1980

In Re the Matter of Nelda Boyer : Brief of Appellant

Utah Supreme Court

SUSIE RICE; RespondentPAUL GOTAY; Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE THE MATTER)

OF) CASE NUMBER 16853

NELDA BOYER.)

BRIEF OF APPELLANT

Appeal from a final order of the Honorable Judge Calvin Gould of the Second Judicial District Court of Weber County, State of Utah, declaring Nelda Boyer an incapacitated person and in need of a guardian.

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Nelda Boyer, a 39 year old woman, is said to be suffering from some degree of mental retardation. The State has imposed a guardian on her; the guardian has the power to make the most fundamental kinds of decisions affecting the liberty and property of Nelda Boyer. The guardian is granted these powers by Utah's Guardianship Statute although the statute's defined standards are unconstitutionally vague and overbroad.

DISPOSITION OF THE LOWER COURT

The Second Judicial District Court of Weber County, State of Utah found that:

a. Appellant was an incapacitated person as that term is defined in Rule 75-1-201 of Utah Code Annotated.

b. Appellant is in need of a guardian.

RELIEF SOUGHT ON APPEAL

Appellant asks that the trial court's order declaring Nelda Boyer incapacitated and in need of a guardian be set aside.

Appellant asks that Utah's Guardianship Statute §75-1-201 be declared unconstitutional for the reason that it is overbroad and vague on its face or, alternatively, that the trial court's finding be set aside since Utah's Guardianship Statute §75-1-201 as applied to Nelda Boyer is unconstitutionally overbroad and vague in that it violates Nelda Boyer's due process rights as guaranteed by the United States Constitution and the Constitution of the State of Utah.

STATEMENT OF FACTS

Appellant is a 39 year old woman. For most of her life she lived with her father and elderly mother in Reno, Nevada. Five years ago her father, who had been extremely ill, died. Because of his illness, appellant's father remained home and as testimony indicates, both father and daughter had established a very close relationship based on mutual care. (Transcript, p. 7)

Soon after appellant's father died, appellant's mother began visiting a family therapist in the State of Nevada. (Transcript, p. 60) Mr. Wayne Abbott,

the family therapist, analyzed the family relationship and concluded that appellant was the cause of the family disruption. (Transcript, p. 58) He therefore, recommended that appellant be separated from the mother. (Transcript, p. 58) He declared her incapacitated (Transcript, p. 52) and in need of a guardian. (Transcript, p. 57) Mr. Abbott also recommended that Mr. Kershaw's Jefferson Manor located in Ogden, Utah, serve as appellant's new home. (Transcript, p. 58)

During the summer of 1979, appellant was invited to Ogden, Utah, by her relatives. Testimony confirms that the invitation to visit was extended for the purpose of getting appellant into Utah in order to facilitate confining appellant at Jefferson Manor and having her declared "incapacitated" and in need of Mr. Jerry Kershaw, as guardian. (Transcript, p. 89)

On September 6, 1979, appellant contacted Utah Legal Services. In preparation for this action appellant was referred to Doctor Richard T. Grow for a psychological evaluation at the joint request of the Division of Rehabilitation Services of Utah and Utah Legal Services. Dr. Grow is a psychologist and Chairman of Weber State College Department of Psychology. He has ten years experience in this field. (Transcript, p. 178) He concluded that appellant was mildly mentally retarded, but did not recommend the imposition of a guardian. (Transcript, p. 185)

During the trial, Sharon Tanner, a friend of the Court in this matter, recommended that a guardian be appointed. (Transcript, p. 82) She elaborated that Mr. Kershaw should not be appointed guardian, however, since several state agencies were presently investigating his nursing homes and many of them would not recommend him. (Transcript, p. 95) Mrs. Tanner also stated that her findings, as presented to the Court, were based on Mr. Abbott's report and on appellant's family testimony. (Transcript, p. 90) Mrs. Tanner admitted not knowing that Mr. Abbott was not a psychologist although she presumed that he was when she used his report. (Transcript, p. 90) Mrs. Tanner never made her own psychological evaluation of the appellant nor had the Court given Mrs. Tanner any guidelines or procedures in pursuing her evaluation of the appellant for the Court. (Transcript, p. 89)

Prior to the trial, Mrs. Tanner's report was presented to the opposing attorney. Based on Mrs. Tanner's findings of Mr. Kershaw, this action's original Complaint was amended so as to withdraw Mr. Kershaw as guardian and substitute appellant's sister, Mrs. Susie Rice, as guardian. (Transcript, p. 109)

The testimony given at trial shows that appellant was 35 years old before she was formally declared mildly mentally retarded. (Transcript, p. 108) For the past 35 years appellant was presumed to be a "slow learner". (Transcript, p. 108) Evidence presented at the trial shows that Nelda Boyer can read (Transcript, p. 5), write (Trans-

Cripe, p. 37, Shop (Transcript, p. 70) and Cook (Transcript, p. 213).

ARGUMENT

POINT I.

A DETERMINATION OF MENTAL INCAPACITY UNDER THE UTAH GUARDIANSHIP STATUTE RESULTS IN A SEVERE DEPRIVATION OF FUNDAMENTAL RIGHTS AND LIBERTIES.

In reviewing Utah's Guardianship Statute §75-5-312, Nelda Boyer requests this Court to seriously review the substantial deprivation that results from a finding of mental incompetency. It has been said that no other judicial determination causes such a complete loss of the basic rights of citizenship. See G. Alexander and T. Lewin", The Aged and the Need for Surrogate Management (1972) (hereinafter referred to as "Alexander and Lewin). In this review, Nelda Boyer asks that the Court keep in mind a famous dissent of Justice Brandeis:

> Experience should teach us to be most on our guard to protect liberty when the government's purpose is beneficient ... The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding. Olmstead v. United States, 277 U.S. 438 479 (1928) Brandeis, J., dissenting.

A finding of mental incompetence and the imposition of a general guardianship transfers that person's basic civil rights to the guardian. "The guardian

assumes responsibility for virtually every decision in the life of the ward." J. Regan and G. Springer, "Protective Services for the Elderly," A Working Paper Prepared for The Special Committee on Aging, United States Senate (July, 1977) (hereinafter "Regan and Springer.").

An incompetent's loss of rights not only includes those usually recognized by courts such as the right to sue, make a contract, purchase and sell property, marry or vote, but also may result in the loss of other less obvious but equally fundamental rights. Among the recognized rights of citizenship which an adjudged incompetent is denied are: the right to go from place to place as he/she pleases Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) ; to meet with persons in public places for social or political purposes Coates v. City of Cincinnati, 402 U.S. 611 (1971) ; to privacy of marriage and family life Roe v. Wade, 460 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965) ; the right to choose a physician and to determine appropriate medical care Roe v. Wade, supra ; the right to be left alone Stanley v. Georgia, 394 U.S. 507 (1969) ; and the right to retain a favorable reputation Wisconsin v. Constautineau, 400 U.S. 433 (1971) . As one prominent commentator has recently remarked, "In a society which

venerates liberty, conservatorship is an anachronism." G. Alexander, "Who Benefits from Conservatorship", 13 Trial 30, 32 (May, 1972).

Moreover, a limited discussion of the rights deprived by the imposition of a guardianship would ignore the profound psychological impact of a judicial decree of incompetence. The United States Court of Appeals recognized this impact in Dale V. Hahn, 440 F2d. 633 (2nd Cir. 1971):

> Although the plaintiff requests recovery of money alleged to be illegally spent by the (guardian), any right she may have to the money is not the critical interest sought to be protected. The important ones are, rather, those affected by the declaration that she was incompetent to handle her own affairs. The stigma of incompetency, the implication that she has some kind of mental deficiency, with attendant untrustworthiness and irresponsibility, and the consequences to her reputation and her normal human relationships with others in her community involve more than a property right, ... Id at 636.

Not only does a declaration of incompetency result in giving a guardian the absolute right to determine a ward's physical environment, but, in many cases, it is tantamount to ordering that the ward be institutionalized. Alexander and Lewin noted in their study of more than 600 cases that there was a remarkably high correlation

between finds of incompetency and subsequent institutionalization:

> not only is a person found to be incompetent bound to be deprived of his right to manage his property, but is very likely to lose his liberty in the process. Reported in Hearings on Legal Problems Affecting Older Americans Before the Special Committee on Aging, United States Senate, 91st Cong., 2d Sess. 12 (1970).

This direct loss of freedom as a result of guardianship determinations is confirmed by a study conducted in San Diego which concluded that despite an attempt to keep persons in the community, legal intervention through incompetency proceedings caused higher rates of institutionalization then otherwise would have occurred. Horowitz and Estes, "Protective Services for the Aged", (1971).

POINT II.

THE STATE'S INTEREST IN IMPOSING GUARDIANSHIP OVER PERSONS DETERMINED TO BE "INCAPACITATED" UNDER UTAH'S STATUTORY SCHEME DOES NOT OUTWEIGH THE FUNDAMENTAL RIGHTS OF PRIVACY AND AUTONOMY.

The United States Supreme Court stated in Whalen v. Roe, 429 U.S. 589, 599-600 (1976), that the right of privacy embraces a "...general individual interest in independence in making certain kinds of important decisions." Nelda Boyer's privacy right to make "certain kinds of important dec[illegible]y

destroyed when guardianship was imposed upon her. She is no longer given the right to make any of the fundamental decisions concerning everyday life. As a result of this intrusion, she is denied one of the basic components of "liberty" protected by the United States Constitution Due Process Clause of the Fourteenth Amendment, (Roe v. Wade, 410 U.S. 113, 152-53 (1973) and the Due Process Clause of Utah's Constitution.

In cases where state legislation has the effect of intruding on personal privacy or autonomy, the Supreme Court has balanced the state's interest allegedly promoted by the statute and the personal privacy and autonomy interests. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973). This interest balancing approach requires that, in order for the statute to stand, the weight of the state interest must outweigh the fundamental privacy interest:

> Where certain fundamental rights are involved, the Court has held that a regulation limiting these rights may be justified only by a 'compelling state interest' ...and the legislative enactments must be narrowly drawn to express only the legitimate state interests at stake ... (Roe v. Wade at 155).

There is no legitimate, compelling state interest which can outweigh appellant's personal privacy

right. The legislative purpose is to protect those persons who are "incapacitated" and who, according to Utah Statute §75-1-201, "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person". The paren patriae doctrine espoused by the statutory scheme may at one time have been viable. In many situations, however, the imposition of a protector over a person who the state determines to be unable to succeed on his own, results in a deprivation and a hindrance upon that person's potential and individuality. With the availability today of numerous special programs for retarded individuals including: special education programs, programs teaching self-care skills, and the possibility of supervised living, the limited state interest is far outweighted by the appellant's privacy interest:

> Individuals who are classified as mentally retarded ... constitute approximately 89% of all persons classified as retarded, and, although limited in their potential for academic achievement, can utilize special education techniques to achieve self-sufficiency as adults. (Emphasis added) The Mentally Retarded Citizen's Civil Rights at page 188.

POINT III.

THE STATUTE PROVIDING FOR THE IMPOSITION OF GUARDIANSHIP OVER "INCAPACITATED PERSONS" DEPRIVES THE PERSONS SO CLASSIFIED OR CERTAIN FUNDAMENTAL RIGHTS. THIS COURT SHOULD, THEREFORE, APPLY STRICT SCRUTINY TO THIS STATUTORY CLASSIFICATION AND REQUIRE THAT THE STATE SHOW A COMPELLING STATE INTEREST TO JUSTIFY THE STATUTE.

Utah Code Annotated §75-1-201 (18) defines an "Incapacitated person" as "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person". U.S.C. §§75-5-303 and 75-5-304 state the procedure for court appointment of a guardian for an "incapacitated person". Section 75-5-303 provides that, "(1) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian". Section 75-5-304 states that, "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 continual care and supervision of the person of the incapacitated person".

Nelda Boyer was found by the court to be an "incapacitated person" because of mental deficiency. She was described at the hearing as being "mildly mentally retarded". (Transcript, p. 52). A retarded individual is entitled to equal protection of the law (U.S. Const. Amend. XIV, Sec. 1) and possesses certain fundamental rights, the same fundamental rights possessed by all other citizens of the United States. In order for the state to infringe on these rights, it must show a compelling state interest. (Roe v. Wade, 410 U.S. 113 (1973); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969).) Even if the state is able to show a compelling state interest, the "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake". (Roe v. Wade, supra.)

A retarded person determined by the court to be an incapacitated person under Utah's statutory scheme loses all of his legal rights. He loses the right to choose where he shall live and where he shall travel; he loses the power to consent to or refuse to submit to medical treatment or other professional care and treatment; he loses all power of control over his property and loses the right to enter a contract. (U.C.A. §75-5-312) In essence, the person upon whom guardianship is imposed loses the right to make any decision concerning the fundamental rights to liberty and property.

There is no compelling state interest to justify such a sweeping classification of persons whose rights are so broadly limited.

> Various conceptions of the retarded individual have been advanced to justify denying the retarded citizen the same rights, needs and desires enjoyed by other memebers of the society ...The retarded individual may be seen as an object of pity deserving of a paternalistic environment which shelters him against injury and risk and makes few demands on his personal growth, development, and responsibility. Fry, The Mentally Retarded Citizen's Civil Rights, 47 UMKC Law Review No. 2, at 189.

The parens patriae stance which the state has assumed cannot possibly be characterized as promoting any compelling state interest required to justify the pervasive and dehumanizing effects of the statute.

POINT IV.

PERSONS SAID TO BE MENTALLY RETARDED ARE DEPRIVED OF FUNDAMENTAL RIGHTS WHEN GUARDIANSHIP IS IMPOSED ON THEM: THE STATE HAS CREATED A SUSPECT CLASSIFICATION WHEN IT MOVES TO DEPRIVE SUCH PERSONS OF THEIR RIGHTS. THEREFORE, THIS COURT SHOULD GIVE SPECIAL SCRUTINY TO THIS STATE ACTION, TO PROTECT THE RIGHTS OF PEOPLE WHO ARE HELPLESS AT LAW TO PREVENT THIS ACTION FROM BEING TAKEN AGAINST THEM.

Persons said to be mentally retarded suffer the loss of any or all legal rights, except those specifically protected by state law, from the time the state determines them to be in need of a guardian. In addition, such persons

suffer the stigma of being labelled mentally retarded and treated for any or all purposes from the perspective of a society which presumes they are in need of help.

In this respect, persons said to be mentally retarded are treated differently from anyone said to be physically ill. Except for some adults who are forced to undergo blood transfusions contrary to their religious beliefs, no state has a law requiring person over the age of majority to be involuntarily hospitalized or treated to protect his own welfare. See, Note, 48 Temple L. Quarterly, 354. 372 (Winter 1975).

A number of commentators have tried to express what it means to individuals to be "culturally defined" as mentally retarded and consequently treated as such by society. See, e.g., Herr, Civil Rights, Uncivil Asylums, and the Retarded, 43 U. Cin. L. Rev. 679, 681 (1974); E. Goffman, Stigman: Notes on the Management of Spoiled Indentity (1963); S. Mercer, Labelling the Mentally Retarded (1972); R. Hurley, Poverty and Mental Retardation: A Casual Relationship (1969).

> Mentally retarded persons, for example have been cast into a number of destructive models which have justified rejection and exclusion from the mainstream of society (Wolfensberger, 1972). The following models are still relatively common today:
>
> 1. The subhuman organism....

2. The menace....

3. The object of pity....

4. The eternal child....

5. The diseased organism....

> The implications of each of these models are highly destructive--they virtually assure that retarded persons will be effectively isolated from community life and denied access to many of those services which are essential to function as an effective human being. Roos, "Basic Facts About Mental Retardation, "published in Vol. I of the Legal Rights of the Mentally Handicapped, at page 17, by the Practicing Law Institute in 1974.

The myriad of rights that can be taken from persons labelled as mentally retarded are documented and cited in Vol. II in an article by W. Carnahan on "Rights to Love, Marry and Bear Children, Hold Property, Have a Job and Go to Court," beginning at page 1015.

The total picture of the plight of mentally retarded persons subjected to imposed guardianship was painted this way in 1963 by the President's Commission on Mental Retardation:

> Most States' provisions for guardianship of the retarded are relics of a time when the mentally retarded individual was considered an incompetent who had to be kept away from normal social contacts. They largely consider or assume the retarded person to be without rights, deny him due process or the equal protection of the laws, and often encumber his family's estate for years at the price of the State's assuming his care. The damage done to retarded

> individuals who are capable of self-support and self-reliance to those who have become caught up in the judicial process, and to families who can in effect be held responsible for a retarded individual into a second generation is incalculable. Stone, "The Aging", in Mental Health and Love: A System in Transition, National Institute of Mental Health P. 136 (1975).
>
> Why don't more lawyers get involved in mental retardation? Quite simply, because there is no money in it....
>
> It is time for all of us, lawyer and layman alike, to realize that the retarded person pays his horrible price in legal, social and human deprivation through no fault of his own. Haggerty, et al., "An Essay on Legal Rights of the Mentally Retarded", Family L. Quarterly 138, 149.

This dismal portrait of the mentally retarded has caused at least one commentator, S. Herr, supra, to call for the diagnosis to be treated as one creating a suspect classification, at 690, and one court to draw the same inference of a need for such a classification, to protect this discrete and helpless minority from unwarranted governmental intrusion, In re G. H., 218 N.W.2d 441 (N.D. 1974). See the rationale behind such a classification, in United States v. Carolene Products Co., 304 U.S. 144, 152, n4. (1938). Certainly persons said to be mentally retarded should benefit from a close judicial scrutiny as that accorded to illegitimate persons or women. New Jersey Welfare Rights

Organization v. Cahill, 411 U.S. 619 S. Ct. 1700 (1973); Frontiero V. Richardson, 411 U.S. 677, 93 S. Ct. 1964 (1973). And something more than a rational basis must be offered by these state defendants to justify the procedures and standards adopted to subject persons said to be mentally retarded to imposed guardianships.

POINT V.

THE UTAH GUARDIANSHIP STATUTE FAILS TO LIMIT THE DEPRIVATION OF RIGHTS TO ONLY THOSE NECESSARY TO PROTECT THE WARD.

Arguably the imposition of a guardian and the taking of necessary protective measures is legitimate when the state's compelling interest is to preserve the health, life and well-being of its citizens. Assuming this to be true, a state may not adopt means to this end which involve a deprivation of rights and liberties more extensive than necessary to protect the individual. The Utah Guardianship Statute unconstitutionally violates this principal.

There are persons who are totally unable to make or convey decisions about their lives (a comatose individual is an obvious example). There are also many retarded persons who are in fact fully capable of providing for their own needs:

Approximately 89% of retarded

> individuals are mildly mentally retarded, 6% are moderately retarded, and only 5% are severly and profoundly retarded. It is generally accepted that the mildly retarded are capable of economic self-sufficiency, and the moderately retarded can be economically productive in sheltered employment. Roos, Basic Facts About Mental Retardation, in Legal Rights of the Mentally Handicapped, (PLI 1974), at p. 19.

Between the above extremes lies a number of mentally retarded persons who are capable of managing some, but not all, of their personal or financial affairs. Such capabilities are easily evidenced in the particular in Nelda Boyer's case.

The transcript shows that Nelda Boyer:

1. Went to school through eighth grade (Transcript, p. 5);
2. Is a bargain hunter (Transcript, p. 105);
3. Can make decisions (Transcript, p.55 & 82);
4. Can take care of her hypoglicemia (Transcrip p. 86);
5. Can shop (Transcript, p. 70);
6. Can make change (Transcript, p. 75);
7. Can formulate plans (Transcript, p.71);
8. Can follow instructions (Transcript, p. 219);
9. Can cook (Transcript, p. 213);
10. Can prepare shopping a list (Transcript, p. 21
11. Has proper hygiene (Transcript, p. 211);

13. Has dressing skills (Transcript, p. 211);

14. Has house skills (Transcript, p. 211);

15. Can read (Transcript, p. 5); and

16. Can write (Transcript, p. 5).

Appointment of a general guardian for a mentally retarded person who is partially competent arguably runs afoul of the federal constitutional principle of "less drastic means". Sheldon v. Tucker, 364 U.S. 479, 488 (1960).

The doctrine of the "least restrictive alternative" is forcefully presented in Sheldon v. Tucker, where an Arkansas statute required teachers to disclose all organizations in which they held membership during the previous five years. In striking down this statute, the Supreme Court held that although the state had a legitimate concern in these matters:

> "that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means of achieving the same basic purpose." Id at 488.

Such a restricted means was to limit inquiry into membership that had been taken in any one of a list of subversive organizations. This principle applies when governmental action infringes upon a person's fundamental, constitutional rights. Where a compelling state interest is found for an infringement of a person's fundamental constitutional rights, this principle requires that the State's infringement occur in the least drastic manner consistent with its purpose. Arguably, the appointment of a plenary guardian for a person who is partially competent does not satisfy the constitutional principle of "less drastic means" because a State could provide a more limited form of guardianship for that person.

For example in the case of Lake v. Cameron, 364 F 2d. 657 (D.C. Cir. 1966), the doctrine of "least restrictive alternative" was applied to the civil commitment field. In that case, an elderly woman was found wandering the streets by a policeman and taken to the District of Columbia Hospital. There diagnosed as suffering from "chronic brain syndrome"; Mrs. Lake "demonstrated very frequent difficulty with her memory". Id at 658.

At the commitment hearing, two psychiatrists testified that Mrs. Lake was, because of her condition, mentally ill and although she was not dangerous to others and would not intentionally harm herself, was subject to "wandering away and being out exposed at night or any time she is out." Id at 657-658. The Court held that Mrs. Lake was not a proper subject for indeterminate commitment without full exploration of all other possible alternatives available for her care and treatment in the community including "an identification card on her person so that the police or others could take her home if she should wander..." Id at 661. In conclusion, the Court said: "Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection." Id at 660.

Under the doctrine of the least restrictive alternative it becomes incumbent upon the state to fully explore all other measures to protect the individual. Guardianship proceedings do not exist in a vacuum. There are available many other social and legal devices that may be called into play to assist an individual of diminished capacity. Legally less restrictive alternatives include, inter alia, agency relationships, of a general, limited or durable nature, forms of joint property such as joint bank accounts, and the Social Security Representative Payee

system. All these allow less restrictive means of handling property, paying bills, etc.

In addition to these legal alternatives, social service support systems designed to assist individuals with limited impairments should be considered by the Court. These services include, inter alia, out-patient medical centers, home health aids, home help services (cleaning, cooking, assistance with personal care), geriatric day care, visiting nurses, transportation services, chore services and nutrition services all of which can be used as alternatives to the appointment of a guardian and, if appointment is necessary, as supplemental services for the ward.

Mr. Gerald A. Miller, State Executive Director of the Utah Association for Retarded Citizens, made this clear during the trial when he described a variety of programs that do exist in Utah:

> There are a number of programs in Utah that affect the lives of all retarded from birth right up through death. The nurses at the Department of Health operate an early infant stimulation. Our public schools are charged by federal law to educate in the State of Utah from 5 to 21 years of age mentally retarded people. And we also have shelter workshops and work activity centers for retarded, in addition to the Department of Vocational Rehab services that offer services to the retarded. Utah also provides services through the State Department of Education, via the Vocational Rehabilitation Services, which licenses work activity in shelter workshop agencies across the State. (Transcript, p. 205)

The attractiveness of the doctrine of least restrictive alternative is that it requires inquiry into how

the individual's "best interest" can be served while minimizing abridgment of fundamental liberties. In this respect, least restrictive alternative comports with the principal that due process is a "flexible doctrine and calls for such procedures as the particular situation demands". Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

POINT VI.

NELDA BOYER'S RIGHTS TO BE PROVED INCAPACITATED BY CLEAR AND CONVINCING EVIDENCE IS BEING DENIED.

Despite the large number of guardianships imposed each year, appeals of incompetency determinations are rare. For example, a field study of 600 guardianship cases in New York did not uncover a single appeal of the trial court's findings. G. Alexander & T. Lewin, at 29. This phenomenon is partially due to the fact that it is unlikely that a finding of incompetency will be overturned on appeal since state courts are most reluctant to set aside determinations of the trial court based on a de novo review of the evidence. Moreover, the standard of proof at a guardianship hearing is typically low, requiring only "clear and convincing" evidence. In Re Guardianship of Mills, 350 Wis. 401, 27 N.W.2d 375 (1947), or some lesser quality and quantity of evidence such as mandated in Nelda Boyer's case which established that the necessity of appointing a

guardian rests with the petitioner who only had to establish this need by a preponderance of the evidence. (Transcript, p.22 In practice, the trial court's decision will be affirmed on appeal if there is any evidence in the record to support it. This attitude is reflected in Re Guardianship of Walters, 37 Ca. 2d. 239, 245 (1951), enunciating the "substantial evidence" rule:

> All conflicts and any reasonable doubt as to the sufficiency of the evidence must be resolved in favor of the order....In cases of this type, as in any other, we must uphold the findings of the trial court if there is any substantial evidence which, together with the aid of all inferences to be drawn from it, tends to support the judgment.

Because of threat of involuntary confinement, the loss of civil rights, the stigma of incompetency and the indeterminate nature of the adjudication, the Utah standard of proof is constitutionally inadequate.

The United States Supreme Court held that proof by a preponderance of the evidence is insufficient in juvenile delinquency proceedings, saying that proof beyond a reasonable doubt is required because it "is a prime instrument for reducing the risk of convictions resting on factual error." In Re Winship, 397, U.S. 358, 363 (1970). The higher standard of proof, by clear and convincing evidence, will not serve to preclude necessary guardianship actions; rather, it will serve to encourage caution in fact finding under

an incompetency proceeding. Moreover, it will reduce the likelihood of factual error, the imposition of unnecessary guardianships and the attendant deprivation of rights and liberties.

In the civil commitment area, Lessard v. Schmidt, 349 F. Supp. 1078, vacated and remanded for a more specific injunctive order, 945 S. Ct. 713 (1974), amended opinion, required proof beyond a reasonable doubt, stating;

> The argument for a more stringent standard of proof is more compelling in the case of a civil commitment in which an individual will be deprived of basic civil rights and be certainly stigmatized by the lack of confidentiality of the adjudication. Id at 1095.

Supporting the necessity for a higher standard of proof, In Re Ballay, 482 F 2d. (D.C. Cir. 1973), drew a distinction between commitment proceedings and other civil cases:

> Where the stakes are frequently economic and where 'we view it as no more serious in general for there to be an erroneous verdict in the plaintiffs favor.' Id at 663, quoting In Re Winship, 397 U.S. 358, 391 (1970)

Clearly the analogous situation prevails in incompetency proceedings where erroneous imposition of a guardianship can be so damaging to the affected individual.

For these reasons, the Utah Guardianship

Statute should be held unconstitutional for failing to ensure that the proposed ward's conduct meets the statutory test of incompetency by clear and convincing proof.

POINT VII.

ACCEPTANCE OF EXPERT WITNESS' TESTIMONY IS WITHIN PROVINCE OF THE TRIER OR FACTS: HOWEVER, IT IS INCUMBANT UPON THE TRIAL JUDGE TO DETERMINE WHETHER PRELIMINARY FACTS HAVE BEEN ESTABLISHED, UPON WHICH THE EXPERT MADE HIS OPINION.

The general precedent is that the trial court is allowed considerable latitude of discretion in admissibility of expert testimony, and in the absence of a clear showing of abuse, the reviewing court will not reverse. Maltudy v. Cox Const. Co., Inc., 598 P.2d 336 (Utah 1979); Rodriguez v. McDonald Douglas Corp., 399 Ca. Rptr. 151 (Cal. App. (1978); Fillmore City, v. Reeve, 571 P.2d 1316 (Utah 1977); State By and Through Road Commission v. Silliman 439 P.2d 279 (Utah 1968); Marsh v. Irvine, 449 P.2d 602 (Utah 1969); Lamb v. Bangant, 525 P.2d 602 (Utah 1974); Re Hanson, 87 Utah 580, 52 P.2d 1103 (1935); Re Christiansen, 17 Utah 412, 53 P. 1003 (1898).

In the case of Dobbs v. State 191 Ark. 236, 85 S.W.2d 694 (1935), the court defines the criteria used to qualify witnesses as expert in the field of mental incompetency. The court oulined the following three

criteria:

> 1) as a general rule such witness should have a general knowledge of medicine as a practicing physician, a general knowledge of the mind and its functions and of mental phenomena and the disorders which attack the mind, although in some jurisdictions exceptions have been made permitting witnesses to testify as experts who did not possess all these qualifications of the insane;
>
> 2) where the claimed mental derrangement is of a common type, any regular physician in good standing, doing general practice, and who has studied the diseases of the mind along with other diseases of the body can testify as an expert, the extent of his learning going alone to his credibility;
>
> 3) where the claimed insanity is not of the commoner type, but is of a rare, unusual, or complex nature, then the witness called as an expert should qualify by showing a reasonable amount of experience in the study and investigation or observation of the kind or class of insanity under investigation.

A general statement in case law regarding the qualifications of an expert witness can be found in Bratt v. Western Air Lines, Inc., 155 F.2d 850 (10th Cir. 1946), wherein the court stated: "A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which witness is to testify, requires special knowledge, skill, experience

or training and that the witness has the requisite special knowledge, skill, experience or training." The court further asserts that "whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible, is a preliminary question for the judge presiding at the trial, and his decision of it is conclusive, unless clearly shown to be erroneous as a matter of law.

According to 40 A.L.R. 2d. §§63, 64, the situation where the mental condition of one sought to be put under or relieved of guardian is involved, the following factual bases are pertinent when the witness testifies to insanity or incompetency. The bases are divided into two categories: sufficient and insufficient.

Nonexpert opinion evidence as to the incompetency of one involved in guardianship proceedings was held to have been founded upon a sufficient predicate of opportunity of observation and acquaintanceship where:

> the witness had known the person in question intimately for sixteen or more years. The sufficiency of this basis involves the witness's opportunity to observe the alleged incompetent.
>
> the witness had cared for the alleged incompetent.
>
> the witness had seen a great change in the incompetent.

Nonexpert opinion was held to be insufficient wherein:

> the witness had known the person in question several years, but had merely met him in passing. Re Carmichael (1860) 36 Ala. 514.
>
> the witness had known the person in question for sixteen years, but had never conversed with him.
>
> no statement of fact or recitation of conduct on the part of one for whom a guardian was sought to be appointed presented an unnatural or unusual situation, all the facts alleged being entirely consistent with the defendants' manner of life, his habits, his prejudices, and his conduct during the years when his mental capacity was not questioned. Caltriden v. Sharon (1914) Iowa 287, 145 N.W. 540.

The credibility of the expert witness is described in the Fillmore case, supra., as being a person with specialized knowledge in the field to the extent that his testimony can be helpful to the jury on matters with which they personally are not familiar. His testimony may be received as an expert but whether he is so qualified rests within the sound discretion of the trial court. The Maltuby case, supra., further describes the expert as someone whose knowledge may be acquired through experience as well as through formal education and study.

However, the Re Hanson holds that the opinion of a witness as to the mental condition of a testator

cannot be given unless the witness gives details of the underlying facts upon which the opinion is based.

In the more recent case of State By and Through Road Commission, supra., the opinion in Re Hanson is upheld and further articulated when the court says,

> the qualification of an expert witness is to be determined by the trial judge, and if he determines that the witness by reason of training and experience can assist the jury by giving an opinion on a matter properly before the court, the Supreme Court, on appeal, should not hold that the testimony should be stricken unless such palpable ignorance of the subject matter is manifested by the witness as to indicate an abuse of discretion on the part of the trial judge in allowing the witness to express an opinion in the first place or in refusing to grant a motion to strike after it is given.

The Rodriguez case, supra., reiterates the issue of the trial judge's duties by declaring,

> acceptance or rejection of expert witnesses is within the province of the trier of fact; however, it is incumbant upon the trial judge to determine whether the preliminary facts have been established, including the foundation material upon which the expert made his assumptions.

Ignorance of the subject matter and lack of determination of the preliminary facts upon which the experts found Nelda Boyer incapacitated abound in this trial:

During the trial and over counsel's objection

(Transcript, p.50 & 52), Mr. Wayne Abbott was permitted to conclude that in his opinion:

1. Nelda Boyer could not hold a job (Transcript, p. 53);

2. Nelda Boyer is mentally deficient (Transcript, p. 52); and

3. Nelda Boyer is in need of a guardian. (Transcript, p. 53)

Nelda Boyer's counter-evidence serves to show that Mr. Abbott admits not being a psychologist, a medical doctor, nor a psychiatrist. (Transcript, p. 59). Mr. Abbott also admits not testing Nelda Boyer in the manner a psychologist would have (Transcript, p. 60) but states that his method is the same as used by psychiatrists (Transcript, p. 66) even through he is not trained in said field (Transcript, p. 59). Mr. Abbott agrees with Doctor Grow's evaluation of Nelda Boyer (Transcript, p.58) even though Mr. Abbott never gave Nelda Boyer any of the tests used by Doctor Grow to evaluate Nelda Boyer. These tests included: Human Figure Drawing, Wechsler Adult Intelligence, Gray's Oral Reading Paragraphs, Bender Gestalt, Graham Campbell Memory For Designs, Sentence Completion, the Minnesota Multiphasic Personality Inventory, Victorian and Rorschach Test. (Transcript, p. 180) Mr. Abbott also admits never visiting Nelda Boyer while Nelda Boyer worked at the MGM Hotel in Reno, Nevada. (Transcript, p.64) Finally, Doctor Grow, the Chairman of the Department of

Psychology at Weber State College, who has ten years of clinical experience and who has helped set up mental health programs within the State of Utah (Transcript, p. 178) concludes that if he had to choose between imposing a guardian on Nelda Boyer or grant her total independence, he, as a psychologist, would recommend to give Nelda Boyer her freedom. (Transcript, p. 185)

Testimony given during the trial shows that Sharon Tanner, a social worker used by the Court, used Mr. Abbott's report to supplement her own report (Transcript, p. 90), but that she would have changed her report had she known Mr. Abbott was not a psychologist. (Transcript, p. 90) Mrs. Tanner also admits not having tested Nelda Boyer (Transcript, p. 89). Nelda Boyer's mother admits not knowing Mr. Abbott's credentials (Transcript, p. 23). Her sister admits that Nelda Boyer's deficiencies are a product of no training (Transcript, p. 109) Testimony also shows that Nelda Boyer was living with her mother a person who is sensitive (Transcript, p. 107) and was close to a nervous breakdown (Transcript, p. 48).

POINT VIII.

THE STANDARD FOR DETERMINING WHETHER A PERSON IS "INCAPACITATED" AS DEFINED IN 75-1-201 UTAH CODE ANNOTATED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

For the purposes of the imposition of a

guardian over an "incapacitated person", §75-1-201 Utah Code Annotated defines an "incapacitated person" as "... any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." The appellant was found to fall within this definition because of a "mental deficiency", or mild mental retardation. (Transcript, p. 52)

> The indentification and treatment of the mentally retarded is, to a large extent, culturally defined. Those individuals who exhibit "significantly subaverage general intellectual functions, existing concurrently with deficits in adaptive behavior and manifested during the development period", are labeled retarded and are treated accordingly. Exactly what constitute subaverage intellectual functioning, however, depends on relative concepts designed to fulfill the social need or desire to classify individuals who are considered inadequate or unable to perform so-called normal tasks. "Retarded Citizens' Civil Rights", UMKC Law Review, Vol 47, No. 2, at page 187.

The difficulty lies in the fact that the statute's terms are so amorphous and value-laden that their application to any particular fact situation is left to

the discretion of the decision-maker. Individuals whose competency is questioned find themselves having to defend any and every aspect of their personal lives since all is made relevant by the statute.

The labels of "mentally retarded" or "mentally deficient" are vague and completely lacking of any satisfactory definition. The only criteria that the statute supplies is whether the person "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person". The Editorial Board Comment to §75-5-304 Utah Code Annotated discusses the term "incapacitated" as applied to the guardianship statute. It merely states that, "It is assumed that the standards suggested by the definition in §75-1-201 (18) for the 'incapacitated' person are different from those which will determine when a person may be committed as mentally ill". The comment goes on to discuss where there might be an overlap between the two standards. It does not shed any light on the meaning of the language used to set up the standard for determining "incapacitated".

In the criminal law context, courts frequently find statutes unconstitutionally vague both because their terms do not set forth precisely the conduct proscribed and because vague statutes provide no ascertainable guidelines to the decision-maker, thus inviting arbitrary

applications of the law. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

Implicit in those decisions is the recognition that a vague standard is no standard at all. Not only the judge but the individual whose liberty interests are at stake must guess at the meaning of the law. As a result, his or her ability to prepare a meaningful defense is severely hampered or obliterated. One major function of the Constitution's guarantee of due process is the elimination of these practical obstacles, yet incompetency proceedings universally place alleged incompetents in such an unfair position.

The use of imprecise language in the statute leads to the creation of a group of persons who suffer the consequences of the statutory definition needlessly. The United States Supreme Court has stated that where a state enacts legislation affecting "fundamental rights", the legislation, "...must be narrowly drawn to express only the legitimate state interests at stake". Roe v. Wade, (Supra). Certainly the state interest in providing "... for the care of a person who is unable to care for himself", (Editorial Board Comment to §75-5-304 U.C.A.) is not served by the use of a statute with such imprecise terminology that its application results in bringing persons within its scope who were not intended by the legislature to be so placed.

The fact that appellant was afforded a hearing was represented by counsel and was assured procedural safeguards does not prevent the statute from being overbroad and vague. Nor can "...even strict construction of a statute...save it from a declaration of unconstitutional if the language is so overbroad and vague, as to impose deprivation of rights from persons who should not have to forfeit them". Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (1974).

The statute provides that a person is "incapacitated" "to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person". (Emphasis added) The statute does not establish the criteria for determining what is a "responsible decision concerning his person". In the vast array of decisions that a person makes daily concerning his person, it is a purely arbitrary classification as to which are "responsible" decisions and which are not. Surely this clearly subjective, cultural standard cannot serve as a basis for stripping a person of his constitutionally-protected rights.

CONCLUSION

Nelda Boyer is now threatened with the severe curtailment of constitutionally protected

rights and liberties. The fundamental rights endangered include the right to contract and hold property, the right to live free of constraint, and the right to life itself. The state under its parens patriae power threatens abridgement of these rights under its guardianship statute because Nelda Boyer is alleged to be mentally incapacitated.

Moreover, as a result of this adjudication, persons of diminished functional abilities are subjected to plenary guardianships, even though a lesser deprivation could be adequate to protect the ward. Permitting this, the Utah Statute endangers Nelda Boyer and other wards with the unnecessary loss of fundamental rights and liberties, including the right to decide her place of residence.

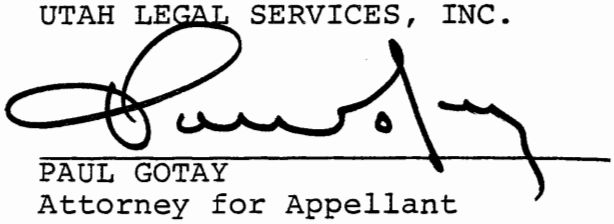
Due process of law will not permit such treatment of our citizens. The charade that the Utah Guardianship Statute is justified by the "best interest" doctrine cannot continue. Rather, instead of negating the individual and his capacity of self-autonomy, state law would do better to concentrate on treating the proposed ward as a whole person, capable of guiding his own destiny and making his own life choices, until the contrary is proven by clear and convincing evidence.

Nelda Boyer requests this Court to find the Utah Guardianship Statute unconstitutional and to enjoin its enforcement against her in the specifics described.

DATED this 17 day of March, 1980.

Respectfully submitted,

UTAH LEGAL SERVICES, INC.



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