Legal Incompetents' Need for Guardians in Florida

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This study assesses the alleged need for guardians in Florida. A survey of the state's 74 public receiving facilities, community mental health centers, and clinics; 30 private receiving facilities; 11 Aging and Adult district offices; Developmental Services institutional and residential placements; and six state mental hospitals revealed that 11,147 persons in Florida reportedly need a legal guardian. The limitations, implications, and possible policy responses to this alleged need are discussed.

Although there is growing discussion about guardianship as a sociolegal disposition for the incompetent mentally ill, developmentally disabled, and elderly, there has been no systemic effort to assess the extent of need for guardianship. This paper reports an assessment of the alleged need for guardians in the state of Florida, a state said to reflect the demographic future of the United States. This paper does not document the actual need for guardianship, but rather the need perceived by the significant, accessible, legal, psychiatric, and social institutions in the state. The need and means for reducing the perceived need for guardianship will be discussed.

Background

In 1982 the Florida Legislature appropriated $160,000 to the Office of the State Courts Administrator for the purpose of developing a Public Guardianship Pilot Program. Florida, unlike 34 other states, does not have a statutory provision for "public guardianship."[1] "Public guardianship" is the judicial appointment and responsibility of a public official in a state or local government agency or court (compared with a private individual in private guardianship) to serve a legal incompetent, the "ward," who does not have willing or responsible family members or friends to serve as guardian.[1,2] Public guardianship is capable of such abuse that it should be done correctly, or it should not be done at all.[1]

One purpose of the Florida Public

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Guardianship Pilot Program is to assess the need for public guardians in Florida. Past guardian needs assessments include:

1. An April 1977 statewide survey by the Florida Aging and Adult Services Program Office of state social workers' caseloads identifying 1,399 legally incompetent persons without guardians and 910 functional incompetents needing adjudication and appointment of a guardian.
2. A 1978 identification by the Department of Health and Rehabilitative Services (HRS) Human Rights Advocacy Committee for Florida State Hospital of one third of the institution's population as legally incompetent and without a guardian.
3. A 1979 U.S. Administration on Aging national study[1] of public guardianship uncovering: (1) a 1977 Tampa survey of medical opinions indicating 700 local citizens needing adjudication and appointment of a guardian, (2) a 1978 Broward County Social Services Division questionnaire finding 20 of 21 respondents citing need for guardianship program, and (3) 1979 Hillsborough County (Tampa) Mental Health Association estimate of 600 people in need of guardianship.
4. A February 1981 survey of three District 4 community mental health centers finding .06% of that area's population legally incompetent but with no guardian, projected as 5,000 people on a statewide basis.
5. A 1979 study[3] of six states (Delaware, Minnesota, North Carolina, Ohio, Washington, and Wisconsin), with a total population of 29 million, where 17 thousand guardianship petitions were filed in one year. This filing rate of .059 percent (one of every 1,706) corresponded interestingly with the filing rate of .056 percent (one of every 1,785) for Florida in 1977 (4,724 guardianships opened in a population of 8,432,927).
6. A 1981 HRS Aging and Adult Services caseload survey by judicial circuit showing 542 persons adjudicated incompetent but with no guardian.
7. A June 1982 HRS Developmental Services Program Office assessment (3.77% error rate) identifying: 1,643 Sunland clients in need of a guardian and 606 "community" (foster care, group home, residential rehabilitation centers, intermediate care facilities for the mentally retarded) clients in need of a guardian, for a total of 2,249.
8. A July 1982 "institutionalized" (state hospital) population survey showing 802 legal incompetents with no guardians, an apparent decline from a similar May 1981 institution survey.
9. A Summer 1982 Florida State University Institute for Social Research review of all Leon County Probate Court guardianship files since January 1977 showing that people without potential guardians do not reach formal adjudication.[4]
10. A November 1982 assessment by the Dade County Grand Jury identifying the need for public guardianship in Dade County.[5]

Definitions

Unless otherwise provided, "legal incompetent," "incompetent," and derivations refer to persons who are legally incompetent by operation of law. "Functional incompetent" and derivations refer to persons who are alleged to meet legal criteria for incompetence but have not been formally adjudicated incompetent. Functional incompetents allegedly need guardianship services, whether private or public. "Guardian advocate" and derivations are legal terms of art originating in Florida Statutes Sections 394.459(3)(a) (1982) and 393.12(2)(a) (1981). A guardian advocate under Chapter 394 relating to mental health is not the same as a guardian advocate under Chapter 393 relating to mental retardation. A mental health guardian advocate is appointed upon a finding of incompetence to consent to treatment, whereas a Chapter 393 guard-

ian advocate is a limited "guardian" appointed without any adjudication of incompetence. Some literature suggests that guardianship is an illusory solution to incompetence to consent to treatment.[6]

Methodology

This needs assessment was conducted via a February 1983 telephone survey of 121 Florida facilities and agencies. Of these sources of data, 74 were public receiving facilities, community mental health centers, or clinics: 30 were private receiving facilities, 11 were HRS Aging and Adult Services district offices, and six were state hospitals. Information solicited from all sources included the number of legally incompetent clients without guardians served by the particular facility/agency as well as the number of functionally incompetent clients. All sources except HRS district offices were asked to disclose information regarding the number of clients incompetent to consent to treatment and without guardian advocates (Florida Statutes Section 394.459(3)a) and to describe the degree of overlap between clients who are legally incompetent and those incompetent to consent to treatment. These sources were also asked to supply information concerning demographic characteristics of legally incompetent clients without guardians (age, race, sex, amount of assets, and extent of physical/psychiatric disabilities), although only state hospitals and public receiving/community facilities maintained sufficient client populations to warrant this search.

State hospital staff were asked to provide the most extensive information, including (in addition to the above data): (1) the number of clients maintained who were eligible for guardian advocates under the "retardation" statute (Florida Statutes Section 393.12(2)a), (2) the number of legally incompetent clients who could be discharged but for the absence of a guardian, and (3) reasons or explanations for the decrease in the number of legal incompetents without guardians between May 1981 and July 1982. Information gathered from HRS Aging and Adult Service district offices pertains to clients legally or functionally incompetent and reasons for changes in the population of legal incompetents without guardians from 1981 to 1983.

For the larger agencies and facilities surveyed by telephone, information was solicited from caseworkers, case managers, or social workers. These staff tended to have the most direct client contact and were most aware of both the legal status of clients and of recent fluctuations in agency caseloads. In most agencies, a single caseworker acted as research coordinator, polling colleagues to assess the particular client population served. An initial call to such caseworkers indicated the request, with follow-up calls several days later. Identification of relevant client populations at several hospitals required assessment at various levels—usually of inpatient, outpatient, and aftercare units. For smaller agencies, a single administrative staff person often was able to provide client information without consulting others.

For about 75% of agencies and facili-

ties sampled, information consisted of estimates made by caseworkers. Estimates were sometimes reported to be only ballpark figures and were necessary due to the reported absence of legal status information in client files. For smaller facilities, and for such larger facilities as Florida State Hospital and Peace River Center, information represents a case-by-case review. The vast majority of staff contacted were cooperative and eager to assist in the needs assessment.

Nonjudicial assessments of legal incompetence are of course suspect but, in the absence of better information, must necessarily suffice. The absence of legal status information in client files is probably not unusual in public bureaucracies nationally. The lack of centralized (versus county level) information about legal incompetence and guardianship status is also problematic.[5]

The telephone survey was chosen as the methodology in order to assure a high response rate, to minimize costs, and to facilitate follow-up questions. Telephone surveys present certain methodologic difficulties, but such a survey seemed appropriate under the economic circumstances of this needs assessment.

The 1983-1985 Department of Health and Rehabilitation Services budget issue was also reviewed for purposes of obtaining a count of developmental services clients. Developmental services clients are listed in a Client Information System and are therefore more amenable to reliable estimates.

Public Receiving and Community Facilities

Public receiving facilities, clinics, and community mental health centers in Florida maintain the largest number of clients eligible for public guardianship services. A state total of 1,036 legal incompetents without guardians was identified, as well as 2,770 functionally incompetent clients. Of the legally incompetent clients without guardians, fewer than 10% require guardians solely for medical consent purposes. The majority of clients require supervision of both financial and personal (daily living, self-care) needs. Most legally incompetent clients from public or community agencies reportedly suffer from senility or organic brain syndrome. (This, of course, does not suggest that all persons suffering from senility or organic brain syndrome are incompetent. In fact, such labels as "senility" and "organic brain syndrome" are too readily used in the incompetency and guardianship process in lieu of more useful functional and behavioral descriptions.[4]) To a lesser extent, these clients are also afflicted with other psychiatric conditions.

Fully two thirds of this legally incompetent population is female, 85% is Caucasian, and the average age of such clients is 63. In comparison to the legally incompetent hospitalized population, incompetent clients without guardians served by public/community agencies tend to represent a broader age range. Administrators from several community facilities claim that two distinct patient

populations are being served: one group of younger (lower age) psychotic patients and one group of older patients (over 65) having medical disorders with psychiatric disability. Most clients are eligible for Social Security Insurance(SSI)/ Medicaid, and a few have other types of assets.

Administrative staff indicate a larger overlap between clients identified as incompetent to consent to treatment (without guardian advocates) and those identified as functionally incompetent. Although incompetence to consent is not as widespread a problem with public and community agencies as is legal incompetence under Florida Statutes Chapter 744, relating to guardianship, lack of guardian advocates appears to be a persistent dilemma facing public receiving facility administrators. Several courts do not appoint guardian advocates on a regular basis, apparently because of policies by clerks or judges, or ignoring of statutory provisions requiring client consent by various facilities. When guardian advocates are appointed, the responsibility is often reportedly assumed by public defenders, public receiving facility administrators, or family members. Questions about guardian advocate liability and immunity apparently deter some persons from serving as guardian advocates. These individuals may be ill-equipped to review treatment needs of clients or may have particular vested interests in choice of treatment offered that may conflict with those of the client.

In comparison to state hospitals, community mental health centers or other outpatient facilities have relatively little contact with clients who are incompetent to consent. Administrators and staff are uneasy in offering treatment when clients are incompetent to consent, and often circumvent difficulties concerning the lack of guardian advocates by referring clients to state hospitals for treatment. At several community mental health centers, however, staff report that they always have a handful of these clients to deal with and need a part-time staff just to locate guardian advocates. Public receiving facilities that operate significant inpatient operations are more profoundly affected by the lack of guardian advocates. Staff of the University Hospital Community Mental Health Center (Jacksonville), for example, face over 30 crisis incidents per month involving incompetency to consent issues. The University Center may be finessing consent requirements, however, because the Fourth Circuit (three counties around Jacksonville) reports only 12 requests for appointment of a guardian advocate in March 1983.

According to staff reports, legally incompetent clients without guardians from public/community agencies are primarily in need of financial supervision. A subset of this group requires "comprehensive care," including management of personal needs. Staff identified several major flaws inherent in the guardian recruitment process. In many jurisdictions, staff could not find guard-

ians capable of providing supervisory care for indigent clients who are without family members. Often the courts, whether clerks or judges, discourage initiation of incompetency proceedings for these clients if no guardians are available and willing to serve.

Although the vast majority of incompetents without guardians live in the more densely populated districts in Florida, failure to provide adequate guardian services in rural communities may have more severe consequences. This problem is perhaps most acute with deinstitutionalized but legally incompetent hospital patients. Public receiving facility staff in rural districts claim that the lack of community mental health facilities and personnel creates a situation in which deinstitutionalized legally incompetent patients are often left unsupervised. Left to their own resources, they become involved in drinking, illicit drugs, and sale, abuse, or neglect of medications and frequently are the victims of criminal activities. This creates a "revolving door" syndrome: without intermediate (inpatient) care facilities in which to place these clients when they decompensate and without guardians to protect and perform surrogate functions for the legal incompetents, they are sent back to state hospitals for treatment.

Conversely, there are reports that, when guardians are available, social workers sometimes find the guardians to not always serve the best interests of clients. In some instances, guardians reportedly attempt to appropriate funds from the ward's estate. In other cases, guardians will not agree to have wards released from state hospitals or do not live in the vicinity of the state hospital, rendering the guardians unable to provide supervisory care for the ward. Faced with the lack of conscientious guardianship alternatives, social workers must often choose between lesser evils: in one district, a client reportedly spent $7,000 from her checking account in a single month, yet staff were reluctant to allow family members to assume guardianship responsibilities and "plunder" the estate. Reported irregularities in guardianship are no longer new phenomena.[1,5,7,8]

A common concern voiced by public/community mental health staff is the lack of centralized recordkeeping in the state regarding legal incompetency, and guardianship. Staff report that they are often unaware (sometimes for years) that clients are legally incompetent or may have guardians assigned. When clients are transferred from state hospitals to public/community agencies, information about legal status remains at the hospital. This is a particular problem with long-term (chronic) clients who have been transferred many times between hospitals and less restrictive facilities. Thus, the public/community statistics here compiled on incompetents without guardians may not include a sizable number of these unidentified incompetents. In several cases, staff at public receiving facilities are able to "track down" information on clients' legal status, although this is not kept in active agency files. The staff often express surprise at discovering the number of legally incompetent clients (with or without guardians) being served by their

agency. Although lacking legal authority, incompetent clients are sometimes allowed to manage personal finances and to make treatment decisions without assistance of a guardian.

State Hospitals

Over 30% (853) of the non-developmentally disabled legal incompetents (2,842) without guardians in Florida and about 10% (624) of functionally incompetent clients (6,054) reside in state hospitals. Of all hospitals, Florida State Hospital, the largest, maintains the majority of such clients. Within this hospital, two units (geriatric and long-term care) account for about 60% of the Florida State Hospital population in need of guardianship services.

Of the 853 incompetent hospital clients without guardians, about half could reportedly be discharged immeditely if guardianship services were available in the community. The remainder would benefit from supervision of both their estates and treatment while institutionalized. Florida State Hospital and Northeast Florida State Hospital (Macclenny) appear to be the most likely beneficiaries of public guardianship services. Of 553 incompetent clients without guardians at Florida State Hospital, almost half could reportedly be discharged if guardians were available. At Macclenny, of 158 clients said to be eligible for guardianship services, about 90% could reportedly be released were guardians present.

Relative to the nonhospital population, hospitalized incompetents are slightly older (average age, 67), are less often female (58%) and Caucasian (60%), have fewer resources (including only about 40% who are eligible for SSI), and are more often characterized by primarily psychiatric disabilities (55%). This group appears to present a particular challenge to public guardians or other potential guardian service providers. Most hospitalized incompetents without guardians have lived as inpatients for many years and do not have immediate access to vocational training or halfway house experiences. It would be incumbent upon public guardians to provide this population with a good deal of reorientation to community activities and resources. The presence of both psychiatric and medical disorders in the hospital population indicates the need for guardians to periodically assess the need for outpatient psychiatric care and to be aware of existing medical facilities in the community. Of course, good hospital and nonhospital health and social services could vitiate the need for continued legal incompetence and guardianship in many cases.

Two hospitals report difficulties in securing guardian advocates for clients incompetent to consent, or eligible for advocate services under the retardation statute (Florida Statutes Section 393.12). Florida State Hospital maintains 308 incompetent to consent clients without guardian advocates, and 40 retarded clients eligible for Section 393.12 advocate services. At Macclenny, 125 clients need guardian advocates, and 95 are eligible for section 393.12 advocacy. Hospital staff report a large overlap between clients who are incompetent and clients

who are incompetent to consent. Lack of guardian advocates sometimes delays treatment required before a client may be discharged. At Florida State Hospital, one client was held custodially for four months due to difficulty in locating a guardian advocate. Despite mandatory provisions in mental health legislation, several jurisdictions are not appointing guardian advocates on a regular basis. This appears to pose a particular problem for Macclenny. The absence of private or nonprofit guardianship agencies in the northeast Florida community provides additional difficulties for administrators at Macclenny in soliciting guardian advocates. Also, courts may discourage hospital administrators from petitioning for guardian advocates. At G. Pierce Wood Memorial (state) Hospital, for example, a $10 fee is required for each request. Instead of waiting for the hospital finance office to process such requests, administrators reportedly resort to full involuntary placement proceedings to facilitate implementation of treatment programs. South Florida State Hospital administrators claim to circumvent problems with incompetence to consent by actively reviewing such clients and referring them to local courts.

Hospital staff offer several explanations for the recent decrease (especially from 1981 to 1982) in hospitalized legal incompetents without guardians. Systemic causes for this decline include: more frequent use of restoration to competency (apparently influenced by aggressive 6-month competency evaluations); location of family members to serve as guardians or the willingness of nursing homes to accept clients without guardians; and reluctance of staff to initiate incompetency proceedings. The decline in incompetents without guardians also might be explained in part by external changes that affect the hospital population, such as: increased efforts at deinstitutionalization of psychiatric inpatients, greater numbers of voluntary (and competent) patients, and death of clients (especially those adjudicated incompetent before 1972). It might be expected that the number of hospitalized incompetent patients without guardians will continue to register a marked decline in years to come, although deinstitutionalized clients will still require guardianship services.

Private Receiving Facilities

Private receiving facilities maintain relatively few clients (579) who might be eligible for public guardian services. These facilities tend to serve acute psychiatric patients and do not typically have well-established aftercare units for long-term outpatient care. Only the facilities in Districts 5, 7, 10, and 11 (nine counties surrounding Clearwater, Orlando, Fort Lauderdale, and Miami), respectively serve more than 100 functionally or legally incompetent clients without guardians. Also, these districts each report maintaining 10 to 20 clients who are incompetent to consent and without guardian advocates. Although private receiving facilities serve a small minority of incompetent clients without guardi-

ans, expansion of guardian services would probably provide relief for what one staff termed a "perpetual problem." Due to the lack of guardians in the community and the lack of community outreach staff at private receiving facilities, many incompetents in these facilities do not receive optimal supervision of their estates and treatment programs. At one facility, staff report recurrent difficulties in assisting acutely psychotic patients who face eviction from apartments, foreclosures on mortgages, and the like because of the absence of available guardians and the inability to assign representative payees on short notice.

HRS Aging and Adult Services

In HRS Division of Aging and Adult Services caseloads, some 3,034 clients would reportedly benefit from guardianship. Of these, 878 are legally incompetent (without guardians) and 2,156 are functionally incompetent. Aging and Adult Services cases are distributed fairly evenly throughout the state, although Districts 3, 7, 10, and 11 (23 countries in north central and south Florida) report a disproportionate number of such cases. It should be noted that data collected do not represent a case-by-case analysis of Aging and Adult Services files. Instead, figures are based on February 1983 estimates by district case managers. Case managers report confidence that estimates are within a 5% margin of error. Three districts (23 countries surrounding Tallahassee, Jacksonville, and Tampa) still cite evidence gathered for a similar survey conducted in 1981. Data compiled from these three districts have not been updated.

Aging and Adult Services staff give several reasons for fluctuations in the number of clients needing guardians. In districts registering increases in this population since 1981 (especially in central Florida), staff claim that caseloads expanded due to an influx of elderly population coming both from the Miami area and from northern counties. In several districts registering decreases in the population eligible for guardianship services, staff reason that more aggressive attempts have been made to locate (private) guardians and to utilize community groups such as the Suncoast Lutheran agency. Analysis of 10 district reports comparing the number of legal incompetents in 1981 and 1983 indicates that HRS now handles about 20% more of this client population.

Developmental Services

According to the 1983–1985 Department of Health and Rehabilitative Services budget issue and count obtained from the Client Information System, Developmental Services has 1,643 institutionalized clients and 608 residential placements who qualify for guardianship services. Guardianship services for developmental services clients would facilitate: corrective, nonemergency treatment; maintenance in the least restrictive environment commensurate with client capabilities; and arranging medical care, management of property and other assets, physical and emotional sup-

ports, legal assistance, and payment of bills.

Summary

Quantitative A substantial number (11,147) of persons appear to be eligible for public guardianship services in Florida. From a nonhospital population, including clients from public and private facilities and HRS Aging and Adult Services, 5,430 are functionally incompetent and 1,989 are legally incompetent and without guardians. From the state hospital population, 624 clients are functionally incompetent and 853 are legally incompetent and without guardians. From both populations (combined), 6,054 functional incompetents and 2,842 legal incompetents appear to be eligible for public guardianship services. From Developmental Services, 1,643 institutionalized clients and 608 residential placements reportedly qualify for guardianship service.

These figures may actually underestimate the potential clientele of a public guardianship agency. Two groups of clients not included in the present assessment are those private clients residing in nursing homes and adult congregate living facilities. Accurate information concerning intellectual/physical functioning and legal status of nursing home clients is extremely difficult to ascertain. Several nursing home ombudsman committee staff claim that such information is currently unavailable or that nursing homes are unwilling to disclose this type of data. However, several other staff involved with integrated medical/psychiatric/long-term care facilities suggest that at least 10% of all nursing home clients in south Florida are legally incompetent and without guardians. A large percentage of the nursing home population might also be functionally incompetent. Private clients needing guardians in adult congregate living facilities are similarly difficult to estimate. An important responsibility of a public guardianship agency would be to establish liaison with nursing homes and adult congregate living facilities in order to assess the need for guardians and guardian advocates within this population.

Another group of clients not identified by the present survey are those living outside the domain of state mental health services (hospitals, public and private facilities, HRS agencies). HRS Aging and Adult Services staff from several districts express confidence that a large number of potential clients have not been located, or identified to protective services, but might benefit from public guardianship. This population might include transient or others who are at "high-risk" of physical or financial loss without provision of public guardianship agency. The present survey also probably underrepresents the need for public guardianship to the extent that the listings of state public and private mental health facilities provided by the HRS Mental Health Program Office may not include recently opened facilities or those reopening in new locations throughout the state.

Location Clients legally incompetent and without guardians are serviced by public receiving and community fa-

cilities (1,036 total), HRS Aging and Adult Services (878 total), and state hospitals (853 total). Functional incompetents are primarily serviced by public receiving and community facilities (2,770 total) and by HRS Aging and Adult Services (2,156). Legally or functionally incompetent clients served by nonhospital agencies and facilities are distributed fairly evenly throughout several geographic districts. Districts 7 (903), 8 (1,025), and 11 (1,503) (16 counties around Orlando, southwest Florida, and Miami) report the greatest number of eligible clients. Of state hospitals, Florida State Hospital reports by far the greatest number of clients in need of guardianship services (553 legal incompetents, 220 functional incompetents). Three other hospitals (Macclenny, South Florida, and G. Pierce Wood) also report significant numbers of such clients.

Diagnostic According to information gathered from state hospitals, and from public receiving/community facilities, those in need of guardianship services are typically female (62%), elderly (average age, 65), and predominantly white (74%). Eligible clients are about as likely to be diagnosed with organic brain syndrome and senility as with schizophrenia and often manifest both medical and psychiatric conditions that contribute to their need for supervision. Clients often receive, or are eligible to receive, Medicaid and SSI benefits. Few have additional resources beyond public assistance. A large majority of clients assessed as potential recipients of guardianship services need more than just a surrogate decisionmaker for medical consent purposes. The most urgent need expressed is for supervision of client finances, although a substantial number of clients may require comprehensive guardianship services (for both person and property). Plenary guardianships reportedly may be most appropriate for clients residing in state hospitals or other inpatient facilities. About half of hospital inpatients without guardians, for example, would not be considered for discharge were guardians available due to severity of deficits in self-care and daily living skills.

Advocacy Services Over 1,000 clients were identified who are incompetent to consent to treatment but are without guardian advocates. These clients are located in public receiving/community facilities (674 total), state hospitals (457 total), and, to a lesser extent, in private receiving facilities (75 total). Of all facilities in the state, Florida State Hospital appears to maintain the largest number (308) of clients who are incompetent to consent and without guardian advocate. About 145 clients at state hospitals are eligible for guardian advocacy under the retardation statute. Most of these clients are maintained at Macclenny (95 total) and at Florida State Hospital (40 total).

Subjective Reports Over 90% of facilities and agencies during the course of the assessment provide unsolicited reports affirming the need for public (or other auxiliary) guardianship services to supplement or replace existing resources. Most staff contacted report a significant shortage of private guardians

and guardian advocates. Consequences of this shortage include delay of patient release from inpatient facilities, lack of aftercare supervision in the event that clients are released without guardians, inadequate monitoring of client treatment programs and finances, and diversion of social worker/case managers' attention from treatment and service delivery issues. According to staff reports, current mechanisms to assess the need for guardians and to assign guardians lack "process consolidation." Administrators are concerned with the absence of a centralized record-keeping agency that would allow determination of clients' legal status. Further, probate courts are not presently equipped to provide guardians for indigent clients due to the inability to identify potential guardians and because of the absence of available community resources to serve in this capacity. As a result, the guardianship process currently appears to discriminate between indigent and nonindigent populations and serves to exclude a number of indigent clients from guardianship care.

Consequences of Being Legally Incompetent and without a Guardian

Despite a contrary consensus in the law and in social science literature and research, the argument is still heard in Florida that public guardianship is a superfluous, redundant service already being performed generally by the Department of Health and Rehabilitation Services, and specifically by HRS social workers, nurses, physicians, and the like. Why, after all, does a legally incompetent resident of a state mental institution, for example, need a legal guardian when the resident's every need (e.g., food, clothing, shelter, health care, etc.) is taken care of by the institution and its staff? This, of course, is an articulation of the *parens patriae* (literally "parent of the country"; the role of the state as sovereign and functional guardian of legally disabled persons) responsibility of the state to care for persons who are unable to care for themselves.

The argument, however, is spurious in at least two significant ways. First, it fails to recognize the harmful aspects of state paternalism:[9] in exercising its *parens patriae* role, the state is not infrequently, if understandably (insufficient resources, for example), the problem for its clients. Second, the argument reflects ignorance of the arguably clear legal mandate. Florida statutes Section 744.331(c)(9) (1981) provides; "When a person is adjudicated mentally or physically incompetent, a guardian of the person shall be appointed . . ." Florida Statutes Section 394.459(3)(a) (1982) provides, "If the court finds that the patient is incompetent to consent to treatment, it shall appoint a guardian advocate." Florida Statutes Section 393.12(2)(a) (1981) provides, "If a retarded person needs protection for his property or person, the court, without an adjudication of incompetency but using the procedures established in chapter 744, shall appoint a guardian advocate . . ." The issue of whether a state has a responsibility to provide guardians for legal incompetents is also clearly ad-

dressed in *In re Gamble*, 394 A.2d 308 (N.H. 1978), in which a state supreme court held that the state must obtain, nominate, and compensate guardians of indigent, incompetent residents of state institutions.

Essentially a public guardian is necessary to provide individual protection and surrogate decisionmaking to legal incompetents who have no other protection or sympathetic guidance.

Without a guardian, a legal incompetent in Florida faces a statutory presumption "to be incapable of managing his own affairs or of making any gift, contract, or instrument in writing that is binding on him or his estate" [Florida Statutes Section 744.331(8)]. In most states legal incompetence restricts or takes away the right to:

Make contracts
Sell, purchase, mortgage, or lease property
Make gifts
Travel or decide where to live
Vote, or hold elected office
Initiate or defend against (law) suits
Make a will, or revoke one
Engage in certain professions
Lend or borrow money
Appoint agents
Divorce or marry
Refuse (or consent to) medical treatment
Keep and care for children
Serve on a jury
Be a witness to any legal document
Drive a car
Pay or collect debts
Manage or run a business[10]

Without a legal guardian, about 421 legally incompetent residents of Florida's state mental hospitals cannot be discharged (although they are otherwise eligible) to less restrictive, and generally less expensive, care.

Conclusion and Recommendations

The documented statistical, legal, and human need of legal incompetents for guardians in Florida is considerable. To the extent that Florida represents the demographic future of an aging America, this case study documents a current and prospective national need. Guardians also serve such third-party interests as state and private hospitals and other agencies seeking reimbursement for costs, discharge of inappropriate admissions, and admission to more appropriate services. (The legitimacy of such third-party interests, compared to incompetents' interests, is debatable, of course.[7]) In any case, the unmet need for guardians justifies statewide implementation of a public guardianship program in Florida and other states.

At the same time, in a cutback environment and period of revenue shortfalls, it would be unrealistic to blithely proceed attaching program to need. There are several ways in which the rather substantial statistical need can be softened and programming then concentrated on the problem core.

First, an aggressive, systematic, and comprehensive effort should be undertaken by state social service departments to restore the legal competence of those who are inappropriately incompetent. Successful efforts have occurred in District 4 (Jacksonville) and at Florida State Hospital, but there has not been a comprehensive effort throughout the Florida system. Restoration is a comparatively simple and inexpensive legal process and

is certainly less costly than inappropriate service from a public guardian.

Second, there is a statutory cause for many of Florida's (and other states', e.g., Virginia) legal incompetents without guardians. Florida Statutes Section 394.471 (1981) grandfathers the legal incompetence of hundreds of people involuntarily committed before July 1, 1972. Before July 1, 1972, one of the criteria for involuntary commitment was legal incompetence [Florida Statute Section 394.20 *et seq.* (1949)]. Also, there was no requirement, as there is now, that a guardian must be appointed for someone declared legally incompetent. Section 394.471 provided for review of pre-1972 commitments from July 1, 1972 until July 1, 1973, but made no provision for review of incompetence: "Nothing in this part invalidates any order appointing a guardian or determining incompetency." Another recommendation, therefore, is that the grandfathered legal incompetence produced by section 394.471 (and similar provisions in other states) be remedied by statutory revision. Alternatively, public guardianship programs could have sufficient independence, expertise, and programmatic obligation to seek judicial relief, as in New Hampshire, for legal incompetents without guardians.

A third way in which the demand for public guardianship can be reduced and made more realistic is through the use of less restrictive alternatives to guardianship.[11] These alternatives include: power of attorney; durable family power of attorney (popularly called "living wills");[12] single transaction court ratification of a particular action, like medical consent; substitute or representative payee; protective services (Florida Statute Sections 410.10–410.11); trusts; joint tenancy; *inter vivos* transfers of property; deeds of guardianship;[13] and even civil commitment. HRS District 1 (four counties of the western Florida panhandle) reports success in avoiding incompetency through the use of representative payees.

Florida has joined 34 states in public guardianship efforts. The current and future need for public guardians is particularly great given Florida's high and growing proportion of elderly citizens and position as the destination for Sunbelt migration away from Snowbelt family and friends. A similar need should be evident in other such states. Limited resources are being spent inefficiently on inappropriate institutionalization for lack of a guardian. The need for guardians can be reduced, but statewide implementation of public guardianship programs should proceed.

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