential deprivations of liberty, the *Gault* Court held that the state has an affirmative duty to appoint counsel for indigent juveniles.[113] Merely providing counsel to someone sophisticated enough to ask for one is not satisfactory.[114] Using a similar rationale to apply this right to civil commitment proceedings, the *Lessard* court determined that when the state acts in its *parens patriae* role, it has the inescapable duty to provide counsel at every step in the proceeding.[115]

Guardianship proceedings in Vermont also are *parens patriae* proceedings which may lead to substantial deprivations of liberty. This is especially true when a guardian is appointed for an old person because the individual's advanced age makes it likely that these deprivations will be permanent. In addition, an elderly person

111. As an advocate, counsel's duty both to his client and to the legal system is to represent his client "zealously within the bounds of law." ABA CANONS OF PROFESSIONAL ETHICS No. 7.

112. *See generally* Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

113. *In re* Gault, 387 U.S. 1, 41 (1967).

114. *Id.* at 39, 40 n.65.

115. Lessard v. Schmidt, 349 F. Supp. 1078, 1098 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

may be involuntarily confined in a nursing home or other care facility; and, as the *Lessard* court concluded, there is a deprivation of liberty "whatever the name of the institution, if a person is held against his will."[116] Moreover, involuntary confinement in institutions like these may hasten the old person's death.[117]

Ordinarily a state's reluctance to appoint counsel for indigents can be justified by its concern with the costs involved. But Vermont already provides free legal assistance to help people with problems in other areas of their lives. Surely it should provide assistance for proceedings with consequences as serious as those attending guardianship. Furthermore, if a guardian is appointed erroneously because the individual lacked the assistance of counsel, the state will incur the costs of supervising the guardian and of hearing an appeal. In sum, Vermont should provide the individual subject to guardianship proceedings with the right to representation by counsel retained or appointed.[118]

4. Standard of Proof

Since Vermont's statutes do not specify which standard of proof must be used in guardianship proceedings,[119] the individual may be declared incompetent by a preponderance of the evidence. In other areas of the law, the use of the preponderance standard has been held to be unconstitutional because it does not sufficiently protect an individual about to lose his liberty.[120]

A great deal turns on the standard of proof used. It tells the trier of fact how much confidence he must have in the correctness of his decision and it allocates the risk of an erroneous decision between the individual and the state.[121] A lenient standard is unfavorable to

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116. *Id.* at 1101.

117. SENATE REPORT, *supra* note 52, at 24.

118. This conclusion is further supported by the fact that Vermont probate judges, already aware of this deficiency, frequently act to correct it either by appointing counsel or a *guardian ad litem*. Interview with Judge Carolyn Harrington, Windsor County Probate Judge in Woodstock, Vermont (Sept. 27, 1977). Telephone interview with Judge Ralph Chapman, Windham County Probate Judge (Oct. 4, 1977).

119. VT. STAT. ANN. tit. 14, §§ 2684, 2685 (1974). For the complete text of these statutes, see notes 29 & 32 *supra*.

120. *In re* Winship, 397 U.S. 358 (1970).

121. *See id.* at 370-71 (Harlan, J., concurring).

the individual because it increases the possibility that a guardian will be appointed erroneously. A strict standard, on the other hand, disadvantages the state by increasing the likelihood that a person in need of care will remain at liberty.[122]

a. Preponderance Standard v. Strict Standard

The threshold question is whether the use of the preponderance standard in guardianship proceedings satisfies due process or whether a more demanding standard is required.[123] In *In re Winship,*[124] the Supreme Court held that the use of the preponderance standard in juvenile proceedings violates due process because "it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted."[125] The *Winship* court required a strict standard even though an adjudication of delinquency is not a conviction and the proceedings themselves are confidential rather than public hearings.

On the other side, it may be argued that the use of the preponderance standards furthers the state's administrative concerns by

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122. *See generally id.*

123. Three standards of proof are applicable to guardianship proceedings. The least demanding is the "preponderance of the evidence" standard which, when applied to guardianship proceedings, tells the trier of fact that the decision to appoint a guardian must be based on a belief that it is more probable than not that the ward is incompetent. *See generally id.* at 371. The "preponderance" standard has commonly been used in civil proceedings in which it is generally no more serious "for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *Id.*

At the other end of the spectrum is the "beyond a reasonable doubt standard" which insists that the trier of fact be firmly convinced the individual is incompetent before an appointment can be made. This "standard provides concrete substance for the presumption of innocence [that] . . . 'lies at the foundation of the administration of our criminal law.' " *Id.* at 363. The third standard, "proof by clear and convincing evidence," requires the fact-finder to be convinced of the ward's incompetence but not to the degree of certitude required for the reasonable doubt standard. Although the clear and convincing standard falls between the other two, it is considerably more demanding than the preponderance standard. It has frequently been used in civil commitment proceedings because of the subjective nature of what must be proved. French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977) and Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds,* 431 U.S. 119 (1977).

124. 397 U.S. 358 (1970).

125. *Id.* at 368.

eliminating the need for the introduction of additional evidence to meet the higher standards of proof.[126] In addition, the use of the preponderance standard protects the state against an erroneous decision not to appoint a guardian when one is needed; an error which may in reality mean that the individual who is unable to care for himself or his property will eventually become a dependent of the state.

Despite these sensible arguments in favor of using the preponderance standard, other, more substantial considerations compel the conclusion that this lenient standard of proof does not satisfy due process in guardianship proceedings. *In re Ballay*[127] rejected the use of the preponderance standard in civil commitment proceedings because proof of mental illness presents special problems. Establishing mental illness is particularly troublesome because "[s]anity and insanity are concepts of incertitude" describing degrees of deviation from a norm.[128] Furthermore, civil commitment proceedings lack the benefit of the presumptions and inferences used to determine *mens rea* in criminal proceedings.[129] Similar problems of proof characterize guardianship proceedings in which findings of incompetence are also based on estimates of deviation from a norm. Even when expert testimony is used, the results are unpredictable because physicians disagree on definitions of mental illness and incompetence.[130]

A second reason for rejecting the preponderance standard is that it does not satisfactorily allocate the risk of an erroneous decision in guardianship proceedings. The stricter standards compen-

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126. *See In re* Ballay, 482 F.2d 648, 663 (D.C. Cir. 1973).

127. *Id.* at 664.

128. *Id.* Quoting Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter and Black, JJ., dissenting), the *Ballay* court said:

> One does not have to echo the skepticism uttered by Brian, C.J., in the fifteenth century, that "the devil himself knoweth not the mind of men" to appreciate how vast a darkness still envelopes man's understanding of man's mind. Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field. Naturally there has always been conflict between the psychological views absorbed by law and the contradictory views of students of mental health at a particular time.

129. *Id.* at 665.

130. *See id.*

sate for the potential ward's disadvantage with respect to physician testimony. A physician's error in diagnosing mental illness is likely to be adverse to the individual whose competence is in doubt. Physicians are more inclined "to call a healthy person sick than a sick person healthy because it is more dangerous to misdiagnose illness than health."[131] Furthermore, when an old person's competence is in question, presumptions of senility rather than competence form the undercurrents of the proceedings.[132]

The third and most important reason for adopting a strict standard of proof is that the consequences of an erroneous decision are devastating for the individual, while considerably less onerous for the state. An erroneous decision not to appoint a guardian may cause the state to assume financial responsibility for a person who, because the guardian was not appointed, has squandered the assets needed for his support. In contrast, the erroneous appointment of a guardian deprives the individual of his physical liberty, his autonomy, his reputation for competence[133] and his property, and profoundly distorts his self-perception in the most fundamental way. Not only will he demean himself and magnify his sense of social ostracism, but he may eventually accept the judgment of incompetence and behave accordingly.[134] And finally, the use of a strict standard will protect the individual without substantially expanding the proceedings themselves.[135] To satisfy due process, guardianship proceedings should determine the individual's competence by a standard more demanding than proof by preponderance of the evidence.

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131. Bartley v. Kremens, 402 F. Supp. 1039, 1050 n.20 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977).

132. *See* note 105 *supra*.

133. According to SENATE REPORT, *supra* note 52, at 36,

> One effect is that anyone, especially an older person, who needs a guardian is popularly assumed to be mentally ill. The aged person with a few of the symptoms of chronic brain syndrome, such as forgetfulness, is more likely to be judged mentally ill and therefore to be declared incompetent.

134. The court in Bartley v. Kremens, 402 F. Supp. 1039, 1050 n.20 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977), discussed Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973):

> Rosenhan suggests that the initial labelings color others' perception of the patient and eventually the patient himself accepts the diagnosis, with all of its connotations and expectations, and behaves accordingly. He also notes that there is substantial evidence that attitudes towards the mentally ill are characterized by fear, hostility, aloofness and dread.

135. *In re* Ballay, 482 F.2d 648, 663 (D.C. Cir. 1973).

b. Reasonable Doubt Standard vs. Clear and Convincing Evidence Standard

If guardianship proceedings do require a stricter standard of proof than the preponderance standard, there remains a further question of which of the two available stricter standards should be adopted: the reasonable doubt standard or the clear and convincing standard. Although the Supreme Court has applied the reasonable doubt standard to juvenile proceedings,[136] lower federal courts are in disagreement about which standard to apply to civil commitment proceedings.[137] Nevertheless, the rationales of these decisions suggest that the clear and convincing standard should be used in guardianship proceedings.

In re Winship,[138] a juvenile case, was decided on narrow grounds. Although the Supreme Court emphasized the seriousness of the deprivations of liberty at risk and the equally serious stigma caused by being labeled a delinquent, an important part of the Court's holding rested on the fact that an adult tried for the same crime as the juvenile would have the protection of the reasonable doubt standard.[139] Since guardianship proceedings do not present an analagous situation, the *Winship* holding does not compel the adoption of the reasonable doubt standard.

Second, the reasonable doubt standard, requiring a very high degree of certitude, severely restricts the state's ability to effect its *parens patriae* responsibilities. The purpose of this standard is to protect an individual charged with a crime from the coercive, prosecutorial power of the state. The clear and convincing standard, by contrast, accommodates the state's need to effect its *parens patriae* function with the individual's need for protection. One part of the state's concern is, of course, to prevent an individual from becoming its financial dependent unnecessarily. A more important goal is to

136. *In re* Winship, 397 U.S. 358 (1970).

137. Two courts which adopted a clear and convincing standard are French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977) and Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds,* 431 U.S. 119 (1977). Courts which have applied the reasonable doubt standard are *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds,* 414 U.S. 472 (1974).

138. 397 U.S. 358 (1970).

139. *Id.* at 359, 365.

provide care to a helpless person who would be unable to survive without it.

And finally, lower federal courts requiring the clear and convincing standard for civil commitment proceedings based their decisions on the difficulty of proving mental illness.[140] As this note has already demonstrated, similar problems of proof characterize guardianship proceedings.[141]

To summarize, the clear and convincing standard should be applied to guardianship proceedings because it tells the trier of fact he must be confident of his decision to appoint a guardian. It also provides some accommodation to the interests of the state and, at the same time, protects the individual from being unfairly burdened with the risk of an erroneous decision.

5. *Trial by Jury*

Vermont's guardianship proceedings do not include the right to a jury trial[142] although a trial by jury is a fundamental right of our criminal justice system.[143] In some jurisdictions it is also a right provided in civil commitment proceedings.[144] The question to be answered here is whether the right to a trial by jury must also be a part of guardianship proceedings.

One of the important functions of a jury is to infuse community values into the legal system. For example, in *Humphrey v. Cady*,[145] the Supreme Court described the jury as representatives of community values concerning the kinds of potential harm that justify confinement for compulsory treatment.[146] In addition, at least one court would agree that the central question in guardianship pro-

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140. *See* cases cited note 137 *supra*.

141. See text accompanying notes 127-30 *supra*.

142. VT. STAT. ANN. tit. 14, §§ 2684, 2685 (1974). For complete text of statutes, see notes 29 & 32 *supra*.

143. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

144. In Wisconsin and Washington, D.C., for example, civil commitment procedures include a right to jury trial on demand. *See In re* Ballay, 482 F.2d 648, 653 n.16 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078, 1100 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

145. 405 U.S. 504 (1971).

146. *Id.* at 509.

ceedings—whether an individual is able to handle his affairs—is an issue appropriate for the "practical wisdom of a jury."[147]

A second advantage is that a jury introduces an additional protective factor into the decisionmaking process[148] and thus provides an extra check against an erroneous decision. A jury's presence in guardianship proceedings would mean that several persons, rather than a single judge, must be persuaded that the individual is incompetent and needs the protection of a guardian.

Confronted with these sound arguments in favor of providing a jury trial, the Supreme Court nevertheless held that a delinquent charged with an act which would be a crime if committed by an adult did not have the right to a jury trial.[149] In *McKeiver v. Pennsylvania*[150] the Court found that a jury is not essential to accuracy in the fact-finding process because other due process safeguards secure the reliability of the evidence.[151] Furthermore, the Court emphasized the fact that the presence of a jury would disrupt the juvenile system's protective goals in that it would "remake the juvenile proceeding into a fully adversary process and . . . [would] put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[152] Acknowledging that in practice juvenile courts fall far short of reaching these goals, the Court concluded that the formality and clamor of a jury trial would nevertheless end any hopes of accomplishing these objectives.[153]

The *McKeiver* rationale applies to guardianship proceedings with equal force. A jury would not be essential to the accuracy of the fact-finding process if the individual were protected by the procedural safeguards of full and timely notice, confrontation and cross-examination, and representation by counsel retained or appointed. In addition, the presence of a jury would transform guardianship proceedings into public hearings. This unnecessary public scrutiny of the most private aspects of the individual's life would

147. French v. Blackburn, 428 F. Supp. 1351, 1361 (M.D.N.C. 1977).
148. McKeiver v. Pennsylvania, 403 U.S. 528, 542 (1971).
149. *Id.* at 545.
150. *Id.* at 528.
151. *Id.* at 543.
152. *Id.* at 545.
153. *Id.* at 550.

vitiate the protective functions of a jury's presence. And finally, a jury trial burdens the state with the administrative costs of jury selection and payment.

Thus, a jury trial should not be required for guardianship proceedings. It burdens the state with administrative costs, dramatically alters the nature of the proceedings and fails to provide the individual with sufficient protections to justify the substantial disadvantages.

SECTION III. SUBSTANTIVE DUE PROCESS

A second due process issue—and one quite apart from the question of procedural safeguards—is whether the deprivations of liberty caused by a judgment of incompetence must be tailored to the needs of the individual. The law in this area is traditionally based on two lines of cases: those dealing with less restrictive alternatives[154] and those concerning irrebutable presumptions.[155]

A. Less Restrictive Alternatives

When a legislative scheme infringes on fundamental rights—as Vermont's involuntary guardianship clearly does since it deprives the individual of both liberty and control over property—due process requires that the scheme's objectives promote compelling state interests[156] and that its infringements be essential to meet those objectives.[157] If the deprivations are not necessary, that is, if the state can accomplish its objectives in other, less restrictive ways, the legislative scheme will be unconstitutional.[158] The requirement that the state must accomplish its goals by less intrusive, or more carefully tailored means is known as the doctrine of less restrictive alternatives. The classic statement of the doctrine can be found in the majority opinion in *Shelton v. Tucker*:[159]

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154. See text accompanying notes 156-73 *infra*.
155. See text accompanying notes 175-89 *infra*.
156. Roe v. Wade, 410 U.S. 113 (1973).
157. *Id.*
158. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).
159. *Id.*

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[160]

In the guardianship context, the state clearly has a compelling interest in providing guardians for those who need them. Meeting the compelling interest standard therefore does not present a problem. The more difficult and critical issue is whether Vermont can accomplish its objectives by means less restrictive than those provided in its current statutory plan. The provisions of the Uniform Probate Code suggest that a less restrictive scheme, one more closely tailored to individual needs, is available.

Unlike Vermont's guardianship scheme, the Uniform Probate Code distinguishes between the powers of the guardian appointed to care for the individual's person and those of a conservator appointed to care for his property; the UPC court is empowered to appoint either a guardian or conservator or both.[161] In addition, the UPC court can either expand or limit the statutorily defined powers or enter other appropriate orders in lieu of appointment.[162] This last, very important provision enables the court to consider and use alternative means of helping the individual. For example, a power of attorney or a trust may provide adequate supervision of the individual's property, just as adult day care centers or home care services may satisfy the need for personal care.

It must be recognized, however, that the mere presence of alternatives does not compel their use. States are not required to adopt the "'narrowest' workable means of accomplishing an end."[163] Instead, the courts consider the reasonableness of a comprehensive regulation adopted in lieu of a narrower, less restrictive alternative.[164]

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160. *Id.*
161. UPC §§ 5-401, 5-312 & comment. For a partial text, see notes 20 & 34 *supra*.
162. *Id.* §§ 5-304, 5-426. For complete text, see notes 24 & 26 *supra*.
163. Shelton v. Tucker, 364 U.S. 479, 494 (1960) (Frankfurter, J., dissenting).
164. *Id.*

Vermont's failure to tailor the powers of the guardian to the needs of the individual seems to be unreasonable in two respects. Individuals for whom guardians are appointed suffer enormous deprivations of liberty, not because they have committed a crime but because of their mental or physical condition. In *Lessard v. Schmidt,*[165] a civil commitment case, the court held that persons who are "suffering from the condition of being mentally ill, but who are not alleged to have committed any crime, cannot be totally deprived of their liberty if there are less drastic means for achieving the same basic goal."[166] The *Lessard* court required the party recommending involuntary hospitalization to prove that satisfactory alternatives to commitment were unavailable before a commitment order would be entered.[167]

The inflexibility of Vermont's guardianship scheme may be attacked on a second front. In many situations, the statutory plan unjustifiably extends Vermont's *parens patriae* powers to the provision of unnecessary protective care. Since the exercise of the *parens patriae* function should be limited to the extent of the individual's incompetence, Vermont lacks a cognizable interest in managing those aspects of a person's life which he is able to direct himself. An individual who is unable to manage his property but who is perfectly capable of caring for his person should not be forced to relinquish all of his liberty and property rights to secure the limited amount of care he needs. Consequently, the state should supervise the individual only to the extent of his incompetence.

The decision in *Roe v. Wade*[168] similarly limited the state's power of regulation to those matters in which the state had a compelling interest. In *Roe,* the Supreme Court authorized state regulation of the abortion decision only to the extent necessary to protect the health of the mother or the life of the fetus. As a result, the state

165. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds,* 414 U.S. 473 (1974).

166. *Id.* at 1096.

167. *Id.* For further information about the application of the doctrine in the civil commitment area, *see* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives* 70 MICH. L. REV. 1107, 1145 (1972); Hoffman & Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses,* 14 SAN DIEGO L. REV. 1100 (1977).

168. 410 U.S. 113 (1973).

could not regulate the abortion decision during the first trimester of pregnancy. Regulation was permitted during the second trimester only to the extent necessary to protect the mother's health, and during the third trimester, regulation was permitted to protect the viability of the fetus.[169]

One could argue, however, that the current structure of Vermont's guardianship statutes is based on two legislative judgments: that few people will in fact need less than total care; that more narrowly defined powers would be impractical to administer because of the large numbers of people to whom the laws are likely to apply.[170] But the failure to adjust the guardian's powers to the ward's needs does not necessarily produce administrative efficiency. It makes little administrative sense to burden the court with unnecessary supervisory duties. The efficiency argument is further undercut by the fact that Vermont has already recognized a limited form of guardianship—the legal representative whose powers are limited to the control of the ward's welfare funds.[171] The legal representative lacks the authority to control the individual's other property or his person.[172]

Since fundamental rights are infringed by involuntary guardianship proceedings and since reasonable, less restrictive alternatives to Vermont's current plan are readily available, due process requires that Vermont adopt a statutory scheme which tailors the guardian's powers to the particular needs of the individual. Vermont's use of its *parens patriae* power must be limited to the extent of the individual's incapacity.

The constitution does not, of course, mandate which type of guardianship scheme Vermont should adopt. Nevertheless, the advantages of a bifurcated system like that of the UPC are apparent. The UPC provides for the appointment of a guardian, a conservator, or both. Better still, it empowers the court to adjust the statutorily defined powers of the guardian or conservator and directs the court

169. *Id.* at 164-65.

170. *See* note 52 *supra.*

171. VT. STAT. ANN. tit. 14, § 2672 (1974). See note 10 *supra* for relevant text.

172. *Id.*

to consider alternatives before an appointment order can be entered.[173]

B. Conclusive or Irrebuttable Presumptions

A separate line of cases based on conclusive or irrebuttable presumption analysis provides a second and distinct way to impose constitutional standards for individualized treatment. A statute affecting fundamental rights[174] will be unconstitutional when it is based on a presumption applied to a group as a whole without allowing members of the group to demonstrate that the presumption is invalid as it pertains to them.[175] The need for individualized treatment becomes important when

> the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure[.] [T]he Due Process Clause requires the Government to act on an *individualized* basis, with general propositions serving only as rebuttable presumptions or other burden shifting devices.[176]

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173. It should be noted at this point that lower federal court decisions applying the doctrine of less restrictive alternatives to civil commitment cases have disagreed about how to administer the doctrine's specific application. Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966), required the court to explore the availability of alternatives. Rejecting *Lake*, the *Lessard* court ruled that the person who recommended involuntary hospitalization should bear the burden of proving "(1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable." Lessard v. Schmidt, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974). Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295, 1320 (E.D. Pa. 1977), imposed the duty to explore alternatives on the state.

At the time this note went to press, Senator Niquette of Chittenden County, Vermont, introduced a bill to revise the law relating to guardianship for mentally disabled persons. S. 32 (1979). Incorporating many of the changes suggested by this note, this bill would serve as an excellent model for other states in the process of reforming their guardianship laws.

174. The majority in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 n.3 (1976), includes the following among fundamental rights: Roe v. Wade, 410 U.S. 113 (1973) (right of a uniquely private nature); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by the first amendment); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate).

175. United States Dep't of Agric. v. Murry, 413 U.S. 508, 518 (1973) (Marshall, J., concurring).

176. *Id.* (emphasis added).

Vermont's guardianship statutes are subject to challenge because they create an irrebuttable presumption respecting a ward's needs. Although a guardian will be appointed upon proof that the individual is mentally incapable of taking care of *either* himself *or* his property,[177] the guardian is invariably assigned control of *both* the individual's person and property.[178] The guardian's powers remain fixed because the individual is not presented with an opportunity to demonstrate what his needs are, and the court is not empowered to limit the extent of the guardian's supervision.

The presumption underlying Vermont's guardianship statutes is analagous to those held unconstitutional in two recent Supreme Court cases, *Cleveland Board of Education v. LaFleur*[179] and *Stanley v. Illinois.*[180] In *LaFleur,* the Supreme Court struck down a school board regulation imposing mandatory maternity leave on teachers who were five months pregnant because it foreclosed individualized determination of fitness to continue working. The regulation operated on a presumption of incapacity even though medical evidence about a teacher's physical condition might be wholly to the contrary and even though there was a "reasonable alternative means of making the crucial determination."[181] Similarly, in Ver-

177. VT. STAT. ANN. tit. 14, § 2683 (1974). For complete text of statute, see note 11 *supra.*

178. *Id.* § 2692. For complete text of statute, see note 12 *supra.*

179. 414 U.S. 632 (1974).

180. 405 U.S. 645 (1972). It should be noted that a recent Supreme Court decision, Weinberger v. Salfi, 422 U.S. 749 (1975), cast some doubt on the vitality of the *LaFleur* and *Stanley* decisions and the validity of their conclusive presumption analysis. *Weinberger* upheld a requirement that surviving spouses of deceased wage earners must have been married to the deceased for at least nine months in order to be eligible for social security benefits. The *Weinberger* court rejected an argument based on *LaFleur* and *Stanley* that the durational requirement was an irrebutable presumption in violation of the due process clause. The Court decided *Weinberger* on equal protection grounds and further characterized *Stanley* and *LaFleur* as equal protection cases involving fundamental rights. Only a few months later, however, in Turner v. Department of Employment Security of Utah, 423 U.S. 44 (1975), the Court revived irrebutable presumption analysis. In *Turner,* the Supreme Court invalidated a Utah statute which made pregnant women ineligible for unemployment benefits from twelve weeks before the expected date of childbirth until six weeks after birth. Citing *LaFleur,* the Court held that the statute was invalid and violated the fourteenth amendment because it was based on a conclusive or irrebutable presumption that women are unable to work because of pregnancy and childbirth. For a helpful discussion of this area of the law, *see* Gordon & Tenenbaum, *Conclusive Presumption Analysis: The Principle of Individual Opportunity,* 71 NW. U.L. REV. 579 (1977); Ackerman, *The Conclusive Presumption Shuffle,* 125 U. PA. L. REV. 761 (1977).

181. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645 (1974), *quoting* Vlandis v.

mont's guardianship proceedings, the statutory presumption of total incompetence controls even though evidence presented at the hearing might be to the contrary.

In the term preceding *LaFleur,* the Court invalidated an Illinois statute based on the presumption that unwed fathers are unfit parents.[182] Under the Illinois law, children of unwed fathers invariably became wards of the state when their mothers died because their fathers were presumed to be unfit parents. The Court objected to the Illinois statute because it precluded consideration of the critical issue, namely the father's competence to care for his children.[183] It concluded that if the father could prove he was a suitable parent, the state's interest in providing care for the children was *de minimis.*[184] In a like manner, the use of the presumptions of incompetence forecloses consideration of the critical issues in guardianship proceedings: the type and extent of the individual's incapacity and the amount of care he needs. The greater the ward's ability to care for himself, the less interest the state has in supervising his life.

But a scheme that operates on the basis of a presumption aids the state in carrying out its responsibilities. The state has a legitimate interest in designing efficient procedures to achieve proper state objectives.[185] All legislation involves some amount of line drawing, which works to the disadvantage of some individuals and to the advantage of others. All legislative classification could probably be improved by affording the right to individualized determinations.[186] But settling controversies by decisions based on a relatively uniform set of rules, rather than by determinations based on an individualized *ad hoc* basis, is considered "to have been a significant step forward in the achievement of a civilized political society."[187]

Although it is true that a scheme operating on the basis of presumptions may be efficient, justifications based on efficiency

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Kline, 412 U.S. 441, 452 (1973).

182. Stanley v. Illinois, 405 U.S. 645 (1972).

183. *Id.* at 657.

184. *Id.* at 657-58.

185. *Id.* at 656.

186. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657 (1974) (Rehnquist, J., dissenting).

187. *Id.* at 658.

alone will not sustain severe infringements of fundamental rights.[188] Furthermore, an individualized determination in guardianship proceedings would not impose additional administrative burdens on the state because the evidence introduced to determine the ward's incompetence could also be used to determine the extent and nature of his incapacity. More important, individualized proceedings will ensure that persons subjected to guardianship proceedings will not be "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[189] By subjecting an individual to restrictions unrelated to his particular disabilities, Vermont's presumption of total incapacity denies him treatment as an individual. The conclusion is compelled that Vermont has a constitutionally mandated duty to provide individuals with the opportunity to rebut the presumptions of total incompetence and to demonstrate what their abilities are.

SECTION IV. CONCLUSION

Although Vermont's guardianship scheme may have been designed for the laudable purpose of providing care for the helpless, the appointment of a guardian has nevertheless become an instrument of unwarranted government infringement of the most basic of human liberties. When an individual loses his property, his physical liberty, his reputation for competence, and his opportunity for self-determination, he loses the right to "shape . . . [his] inner life and . . . to control the face . . . [he] presents to the world."[190] He loses his ability to express that which is uniquely his—his individuality, his "personhood."[191] These losses are all the more painful when they are suffered by the aged because the damage that is done is likely to be permanent.

By imposing unjustified restrictions on these basic liberties, Vermont's guardianship statutes fall far below constitutional standards of procedural and substantive fairness. To comply with the

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188. *Id.* at 656.

189. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

190. TRIBE, *supra* note 1, at 893. It cannot be overemphasized that in Vermont, as in most states, "the guardian assumes responsibility for virtually every decision in the life of the ward." SENATE REPORT, *supra* note 52, at 40.

191. TRIBE, *supra* note 1, at 892.

Constitution's procedural requirements, the guardianship proceedings should afford the rights of adequate notice, cross-examination and confrontation, counsel retained or appointed, and proof of incompetence by clear and convincing evidence. These safeguards will ensure that the evidence presented is accurate and that there is a fair allocation of the risk inherent in the decisionmaking process. The presence of these safeguards will also provide the individual who is affected by the proceedings with an opportunity to participate in the process by which decisions concerning his future are made. This opportunity embodies "the elementary idea that to be a *person,* rather than a *thing* is at least to be *consulted* about what is done with one."[192]

To meet constitutional standards for substantive fairness, Vermont's statutory scheme must recognize that individuals—especially the elderly—need a "flexible form of guardianship tailored to their individual capacity which allows them to retain control over those decisions which they are capable of making."[193] Individuals whose competence is in question must be given the opportunity to rebut the statutory presumption of total incompetence. The guardian's powers must be tailored to the individual's particular incapacities so that they do not unduly infringe protected liberties. This flexible form of guardianship will recognize what it means "to be human at a given time and place."[194] But more important, it will yield a "structure for creating a future continuous with and contiguous to the most humane designs of the past."[195]

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192. TRIBE, *supra* note 1, at 503.
193. Regan, *supra* note 52, at 608.
194. TRIBE, *supra* note 1, at 892.
195. *Id.* at 893.