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# CONSTITUTIONAL DEFICIENCIES IN OKLAHOMA GUARDIANSHIP LAW

*The history of American freedom is, in no small measure, the history of procedure.<sup>1</sup>*

*Mr. Justice Frankfurter*

## I. INTRODUCTION

A guardianship is society's way of informing a person that he is not competent to manage his personal and/or financial affairs, and that for his own best interests the state will appoint a substitute decision maker who will care for his person and his estate.<sup>2</sup> Notwithstanding its beneficent purpose, the imposition of an involuntary guardianship is a serious infringement of the ward's personal freedom.<sup>3</sup> By declaring a person incompetent<sup>4</sup> the court severely restricts his power to create or modify legal relations with other persons.<sup>5</sup> The foreseeable results of imposing an unwanted guardian, however, extend well beyond the sig-

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1. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J. concurring).

2. Kindred, *Guardianship and Limitations upon Capacity*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 63 (1976). For purposes of this comment, the term "guardian" will refer to a person who is appointed by the court to care for the person and the property of an adjudicated incompetent. The term "ward" will refer to a person who is declared incompetent and who is found by the court to be in need of a guardian. See OKLA. STAT. tit. 30, §§ 1-22 (1971). See, e.g., *In re Guardianship of Campbell*, 405 P.2d 203, 207 (Okla. 1966). There is also statutory authority in Oklahoma which allows the court to appoint only a guardian of the estate. This type of guardian is called a "conservator." OKLA. STAT. tit. 58, §§ 890.1-.10 (1971). For a compilation of relevant statutes and an analysis of their application to the property of adjudicated incompetents, see, *Report of the A.B.A. Committee on Legal Incapacity, Guardianship of Property of Incompetents*, 9 REAL PROP., PROB. & TR. 535 (1974). See also Alexander, Brubaker, Deutsche, Korner & Levine, *Surrogate Management of the Property of the Aged*, 21 SYRACUSE L. REV. 87 (1969); *Symposium on the Law of Guardianship*, 45 IOWA L. REV. 209 (1960). For a general description of the history and nature of guardianship, see Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 602-07 (1972).

3. Effland, *Caring for the Elderly Under the Uniform Probate Code*, 17 ARIZ. L. REV. 373, 383 (1975). See also Horstmen, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 231 (1975) [hereinafter cited as *Protective Services*]; Comment, *An Assessment of the Pennsylvania Estate Guardianship Incompetency Standard*, 124 U. PENN. L. REV. 1048, 1049 (1976); Comment, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676, 680 (1964) [hereinafter cited as *Disguised Oppression*].

4. An incompetent has been defined as any person who, though not insane, is by reason of old age, disease, weakness of the mind, or from any other cause, unable or incapable, unassisted, of properly taking care of himself or managing his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. *In re Guardianship of Bogan*, 441 P.2d 972, 974 (Okla. 1968).

5. *Disguised Oppression*, *supra* note 3, at 676.

nificant deprivations of liberty and property. Inherent in any decree of incompetency is a substantial amount of social stigmatization and a concomitant loss of dignity similar to that occurring in civil commitment.

Although involuntary guardianship and civil commitment proceedings cannot be equated for all purposes, the effects of each are strikingly similar.<sup>6</sup> With respect to civil commitment, procedural protections have been increased by recent case law<sup>7</sup> and legislative enactments.<sup>8</sup> Unfortunately a commensurate increase has not occurred with respect to guardianship proceedings. One reason for the lesser degree of procedural protection afforded the alleged incompetent is suggested by the regular judicial invocation of the mythical talismans—"best interests,"<sup>9</sup> "preventative and protective,"<sup>10</sup> and "parens patriae"<sup>11</sup>—which are supposedly descriptive of the proceeding as well as the role of the state. Far too often, however, this language is used to conceal the significant deprivations which occur in the guardianship process.<sup>12</sup> The practical effect of such language is reflected by the inordinate amount of discretion vested in the probate courts.

Another proffered rationale for the current paucity of procedural protections in guardianship hearings is related to its historic civil nature. At one time, the civil-criminal distinction was a sufficient argument to defend lax procedures in the juvenile and civil commitment areas.<sup>13</sup> In *In re Winship*,<sup>14</sup> however, the Supreme Court specifically rejected this line of argument. In the context of a juvenile delinquency proceeding, the Court said, "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards . . . ."<sup>15</sup> Clearly, the traditional arguments favoring reduced procedur-

6. One commentator suggests that the effects of an incompetency adjudication are similar to "those attendant upon certain criminal convictions." Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341, 348.

7. See, e.g., O'Connor v. Donaldson, 422 U.S. 563 (1975); *Humphery v. Cady*, 405 U.S. 504 (1972); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (1974), *remanded on other grounds*, 421 U.S. 957, *on remand*, 413 F. Supp. 1318 (1975).

8. See, e.g., OKLA. STAT. tit. 43A, § 54.1 (Supp. 1977).

9. See, e.g., *In re Fox' Estate*, 365 P.2d 1002, 1006 (Okla. 1961).

10. See, e.g., *Shelby v. Farve*, 33 Okla. 651, 659, 126 P. 764, 767 (1912); *In re Nagle's Estate*, 418 Pa. 170, —, 210 A.2d 262, 264 (1965).

11. See notes 79-87 *infra* and accompanying text.

12. Comment, *An Assessment of the Pennsylvania Estate Guardianship Incompetency Standard*, 124 U. PENN. L. REV. 1048, 1049 (1976).

13. See, e.g., *In re Gault*, 387 U.S. 1, 17 & n.22 (1967) (juvenile); *Kent v. United States*, 383 U.S. 541, 555 (1966) (juvenile); *In re Brown*, 444 P.2d 304, 305 (Mont. 1968) (civil commitment).

14. 397 U.S. 358 (1970).

15. *Id.* at 365-66. The Tenth Circuit in *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968),

al protections are no longer perfunctorily accepted in those areas analogous to guardianship.

Neoteric conceptions of the fourteenth amendment to the Federal Constitution compel the conclusion that Oklahoma guardianship procedure is in need of fundamental change. The purpose of this comment is to delineate the constitutional deficiencies in the current law from both due process and equal protection views. Additionally, suggestions will be offered where applicable, as to how these defects can be eliminated.

## II. CURRENT OKLAHOMA PROCEDURE

Oklahoma guardianship law requires that a relative or friend of the suspected incompetent file a verified petition with the probate court alleging that the person is insane or otherwise incompetent to manage his property.<sup>16</sup> Upon receipt of such a petition, the court must give the alleged incompetent notice of the time and place of the hearing on the petition.<sup>17</sup> This notice must be personally served on the individual at least five days before the time set for the hearing.<sup>18</sup> Failure to obtain personal service deprives the court of jurisdiction to determine the validity of the allegations presented in the petition.<sup>19</sup> Therefore any proceeding lacking the requisite statutory notice is void. Likewise, any subsequent decree adjudging a person incompetent and appointing a guardian will be subject to collateral attack.<sup>20</sup>

The alleged incompetent is required to appear at the hearing un-

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concluded that the civil-criminal distinction was also inappropriate in a civil commitment setting. In holding that the prospective mental patient had a constitutional right to counsel at the commitment hearing, the court said that due process protections did not depend on "whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency." *Id.* at 396. See also *In re Ballay*, 482 F.2d 648, 669 (D.C. Cir. 1973); *Bartley v. Kremins*, 402 F. Supp. 1039, 1047 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977). Clearly, due process safeguards are no longer limited to criminal proceedings. In recent years the Supreme Court has mandated procedural protections in a number of areas considered exclusively civil. See, e.g., *In re Winship*, 397 U.S. 358 (1970) (juvenile delinquency proceedings); *Goldberg v. Kelley*, 397 U.S. 245 (1970) (termination of welfare benefits); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wage garnishment); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings); *Specht v. Patterson*, 386 U.S. 605 (1967) (commitment under state sex offender act); *Kent v. United States*, 383 U.S. 541 (1966) (waiver hearing in juvenile delinquency proceedings).

16. OKLA. STAT. tit. 58, § 851 (Supp. 1977).

17. *Id.*

18. *Id.* See *McElroy v. Pegg*, 167 F.2d 668 (10th Cir.), *cert. denied*, 335 U.S. 817 (1948); *In re Mize's Guardianship*, 193 Okla. 164, 142 P.2d 116 (1943).

19. *Colby v. Jacobs*, 179 Okla. 170, 170, 64 P.2d 881, 882 (1937); *Martin v. O'Reilly*, 81 Okla. 261, 200 P. 687 (1921).

20. *Martin v. O'Reilly*, 81 Okla. 261, 200 P. 687 (1921).

less unable to attend.<sup>21</sup> He may employ counsel to present a defense to the allegations made against him,<sup>22</sup> but the court is not required to inform him of this right.<sup>23</sup> Similarly, the court is under no duty to appoint counsel for the alleged incompetent if he fails to appear at the hearing or where he appears without counsel.<sup>24</sup>

The guardianship proceeding is denominated as "special," so the question of incompetency is an issue of fact to be decided by the court.<sup>25</sup> If, after a full hearing, it "appears" to the court that the alleged incompetent is "incapable of taking care of himself and managing his property," a guardian must be appointed.<sup>26</sup>

The burden of proving incompetency is on the petitioner.<sup>27</sup> The statutory language, however, fails to specify the requisite degree of proof.<sup>28</sup> Likewise the Oklahoma courts have created as much uncertainty as the legislature by construing the statutory language to require only that the incompetence of the person must "clearly appear" from the evidence before the court can appoint a guardian.<sup>29</sup>

21. OKLA. STAT. tit. 58, § 851 (Supp. 1977). See, e.g., *Petroleum Auditors Ass'n v. Landis*, 182 Okla. 297, 77 P.2d 730 (1938); *Bartlett v. Bell*, 125 Okla. 236, 257 P. 309 (1926). While the prospective ward is required to be at the hearing, in actual practice he is seldom present. See R. Allen, E. Ferster & H. Weihofen, *Mental Impairment and Legal Incompetency*, 8, 83 (1968) (Report of the Mental Competency Study, An Empirical Research Project, conducted by The George Washington University Institute of Law, Psychiatry and Criminology, Under the Sponsorship of the National Institute of Mental Health, Department of Health, Education and Welfare) [hereinafter cited as Allen].

22. *Mazza v. Pechacek*, 233 F.2d 666, 667 (D.C. Cir. 1956) (undeniable right to employ and have counsel present at incompetency hearing); cf. *Bradburn v. McIntosh*, 159 F.2d 925 (10th Cir. 1947) (right to employ counsel for a restoration hearing).

23. See notes 93-112 *infra* and accompanying text. See also Allen, *supra* note 21, at 85.

24. *Ned v. Robinson*, 181 Okla. 507, 510, 74 P.2d 1156, 1160 (1937), *cert. denied*, 304 U.S. 550 (1938).

25. *In re Washam's Estate*, 364 P.2d 896, 898 (Okla. 1961) (special proceeding); *In re Thomas*, 207 Okla. 321, 324, 249 P.2d 441, 444 (1952) (issue of fact decided by the court). A jury trial is neither contemplated nor required in a guardianship proceeding. See *Ned v. Robinson*, 181 Okla. 507, 74 P.2d 1156 (1937), *cert. denied*, 304 U.S. 550 (1938).

26. OKLA. STAT. tit. 58, § 852 (1971). The "full hearing" which the statute requires may average only a few minutes due to crowded court dockets. See Allen, *supra* note 21, at ix, 87-88. "Mental incompetency or incapacity is established when there is found to exist an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life." *In re Guardianship of Prince*, 379 P.2d 845, 847 (Okla. 1963); *Fish v. Deaver*, 71 Okla. 177, 180, 176 P. 251, 253 (1918). For cases on this point, see those collected at Annot., 9 A.L.R.3d 774 (1966).

27. Cf. *In re Carney's Guardianship*, 110 Okla. 165, 167, 237, P. 111, 113 (1925) (on a petition for restoration of competency, the burden is on the petitioner to prove the ward has regained his competency).

28. OKLA. STAT. tit. 58, § 852 (1971) states in part: "If . . . it *appears* to the judge . . . ." (emphasis added).

29. *Fish v. Deaver*, 71 Okla. 177, 180, 176 P. 251, 253 (1918). Generally, states allow courts to make a finding of incompetence upon a mere preponderance of the evidence. See *Protective Services*, *supra* note 3, at 254.

Even though a determination of incompetency is reviewable on appeal,<sup>30</sup> the decision to appoint a guardian is "grounded so deeply in discretion"<sup>31</sup> that the reviewing court generally allows the judgment to stand if there is sufficient competent evidence to sustain the court's conclusion.<sup>32</sup> Only where the judgment of the trial court indicates an abuse of discretion<sup>33</sup> or where it is clearly against the weight of the evidence or contrary to law<sup>34</sup> will the decision be overruled.<sup>35</sup>

Oklahoma law also provides for proceedings to determine an incompetent's restoration to capacity.<sup>36</sup> The statute allows the ward,<sup>37</sup> his guardian, a relative, or a friend<sup>38</sup> to petition the court in which the ward was declared incompetent to have his restoration to capacity judicially determined.<sup>39</sup> The petition must allege that the ward is competent and capable of taking care of himself and his property. Therefore, the burden of proof for restoration is placed on the petitioner.<sup>40</sup>

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30. *In re Washam's Estate*, 364 P.2d 896, 898 (Okla. 1961); *In re Winnett's Guardianship*, 112 Okla. 43, 45, 239 P. 603, 605 (1925).

31. Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 Duke L.J. 341, 348.

32. *In re Winnett's Guardianship*, 112 Okla. 43, 45, 239 P. 603, 605 (1925).

33. *In re Fox' Estate*, 365 P.2d 1002, 1006 (Okla. 1961); *Brigman v. Cheney*, 27 Okla. 510, 510, 112 P. 993, 994 (1910).

34. *Gould v. Smith*, 405 P.2d 82, 83 (Okla. 1965). See *In re Vaughn's Guardianship*, 205 Okla. 438, 439, 239 P.2d 403, 404 (1951). Cf. *Mellot v. Lambert*, 161 Okla. 276, 279, 18 P.2d 532, 534 (1933) (court's decision to restore ward's competency will not be disturbed unless "plainly wrong").

35. Much of Oklahoma's guardianship law is derived from the laws of California and South Dakota. *Kersey v. McDougal*, 79 Okla. 53, 58, 191 P. 594, 599 (1920); *Fish v. Deaver*, 71 Okla. 177, 180, 176 P. 251, 253 (1918). These jurisdictions have allowed similar discretionary powers to develop in their probate courts. See, e.g., *In re Cowper's Estate*, 179 Cal. 347, —, 176 P. 676, 677 (1918); *In re Knott's Guardianship*, 71 S.D. 53, —, 21 N.W.2d 59, 61 (1945).

An Indiana court recently described an appellate court's reluctance to set aside a trial court's decision of incompetency. It said: "Only where the evidence is without conflict and leads inescapably to but one conclusion and the trial court has reached a contrary conclusion will its decision be set aside on grounds that it is contrary to law." *In re Wurm*, 360 N.E.2d 12, 16 (Ind. App. 1977).

36. OKLA. STAT. tit. 58, § 854 (1971).

37. *In re Barnett*, 122 Okla. 160, 165, 252 P. 410, 414 (1927).

38. Friend means "one favorably disposed toward" the incompetent, "and acting for his interest and benefit [with] no particular degree of intimacy being required." *Ned v. Robinson*, 181 Okla. 507, 507, 74 P.2d 1156, 1157 (1937), cert. denied, 304 U.S. 550 (1938).

39. OKLA. STAT. tit. 58, § 854 (1971).

40. The restoration proceeding is a "continuation of the original proceeding." *Bradburn v. McIntosh*, 159 F.2d 925, 931 (10th Cir. 1947). Therefore the procedures followed in the second hearing will generally be the same as in the first. See, e.g., *In re Vaughn's Guardianship*, 205 Okla. 438, 239 P.2d 403 (1952). It should be noted that OKLA. STAT. tit. 58, § 854 (1971) unlike Okla. Stat. tit. 58, § 851 (Supp. 1977), has no minimum time period between the issuance of notice by the court and the time set for the restoration hearing. The rationale behind having no minimum time is that the procedure should be "calculated to expedite a restoration proceeding," *Bradburn v. McIntosh*, 159 F.2d at 931, in the belief that if the ward has in fact regained his capacity, then his rights and liberties should be reinstated as quickly as possible.

### III. POTENTIAL DEPRIVATIONS RESULTING FROM A DECLARATION OF INCOMPETENCY

#### A. *The scope of the fourteenth amendment's procedural guarantees*

It has not gone unnoticed that an involuntary guardianship is a serious deprivation of one's rights and liberties. In the past, American courts have recognized the substantial detrimental effect of imposing an unwanted guardian upon a person.<sup>41</sup> In this respect, Oklahoma is no exception.<sup>42</sup> The fact that personal interests are affected in the guardianship process, however, does not necessarily mean they are protected by the fourteenth amendment's procedural guarantees.<sup>43</sup> Those guarantees apply only when "the state seeks to remove or significantly alter" interests that are within the meaning of either "liberty" or "property" as used in the due process clause.<sup>44</sup>

In *Morrissey v. Brewer*,<sup>45</sup> the Supreme Court adopted a two-step approach to determine whether due process applies in any given situa-

41. While holding that an adjudged incompetent had the right to appeal the original decision, the Vermont Supreme Court, in *Shumway v. Shumway*, 2 Vt. 339 (1829), commented, "It would be dangerous in the extreme to give courts of probate (which can have no jury), final jurisdiction of causes of such vast importance as it respects the liberty and happiness of our citizens." *Id.* at 340. In discussing the right of a ward to petition for his restoration to capacity, the Eighth Circuit in *Cockrill v. Cockrill*, 92 F. 811 (8th Cir. 1899), said: "To deny him this privilege might be the means by which evil-disposed persons could permanently restrain him of his liberty, and deprive him of his rights." *Id.* at 818. A New York court described the proceeding to appoint a committee, the state's version of a guardian, as one "calculated to deprive a citizen, not only of the possession of his property, but also of his personal liberty." *In re Burke*, 125 App. Div. 889, 891, 110 N.Y.S. 1004, 1006 (1908); accord, *In re Ginnel*, 43 N.Y.S.2d 232, 235 (Sup. Ct. 1943). See generally N.Y. MENTAL HYG. LAW §§ 78.01-31 (McKinney 1976). The Wisconsin Supreme Court, in *In re Reed's Guardianship*, 173 Wis. 628, 182 N.W. 329 (1921), intimated the seriousness of the proceeding when it said: "[I]t must also be borne in mind that liberty of the person and the right to the control of one's own property are very sacred rights which should not be taken away or withheld except for very urgent reasons." *Id.* at —, 182 N.W. at 330.

42. The Oklahoma Supreme Court in *In re Washam's Estate*, 364 P.2d 896 (Okla. 1961), stated: "It is clear that one's liberty and the right to control his property should not be taken away or withheld except for urgent reasons." *Id.* at 898 (quoting 25 AM. JUR. *Guardian and Ward* § 18). Accord, *In re Guardianship of Bogan*, 441 P.2d 972, 974 (Okla. 1968). In *Fish v. Deaver*, 71 Okla. 177, 176 P. 251 (1918), the Oklahoma Supreme Court, in a rare reversal of a trial court decision for insufficiency of evidence, stated that "[c]itizens are not to be . . . lightly deprived of their constitutional rights." *Id.* at 180, 176 P. at 253.

43. In *Paul v. Davis*, 424 U.S. 693 (1976), the United States Supreme Court noted that the interests comprehended within the meaning of liberty and property, derive their "constitutional status" from one of two sources. Either the interests "have been initially recognized and protected by state law," *id.* at 710; or they may alternatively be "guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the fourteenth amendment." *Id.* at 710 n.5.

44. *Id.* at 711; *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). Before an individual can invoke the protection of the fourteenth amendment, he must show that there has been "state action." This term refers to exertions of state power in all forms. It is a long established proposition that the action of state courts and judicial officers in their official capacities constitutes state action within the meaning of the fourteenth amendment. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948).

45. 408 U.S. 471 (1972).

tion.<sup>46</sup> The initial inquiry is not merely to evaluate "the 'weight' of the individual's interest," but rather to determine if the nature of the private interest affected is "within the contemplation of the 'liberty or property' language of the fourteenth amendment."<sup>47</sup> Once having decided that due process applies, the analysis focuses upon the appropriate process for the particular situation.<sup>48</sup>

The Supreme Court has not attempted to precisely define the term "liberty." It has held, however, that the word includes some definite concepts.

Without a doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by freemen.<sup>49</sup>

In similar fashion, the Court has declined to specifically delimit the term "property." It has concluded that property interests protected by the due process clause "extend well beyond actual ownership of real estate, chattles or money."<sup>50</sup> Property basically connotes "a broad range of interests that are secured by 'existing rules or understandings.'"<sup>51</sup> The threshold question remains, therefore whether the rights and interests affected by a determination of incompetency under Oklahoma guardianship law are embodied within the language of the due process clause.

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46. For an analysis of this approach, see Note, *Procedural Due Process in Government-Subsidized Housing*, 86 Harv. L. Rev. 880, 887-93 (1973).

47. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Compare *Perry v. Sindermann*, 408 U.S. 593 (1972) (teacher who had ten one-year contracts with the state university system which had no formal tenure program, had a property interest which required procedural due process protection if he could prove a de facto tenure program) with *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (non-tenured assistant professor dismissed after one year employment has no property interest within the meaning of the due process clause).

48. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). For the second step of the analysis, see notes 72-73 *infra* and accompanying text.

49. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922)). "A liberty is 'fundamental' in the Court's view not because of its subjective importance to the individual, but rather because it finds a place in the provisions of the Constitution or in the scheme of social organization the Constitution is believed to have sought to protect." Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1155 (1972). For a historical analysis of the term "liberty," see Shattuck, *The True Meaning of the Term Liberty in Those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property"*, 4 HARV. L. REV. 365 (1891).

50. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).

51. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).



*B. Interests within the meaning of liberty and property*

Upon a determination of incompetency and issuance of letters of guardianship, the guardian is given "power over the person and the property of the ward unless otherwise ordered."<sup>52</sup> The guardian's power over the person entails custody of the ward,<sup>53</sup> consequently he "may fix the residence of the ward at any place within the state, but not elsewhere, without permission of the court."<sup>54</sup>

The extent of the guardian's authority can be seen in the Oklahoma Supreme Court's decision in *In re Gray's Estate*.<sup>55</sup> There the court encountered a situation where the guardian placed his ward in an out-of-state sanatorium for treatment of tuberculosis pursuant to an order from the county court authorizing the move. The court's primary focus was on the issue of whether the lower court's order, permitting removal of the ward to an out-of-state hospital, authorized the guardian to establish the ward's residence in Colorado. The case, however, may be cited for the proposition that the guardian, acting in concert with the court, can place the ward in an institution such as a hospital or nursing home.<sup>56</sup>

This position receives additional support from a provision in Oklahoma's mental health law. The pertinent statute permits the guardian of a person to "petition the superintendent of an institution for mental health for the admission of his ward."<sup>57</sup> Therefore the determination of incompetence assumes even greater importance since the incompetent

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52. OKLA. STAT. tit. 30, § 14 (1971).

53. OKLA. STAT. tit. 30, § 15 (1971). *But see Ex parte Fortune*, 175 Okla. 514, 53 P.2d 1100 (1936) (per curiam). *See generally* Fraser, *Guardianship of the Person*, 45 IOWA L. REV. 239 (1960).

54. OKLA. STAT. tit. 30, § 15 (1971). *See, e.g., In re Camp's Guardianship*, 192 Okla. 265, 266, 135 P.2d 973, 974 (1943). *But cf. Groseclose v. Rice*, 366 P.2d 465, 468-69 (Okla. 1961) (ward may, under certain circumstances, change his residence from one state to another without permission of his guardian or the court).

55. 119 Okla. 219, 250 P. 422 (1926).

56. *See, e.g., Browne v. Superior Court*, 16 Cal. 2d 593, —, 107 P.2d 1, 4 (1940), where the decision of the California Supreme Court implied that a guardian, without authorization from the court, could arrange for a hospital to care for the ward as long as the arrangements were reasonable and were for the benefit of the ward. *But see Ex parte Spurrier*, 111 Okla. 242, 238 P. 956 (1925) (guardian of minors could not delegate his powers or divest his responsibilities without an order from the court). *See generally Protective Services, supra* note 3, at 232.

Chief Justice Burger, concurring in *O'Connor v. Donaldson*, 422 U.S. 563, 578 (1975), recognized the ability of the state to deprive the individual of his liberty through a guardianship. While discussing the "historic *parens patriae* power" of the state, he suggested that "an inevitable consequence of exercising the . . . power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution." *Id.* at 583.

57. OKLA. STAT. tit. 43A, § 58 (1971) further provides that "[t]he superintendent may admit said incompetent if, in his judgment, the mental condition of the incompetent is of such nature as to make it necessary that he should receive hospital treatment or care."

individual is subject to compulsory hospitalization at his guardian's discretion without the normal procedural safeguards.<sup>58</sup>

There is no doubt that a fundamental ingredient of personal liberty is freedom from bodily restraint.<sup>59</sup> Therefore, if the guardian is able to determine the ward's place of residence within the state and can require that he remain at the residence for treatment, then the potential loss of liberty for the alleged incompetent is within the contemplation of the "liberty" language of the fourteenth amendment. It is of little constitutional consequence that the residence of the ward is called a nursing home or general hospital.<sup>60</sup> What is constitutionally significant is that the guardian can require the ward to remain there.<sup>61</sup>

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58. AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 261 (1971 ed.) [hereinafter cited as A.B.A. STUDY]. But see *Saville v. Treadway*, 404 F. Supp. 430, 432 (M.D. Tenn. 1974). Cf. *In re Long*, 25 N.C. App. 702, 214 S.E.2d 626 (1975) (juvenile committed by mother). In *Winters v. Miller*, 446 F.2d 65 (2d Cir.), cert. denied, 404 U.S. 985 (1971), the Second Circuit stated that when the state is acting as *parens patriae* with respect to one adjudged mentally incompetent, forced medical treatment is acceptable.

While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found legally incompetent, there was never any effort on the part of the appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be "best" for her.

*Id.* at 71 (dictum). See, e.g., *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976). See also Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1139-40 (1967). Presumably concomitant with the power to force treatment upon the ward would be the power to require that the ward remain in a place where the treatment is given. Chief Justice Burger, concurring in *O'Connor v. Donaldson*, 422 U.S. 563, 578 (1975), noted that "involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law." *Id.* at 580 (emphasis added). See generally *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969); *In re Quinlan*, 137 N.J. Super. 227 (Ch. Div. 1975), modified and remanded, 70 N.J. 10, 355 A.2d 647 (1976); *In re Williams*, 319 P.2d 586 (Okla. 1957).

59. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

60. Cf. *In re Gault*, 387 U.S. 1, 27 (1967) where the Court noted that the title of the institution to which the juvenile is sent upon a determination of delinquency has little practical value for due process analysis. The prime factor to be considered is whether it is "an institution of confinement in which the child is incarcerated for a greater or lesser time."

61.

Measures which subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element, and this reality is not altered by the fact that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform. As such, these measures must be closely scrutinized to insure that power is being applied consistently with those values of the community that justify interference with liberty for only the most clear and compelling reasons.

Livermore, *On the Justifications for Civil Commitment*, 117 U. PENN. L. REV. 75 n.1 (quoting F. Allen, *The Borderland of Criminal Justice* 37 (1964)).

The United States Supreme Court has shown special concern for freedom from physical confinement. In *Baxstrom v. Herold*, 383 U.S. 107, 113 (1966), an equal protection case dealing with civil commitment of prisoners after completion of a penal sentence, the Court acknowledged the impact of commitment on "fundamental rights." In *Pearson v. Probate Court*, 309 U.S. 270, 276-77 (1940), while validating a state commitment statute for sexual psychopaths, the Court recognized "the special importance of maintaining the basic interests of liberty in a class of cases

Coincident to the potential deprivation of personal liberty, a person who is declared incompetent is divested of control over his property.<sup>62</sup> He loses the right to contract and convey,<sup>63</sup> the right to marry,<sup>64</sup> the right to drive a motor vehicle,<sup>65</sup> and the right to practice certain licensed professions.<sup>66</sup>

where the law . . . may be open to serious abuses in administration." In cases dealing with juvenile delinquency, *In re Gault*, 387 U.S. 1 (1967) and *In re Winship*, 397 U.S. 358 (1970), the Court premised its close scrutiny of procedures on the fact that "liberty" was in jeopardy. *Gault*, 387 U.S. at 27; *Winship*, 397 U.S. at 366, 368. In a criminal context, Justice Harlan noted in his concurring opinion in *Williams v. Illinois*, 399 U.S. 235, 259 (1970), that past decisions "unquestionably show that this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free." *Id.* at 263 (emphasis added). See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (persons civilly committed are entitled to due process); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (civil commitment entails a "massive curtailment of liberty"); *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (a proceeding which leads to confinement of the individual, whether it is called civil or criminal, is subject to the equal protection clause and the due process clause of the fourteenth amendment); *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969) (civil commitment is "an extraordinary deprivation of liberty which cannot occur without due process of law"); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) (with the awesome prospect of incarceration, the proceeding, whether labeled civil or criminal, requires due process safeguards); *Holm v. State*, 404 P.2d 740, 742 (Wyo. 1965) (notwithstanding the states beneficent motives, an individual who is subject to a proceeding which may lead to incarceration, is entitled to procedural due process). See generally *Protective Services*, *supra* note 3, at 231-35. The guardianship also leads to a constriction of the rights of travel and association. Justice Douglas has said that these rights make "all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person." *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

62. The right to acquire, enjoy, own and dispose of property has received recognition by the Supreme Court as a fundamental right. "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 . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). See also *Jones v. Mayer Co.*, 392 U.S. 409 (1968). See Efland, *Caring for the Elderly Under the Uniform Probate Code*, 17 ARIZ. L. REV. 373, 383 (1975). See generally OKLA. STAT. tit. 30, § 16 (1971) (power of the guardian of the estate); OKLA. STAT. tit. 58, §§ 890.1-10 (1971) (conservatorship statutes).

63. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922); *Pyeatte v. Board of Regents of the University of Oklahoma*, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952). In *Pyeatte*, the district court noted that it was "undoubtedly true that the right to contract is both a liberty and a property right within the protection of the fourteenth amendment to the Federal Constitution." 102 F. Supp. at 412. Oklahoma, like most states, prohibits a person who has been declared incompetent from contracting or conveying until restored to capacity. OKLA. STAT. tit. 15, § 24 (1971). See, e.g., *National Life Ins. Co. v. Jayne*, 132 F.2d 358, 360-61 (10th Cir. 1942). See generally *Allen*, *supra* note 21, at 260; *Weihsen, Mental Incompetency to Contract or Convey*, 39 So. CAL. L. REV. 211 (1966). Guardianship helps to resolve the quandry presented by two conflicting policies. The first manifests itself in the rule of law allowing a person to avoid transactions which he has entered into while incompetent. The second emphasizes the need in a commercial society to accord finality and certainty to all transactions so that commercial activity may continue unimpeded. *Allen*, *supra* note 21, at 71-73.

64. OKLA. STAT. tit. 43, § 1 (1971). But see *Ross v. Ross*, 175 Okla. 633, 54 P.2d 611 (1936) (*per curiam*).

65. OKLA. STAT. tit. 47, § 6-103(5) (1971).

66. Liberty means the right "to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). OKLA. STAT. tit. 5, Ch. 1, App. 1, Art. 2, § 7(b) (1971), provides that "[a]ny member of the [Bar] Association

In addition to the significant loss of personal and economic rights, the ward is stigmatized by the adjudication of incompetence.<sup>67</sup> The Supreme Court, in *In re Winship*,<sup>68</sup> recognized that an individual's reputation, along with his personal liberty, are interests of immense importance which require procedural protection.<sup>69</sup> In *Wisconsin v. Constantineau*,<sup>70</sup> the court again recognized that stigmatization was a deprivation of liberty in the constitutional sense. In so holding, the Court said: "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."<sup>71</sup>

It is clear that in Oklahoma, a declaration of incompetency, and the appointment of a guardian, result in a serious deprivation of personal rights and liberties cognizable under either the "liberty" or "property" language of the fourteenth amendment.

#### IV. WHAT PROCESS IS DUE

Once the constitutional stature of the deprivation is established, the second step under the *Morrissey* analysis is to determine what process is due.<sup>72</sup> This determination is made by "balancing, with respect to each procedural protection, the magnitude of the individual interests and the importance of the procedure in protecting them, against the countervailing state objectives."<sup>73</sup>

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who shall have been adjudged to be insane, mentally incompetent, or mentally ill shall not practice law." OKLA. STAT. tit. 59, § 567.8(5) (1971), allows the Board of Nurse Registration to deny or revoke a license to practice registered nursing to one who has been judicially declared incompetent. See generally Allen, *supra* note 21, at 354; Johnson, *Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?*, 46 DEN. L.J. 516, 573-78 (1969).

67. *Protective Services*, *supra* note 3, at 234. See Article, *Limitations on Individual Rights in California Incompetency Proceedings*, 7 U.C.D.L. REV. 457, 479 (1974) [hereinafter cited as *Individual Rights*].

68. 397 U.S. 358 (1970) (proof beyond a reasonable doubt in a juvenile delinquency hearing is an essential of due process and fair treatment).

69. *Id.* at 367.

70. 400 U.S. 433 (1971). There the police chief of Hartford, pursuant to a state statute, posted notice in all liquor stores forbidding the sale or gift of liquor to the appellee because of the latter's excessive drinking habits. The Court held that the posting of notice was such a stigma or badge of disgrace that it required procedural due process protections.

71. *Id.* at 437; accord, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972). See also *In re Ballay*, 482 F.2d 648, 668-69 (D.C. Cir. 1973); *Dale v. Hahn*, 440 F.2d 633, 636 (2d Cir. 1971). But see *Paul v. Davis*, 424 U.S. 693, 712 (1976) (Interest in reputation, standing alone, is "neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law.>").

72. See note 48 *supra* and accompanying text.

73. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1271 (1974) [hereinafter cited as *Developments in the Law—Civil Commitment*]. "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essen-

To effectuate the guarantees of the Federal Constitution, a system has been developed "whereby a person who may be subject to a grievous loss of liberty is entitled to adequate procedural safeguards."<sup>74</sup> The procedural requirements, however, will always vary according to the situation. In this regard, due process is "flexible"<sup>75</sup> and "not static."<sup>76</sup> Therefore, any determination of the appropriate procedures required by due process in a given situation must begin by identifying the specific governmental function involved.<sup>77</sup>

The prime function of a guardianship is to protect the ward and his property during the period in which he is unable to do so himself.<sup>78</sup> The state's role is envisioned as that of a protector who acts in *parens patriae* toward incompetents.<sup>79</sup> The Supreme Court in *Mormon Church v. United States*,<sup>80</sup> suggested that the state's *parens patriae* power, like its police power, is ingrained in the fabric of the modern state.<sup>81</sup> In *Kent*

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tial term in the social compact which defines the rights and delimits the powers which the state may exercise." *In re Gault*, 387 U.S. 1, 20 (1967).

74. *Bartley v. Kremens*, 402 F. Supp. 1039, 1045 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977) (remanded for reconsideration of class definition). As Justice Douglas noted in *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that makes the difference between rule by law and rule by fiat."

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

76. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (1974), *remanded*, 421 U.S. 957, *on remand*, 413 F. Supp. 1318 (1975).

77. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Goldberg v. Kelley*, 397 U.S. 254, 263 (1970); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

78. *Oyama v. California*, 332 U.S. 633, 643 (1947); *In re Guardianship of Campbell*, 450 P.2d 203, 207 (Okla. 1966).

79. The theory of protecting incompetents has a long history. Formal procedures for the protection of an incompetent's property were readily available during the time of Cicero. See A.B.A. STUDY, *supra* note 58, at 1. "Guardianship of the mentally disabled in Medieval England was the function of the lord of the manor, who was to protect . . . [the ward's] proprietary and personal interests." *Id.* at 250. By the fourteenth century, guardianship was officially recognized in English law by the enactment of the statute *De Praerogativa Regis*, 17 Edw. II, Ch. 9-10 (1324), whereby the rights of wardship were surrendered to the king and exercised through the Lord Chancellor. See generally 1 F. POLLACK & F. MAITLAND, *The History of English Law* 464 (2d ed. 1898); A.B.A. STUDY, *supra* note 58, at 250. The role of the sovereign in the care and protection of a mentally disabled person was designated as that of *parens patriae*, a term used to describe the king's position as the father of the country. See *Protective Services*, *supra* note 3, at 218. For an historical analysis of the origin and purpose of the doctrine in England, see *Hawks v. Lazaro*, 202 S.E.2d 109 (W. Va. 1974).

By the time the American colonies were settled, the king acted as "the general guardian of all infants, idiots, and lunatics." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (quoting 3 W. BLACKSTONE, *Commentaries* 47 (1783)). When the colonies united, each state assumed responsibility for the mentally unsound within its boundaries. Jurisdiction over infants, incompetents, and the mentally impaired was vested in the local courts of equity. See A.B.A. STUDY, *supra* note 58, at 250.

80. 136 U.S. 1 (1890).

81. The Court said:

This prerogative of *parens patriae* is inherent in the supreme power of every state,

*v. United States*,<sup>82</sup> the Court described the *parens patriae* role of the state as being parental rather than adversarial.<sup>83</sup> While acknowledging the laudable state objective of providing juvenile courts, the *Kent* Court noted that functioning in a parental role is never to be construed as "an invitation to procedural arbitrariness."<sup>84</sup>

This theme was reiterated in *In re Gault*<sup>85</sup> a year later. There the Court refused to validate a scheme of reduced procedural safeguards in a juvenile delinquency hearing when the state premised its validity solely on the *parens patriae* power. In rejecting the state's argument, the Court cautioned "that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."<sup>86</sup> The thrust of the *Gault* holding requires that a court candidly appraise any claim for reduced procedural and substantive safeguards which seeks justification on the basis of the *parens patriae* doctrine.<sup>87</sup>

The impact of *Gault* was immediate in analogous areas. In a civil commitment context, the Tenth Circuit in *Heryford v. Parker*<sup>88</sup> held that the reasoning of *Gault* applied whenever an individual's liberty was at stake.<sup>89</sup> In affirming the lower court's conclusion that the committed patient had been denied his constitutional right to counsel at the initial hearing, the court noted that whenever the state acts in *parens patriae*, "it has the inescapable duty to vouchsafe due process."<sup>90</sup>

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. . . [it] has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.

*Id.* at 57. See also *Developments in the Law—Civil Commitment*, *supra* note 73, at 1208. With language such as the foregoing, it is not surprising that courts have often viewed the police power and the *parens patriae* power as synonymous. See, e.g., *Developments in the Law—Civil Commitment*, *supra* note 73, at 1201-59; *Protective Services*, *supra* note 3, at 224-25.

82. 383 U.S. 541 (1966). There the Court held that a juvenile was entitled to procedural due process before the juvenile court could make a valid waiver of its exclusive jurisdiction.

83. *Id.* at 555.

84. *Id.*

85. 387 U.S. 1 (1967).

86. *Id.* at 18.

87. *Id.* at 21. See *O'Connor v. Donaldson*, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring).

88. 396 F.2d 393 (10th Cir. 1968). The case involved a habeas corpus proceeding instituted by a mother on behalf of her son who had been committed to a state training school for the feeble-minded and the epileptic.

89. *Id.* at 396. The Wyoming statutes, WYO. STAT. §§ 9-444 to 9-449 (1957), required the court to appoint a guardian ad litem to represent the proposed patient only if the subject was a minor without a parent or guardian.

90. *Id.* Accord *Lessard v. Schmidt*, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (1974), *remanded on other grounds*, 421 U.S. 957, *on remand*, 413 F. Supp. 1318 (1975); *Dixon v. Attorney Gen.*, 325 F. Supp. 966, 972 (M.D. Pa. 1971).

The mandate from *Gault* is clear. Courts should look through the state's benevolent role as *parens patriae* to the substance of the guardianship proceeding in determining which procedural safeguards are needed to adequately protect the prospective ward from unjustified encroachment of his rights and liberties.<sup>91</sup> When deprivations are inherent in the process, and the interests involved are within the scope of the fourteenth amendment's protection, the procedures by which the facts are determined are clearly as important as the validity of the substantive law being applied.<sup>92</sup>

#### A. Notice

In *Mullane v. Central Hanover & Trust Co.*,<sup>93</sup> the Supreme Court reiterated a basic tenet of constitutional law. It held that in any proceeding which is to be accorded finality, due process requires notice that is "reasonably calculated, under all the circumstances" of the case, to inform the interested parties of the nature and purpose of the impending action.<sup>94</sup> Oklahoma guardianship law requires only that notice of the time and place of the hearing be given to the alleged incompetent.<sup>95</sup> Nevertheless, since the statute uses the term "notice" it can be argued that the legislature means such notice as is required by the due process clause. So construed, the statute would be constitutional on its face.<sup>96</sup> In practice, however, the form and substance of the notice actually given are rarely adequate to meet constitutional standards.<sup>97</sup>

It is questionable, in light of the Supreme Court holding in *Covey v. Town of Somers*,<sup>98</sup> whether the minimum statutory notice of time and place is reasonably calculated to inform an alleged incompetent of the nature and purpose of the proceeding. In *Covey*, the Court dealt with the constitutional sufficiency of notice by mail to an individual

91. See, e.g., *Quesnell v. State*, 83 Wash. 2d 224, —, 517 P.2d 568, 574-75 (1973).

Justice Brandeis, perhaps too early for his time, recognized the inherent problems involved in a *parens patriae* type of philosophy. In *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting), he said: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding." *Id.* at 479.

92. *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958).

93. 339 U.S. 306 (1950). In *Mullane*, the issue was the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund.

94. *Id.* at 314. See *French v. Blackburn*, 428 F. Supp. 1351, 1356 (M.D.N.C. 1977); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1127 (D. Haw. 1976).

95. OKLA. STAT. tit. 58, § 851 (Supp. 1977). See notes 16-17 *supra* and accompanying text.

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

97. In Oklahoma, the standard guardianship notice form merely contains an indication of the nature of the proceeding, the date, time, and place of the hearing. See HUFF, OKLAHOMA PROBATE LAW AND PRACTICE § 594 (1957).

98. 351 U.S. 141 (1956). This case involved a judicial foreclosure of a tax lien on real property.

who was known to be mentally deficient by the community. The Court rejected the town's argument that it was not required by the fourteenth amendment to give the suspected incompetent notice beyond that deemed adequate for an ordinary taxpayer.<sup>99</sup> Instead, the Court held that since the notice was given to a person of known disability, despite the town's compliance with an otherwise valid statute, the *Mullane* standard was not fulfilled.<sup>100</sup>

While *Covey* deals with the deprivation of property rights, guardianship proceedings have even more at stake for the prospective ward in terms of fundamental rights and liberties.<sup>101</sup> Considering the type of proceeding, the kind of individual involved, and the critical nature of the rights, it would seem that the form and content of notice ought to warrant closer judicial scrutiny than has been accorded them in the past.<sup>102</sup> In recent years, similar conclusions have been reached regarding notice provisions in the civil commitment context.

In *Lessard v. Schmidt*,<sup>103</sup> a three judge federal court held that when a state seeks to impinge upon a person's fundamental right to liberty, it must give the person notice designed not only to facilitate the preparation of his defense, but also to inform him of his rights throughout the commitment proceeding.<sup>104</sup> In a similar fashion, the West Virginia Supreme Court, in *Hawks v. Lazaro*,<sup>105</sup> determined that the state's notice provision for civil commitment, while constitutional its face, was unconstitutional as applied. In granting a writ of habeas corpus to the petitioner, the court stated that for notice to be meaningful it must "contain a detailed statement of the grounds upon which the commitment is sought," as well as a statement of the basic facts supporting the conclusion that the individual is in need of commitment.<sup>106</sup>

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99. *Id.* at 146.

100. *Id.* The legal implication of the *Covey* holding is clear. The requirements of notice are greater when given to one of suspected mental disability than when given to a normal individual.

101. See notes 52-71 *supra* and accompanying text.

102. *Protective Services*, *supra* note 3, at 239.

103. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (1974), *remanded on other grounds*, 421 U.S. 957, *on remand*, 413 F. Supp. 1318 (1975).

104. The court in *Lessard* stated that

[n]otice of date, time and place is not satisfactory. The patient should be informed of the basis of his detention, his right to jury trial, the standard upon which he may be detained, the names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony.

*Lessard v. Schmidt*, 349 F. Supp. at 1092. *Accord*, *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1127 (D. Haw. 1976). See generally Kalcheim, *Protecting the Aged Person—The Commitment Procedure*, 10 FAM. L.Q. 161 (1976).

105. 202 S.E.2d 109 (W.Va. 1974).

106. *Id.* at 124.



The court also noted that before such notice could satisfy constitutional standards, it must inform the individual of his rights, especially his right to counsel.<sup>107</sup>

With respect to the Supreme Court's holdings in *Covey*<sup>108</sup> and *Mullane*,<sup>109</sup> it is clear that notice which contains only the time and place of the guardianship hearing is not "reasonably calculated, under all the circumstances,"<sup>110</sup> to inform the individual of the nature and purpose of the hearing. Likewise, it cannot be denied that this type of notice does little to inform the individual of his rights at the hearing or to convey the seriousness of an adverse determination by the court. While due process requires meaningful notice, what the alleged incompetent normally receives is a "mere gesture" which should be constitutionally suspect.<sup>111</sup>

Therefore, in order to avoid a successful due process challenge, notice in Oklahoma guardianship proceedings should contain more than a clear description of the nature and purpose of the hearing. It should also contain a description of the alleged incompetent's legal rights and recourses, and briefly describe the adverse effects which arise upon a finding of incompetency.<sup>112</sup>

### B. *The Right to Counsel.*

The alleged incompetent has the right to hire counsel to represent him at the incompetency hearing.<sup>113</sup> Quite often, however, the person for whom the guardian is sought has no knowledge of this right. Furthermore, few jurisdictions require their courts to inform the prospec-

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107. *Id.* See *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977), where a three judge federal court found "little merit" to the plaintiff's due process challenge to the notice provision contained in the North Carolina civil commitment procedure. After holding the statute constitutional on its face, the court went on to hold that the notice actually given to the plaintiff was entirely adequate under the standard enunciated in *Mullane v. Central Hanover & Trust Co.*, 339 U.S. 306 (1950), because it included not only the time, date, and place of the hearing, but also its purpose, his right to counsel and a statement of the possible adverse ramifications of the court's decision. 428 F. Supp. at 1356.

108. See notes 98-100 *supra* and accompanying text.

109. See notes 93-94 *supra* and accompanying text.

110. *Mullane v. Central Hanover & Trust Co.*, 339 U.S. 306, 314 (1950)

111. In *Mullane* the Court said: "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Id.* at 315.

112. See *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1127 (D. Haw. 1976); Allen, *supra* note 21, at 240. The new California notice provision for guardianship proceedings can serve as a model notice statute. The contents of a notice citation to an alleged incompetent must include, among other things: (1) a specific delineation of the legal standards for the appointment of a guardian; (2) the effects of an adjudication of incompetency in terms of rights affected; (3) the rights of the alleged incompetent at the hearing, such as the right to counsel, jury trial, and the right to appear and oppose the petition. CAL. PROB. CODE § 1461 (West Supp. 1977).

113. See *Mazza v. Pechacek*, 233 F.2d 666 (D.C. Cir. 1956).

tive ward of his legal rights. Consequently, many who are subject to these proceedings are not represented at the incompetency hearing.<sup>114</sup> This raises the question of whether the court should appoint counsel for the unrepresented individual.<sup>115</sup>

Oklahoma, like many other states,<sup>116</sup> has no statutory provision for court appointment of counsel when the alleged incompetent is unrepresented at the hearing.<sup>117</sup> In *Ned v. Robinson*,<sup>118</sup> the Oklahoma Supreme Court was asked to supply this provision "by implication." Although the court was impressed by the petitioner's arguments, it would not imply, from the statutes, a right to appointed counsel.<sup>119</sup> Nevertheless, the court did not examine whether this right existed under the due process clause; nor has it addressed this issue in subsequent cases.

In a criminal felony context, the United States Supreme Court has said that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>120</sup> In *Argersinger v. Hamlin*<sup>121</sup> the Supreme Court de-emphasized the importance of the classification of the crime and extended the right to appointed counsel to all criminal proceedings in which the accused may be denied his liberty.<sup>122</sup> While the guardianship proceeding is not a criminal mat-

114. See Allen, *supra* note 21, at 8, 85; *Disguised Oppression*, *supra* note 3, at 685. California is one state which requires its courts to inform the prospective ward of his rights. CAL. PROB. CODE § 1461.5 (West Supp. 1977).

115. Allen, *supra* note 21, at 85. See *Protective Services*, *supra* note 3, at 244.

116. See A.B.A. STUDY, *supra* note 58, at 280-88 (Table 8.3, Counsel and Guardian ad litem column).

117. There are two views on the role of appointed counsel in an incompetency hearing. One view is that counsel should be neutral and should act as an officer of the court in the fact finding process. Cf. *Mazza v. Pechacek*, 233 F.2d 666 (D.C. Cir. 1956) (civil commitment hearing). The other view is that counsel should take the traditional adversarial role and present his client's case in its most favorable light. Cf. *Kent v. United States*, 383 U.S. 541, 563 (1966) (juvenile delinquency hearing); *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974) (civil commitment hearing). See generally Allen, *supra* note 21, at 89; Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and A Proposal*, 45 MISS. L.J. 43 (1974); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1965).

118. 118 Okla. 507, 74 P.2d 1156 (1937), *cert. denied*, 304 U.S. 550 (1938).

119. We do think, however, that in the matter of appointing a guardian ad litem . . . it would have been far wiser for the legislature to provide for some form of protection, which has been done in several states, but in the absence of such provision we are without power to create it, *under color of the doctrine of implication*, for there is no statutory provision or wording upon which to base such implication.

*Id.* at 510, 74 P.2d at 1160 (emphasis added).

120. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

121. 407 U.S. 25 (1972).

122. This theme was further expressed in the Court's holding where it quoted with approval the Oregon Supreme Court decision in *Stevenson v. Holzman*, 254 Or. 94, 102, 458 P.2d 414, 418 (1969) which stated: "[w]e hold that no person may be deprived of his liberty who has been denied the assistance of counsel . . . ." *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972).

ter,<sup>123</sup> its civil nature does not in itself obviate the need for having the due process safeguard of appointed counsel for the alleged incompetent. In fact, legal representation is now required in civil proceedings analogous to the guardianship situation.<sup>124</sup>

In a juvenile setting,<sup>125</sup> the Supreme Court in *Kent v. United States*<sup>126</sup> determined that procedural due process was required in a hearing where the juvenile court may waive its exclusive jurisdiction to the adult court. Without considering the merits of the waiver, the Court held that because the juvenile would be exposed to a more severe sanction the proceeding was unconstitutional unless the juvenile had "the effective assistance of counsel."<sup>127</sup> One year later, the Court in *In re Gault*<sup>128</sup> extended the *Kent* holding to cover proceedings which determine delinquency. Due to the "awesome prospect of incarceration," it reasoned that an individual vitally needed the assistance of counsel in preparing defenses, identifying questions of law, conducting a proper examination of any witness, and generally assuring the individual of a fair hearing.<sup>129</sup>

An area most analogous to the guardianship situation is the civil commitment of mentally ill persons. The Supreme Court has held that one who is civilly committed is entitled to due process;<sup>130</sup> however, it has not specifically addressed the issue of what constitutes proper commitment procedures.<sup>131</sup> Nevertheless, several federal and state court decisions have dealt with this question. These cases reflect the general theme that a person who may be deprived of his liberty by the state is constitutionally guaranteed certain procedural protections before that deprivation can occur.<sup>132</sup> Without exception, these cases recognize the

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123. The sixth amendment to the Federal Constitution provides in part that: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence." This provision was specifically made applicable to the states through the fourteenth amendment in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

124. See *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968). See also *Individual Rights*, *supra* note 68, at 477; *Protective Services*, *supra* note 3, at 245.

125. The juvenile setting has long been considered civil for purposes of sixth amendment procedural protection.

126. 383 U.S. 542 (1966).

127. *Id.* at 554. The consequence of a juvenile court waiver in this case, was that Kent would be exposed to the possibility of a death sentence when tried by the adult court. If there was no waiver, he would only be subject to treatment in a home for minors until the age of 21.

128. 387 U.S. 1 (1967). See notes 85-87 *supra* and accompanying text.

129. *Id.* at 36.

130. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

131. *Id.* at 573.

132. In one of the earlier cases dealing with procedural rights in a commitment setting, *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964), the Kentucky Supreme Court authorized

right to counsel as essential to satisfy the mandate of the due process clause.

The leading case favoring greater procedural protection for an individual subject to a commitment proceeding is the Tenth Circuit decision of *Heryford v. Parker*.<sup>133</sup> There the court determined that the reasoning of the Supreme Court in *Gault*<sup>134</sup> applied in a commitment setting because of the strong possibility of involuntary incarceration. The court noted that it is the possibility of confinement, irrespective of its purpose, which gives rise to the procedural requirements of the due process clause.<sup>135</sup> The *Heryford* court concluded that due process required the state to assure representation by legal counsel at every step of the commitment proceeding.<sup>136</sup>

The courts have found that the determinative factor necessitating the appointment of counsel for unrepresented defendants in criminal, juvenile, and civil commitment proceedings is the individual's potential loss of liberty. In this respect, the guardianship proceeding is analogous, as the prospective ward is subject to a substantial deprivation of liberty upon a determination of incompetency.<sup>137</sup> This analogy compels the appointment of counsel for an unrepresented, prospective ward to guarantee due process in Oklahoma guardianship proceedings.

### C. Jury trial

During the early stages of American jurisprudence, incompetency determinations were made by the courts of equity.<sup>138</sup> Consequently, guardianship hearings acquired the designation of "special proceedings."<sup>139</sup> Due to the equitable nature of the proceeding, the right to trial by jury, was not recognized by the courts.<sup>140</sup> If the right to

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procedural protection identical to that afforded the criminal defendant. This broad holding was justified solely on the grounds that the proceeding might lead to the loss of personal liberty. *Id.* at 682. *See State v. United States Veterans Hosp.*, 268 Minn. 213, —, 128 N.W.2d 710, 716-17 (1964).

133. 396 F.2d 393 (10th Cir. 1968). *See* notes 88-90 *supra* and accompanying text.

134. *See* notes 128-29 *supra* and accompanying text.

135. *See* note 61 *supra*.

136. 396 F.2d at 396. *See also* *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Haw. 1976); *Bartley v. Kremens*, 402 F. Supp. 1039, 1050-51 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977); *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085, 1092 (E.D. Mich. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (1976); *Dixon v. Attorney Gen.*, 325 F. Supp. 966, 974 (M.D. Pa. 1971).

137. *See* notes 52-71 *supra* and accompanying text.

138. A.B.A. STUDY, *supra* note 58, at 250.

139. *See In re Washam's Estate*, 364 P.2d 896, 898 (Okla. 1961). *Cf. In re Vaughn's Guardianship*, 205 Okla. 438, 239 P.2d 403 (1952) (restoration to capacity is a special proceeding).

140. *Cf. Barton v. Barbour*, 104 U.S. 126, 133 (1881), where the Court said: "If it be conceded

a jury trial existed at all in an incompetency determination, it existed solely because it was conferred by statute.<sup>141</sup>

In *Ned v. Robinson*,<sup>142</sup> the Oklahoma Supreme Court construed the pertinent guardianship statutes and held that they neither contemplated nor required a jury trial in an incompetency proceeding.<sup>143</sup> In addition, the Court reviewed the claim that the right to jury trial guaranteed by the constitution provision<sup>144</sup> had been violated. It concluded that because there had never been a right to a jury trial in an incompetency proceeding prior to statehood, the constitutional provision had not been transgressed.<sup>145</sup>

Attempts to extend the Federal Constitution's mandate of a jury trial<sup>146</sup> to areas analogous to the guardianship setting have been rejected. In *McKeiver v. Pennsylvania*,<sup>147</sup> the Court declined to revamp the juvenile proceeding there under review into a full adversarial hearing. The court declared that the jury trial would not markedly increase the accuracy of the fact finding process, but would, conversely, hinder the ability of the juvenile court to function in an informal, non-criminal atmosphere.<sup>148</sup> In recent years courts have applied the *McKeiver* holding in the civil commitment area and rejected demands for a jury trial when it is not specifically provided for by statute.<sup>149</sup> The expressed rationale, which parallels that given in *McKeiver*, is that the benefits of

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or clearly shown that a case belongs to . . . [equity], the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity." *Accord*, *Katchen v. Landy*, 382 U.S. 323, 337 (1966).

141. See *People v. Bradley*, 22 Ill. App. 3d 1076, —, 318 N.E.2d 267, 275 (1974). Cf. *People v. Amor*, 12 Cal. 3d 20, 523 P.2d 1173, 114 Cal. Rptr. 765 (1974) (jury cannot be demanded as a matter of law in a special proceeding, unless it is expressly made available by statute).

142. 181 Okla. 507, 74 P.2d 1156 (1937), *cert. denied*, 304 U.S. 550 (1938).

143. *Id.* at 509, 74 P.2d at 1159.

144. OKLA. CONST. art. 2, § 19.

145. 181 Okla. at 509, 74 P.2d at 1159. See *Ex parte Dagley*, 35 Okla. 180, 128 P. 699 (1912). For a collection of cases on this point of law, see Annot., 33 A.L.R. 2d 1145 (1954).

146. The United States Supreme Court has recognized that a jury trial is not essential in all types of cases to achieve a fundamentally fair result. See *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968). The rationale behind such a conclusion is premised on the belief that a judge is as capable as a jury in accurately finding the necessary facts. *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J., concurring). This presumption is buttressed by the fact that juries quite often are not required in cases of equity, probate, or workmen's compensation. *Id.* at 543 (Blackmun, J., plurality).

147. 403 U.S. 528 (1971).

148. *Id.* at 545-51. For a concise recapitulation of the history and theory underlying the juvenile court system, see *In re Gault*, 387 U.S. 1, 14-18 (1967).

149. See, e.g., *Doremus v. Farrell*, 407 F. Supp. 509, 516 (D. Neb. 1975); *Bartley v. Kremens*, 402 F. Supp. 1039, 1051 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977); *Lynch v. Baxley*, 386 F. Supp. 378, 394-95 (M.D. Ala. 1974). Cf. *Gomez v. Miller*, 341 F. Supp. 323, 331 (S.D.N.Y. 1972) (due process does not require a jury trial on the issue of dangerousness), *aff'd*, 412 U.S. 914 (1973).

increased procedural fairness and community input will not be sufficiently realized to outweigh the state's interests in economy and informality.<sup>150</sup>

*Simon v. Craft*,<sup>151</sup> an early Supreme Court case, held that due process did not require a particular mode of hearing for insanity proceedings. Rather, it requires only "a regular course of proceedings" in which the individual has proper notice and the opportunity to defend himself.<sup>152</sup> At least one court has construed this holding as a clear enunciation of the position that due process does not require a jury trial in an incompetency hearing.<sup>153</sup>

Considering the rights which are at stake in the guardianship proceeding, the individual accused of incompetency should be assured a hearing in which genuine community standards are applied. Against this consideration must be balanced the legitimate state objectives of providing a quick, efficient, and informal method of appointing a guardian for those who are in need of protection. In light of the Supreme Court's view that a trial by jury is not an essential component of either a fundamentally fair hearing or accurate factfinding,<sup>154</sup> it is highly unlikely that the Court would mandate a jury trial for an incompetency adjudication on the basis of due process.

There are, however, unique features of Oklahoma law which may provide for such a right under the equal protection clause of the fourteenth amendment. The basic command of the equal protection clause is that persons similarly situated be treated alike in the absence of a rational justification for a difference in treatment.<sup>155</sup> The Oklahoma

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150. See, e.g., *Doremus v. Farrell*, 407 F. Supp. 509, 516 (D. Neb. 1975); *Bartley v. Kremens*, 402 F. Supp. 1039, 1051 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977); *Lynch v. Baxley*, 386 F. Supp. 378, 394-95 (M.D. Ala. 1974). Cf. *Gomez v. Miller*, 341 F. Supp. 323, 331 (S.D.N.Y. 1972) (due process does not require a jury trial on the issue of dangerousness), *aff'd*, 412 U.S. 914 (1973).

151. 182 U.S. 427 (1901).

152. *Id.* at 437.

153. *Ward v. Booth*, 197 F.2d 963, 967 (9th Cir. 1952). But see *Hager v. Pacific Mut. Life Ins. Co.*, 43 F. Supp. 22, 26 (E.D. Ky. 1942) where the court said:

I do not believe that under our Federal or State Constitutions a person can be declared incompetent and have his property taken out of his hand or be placed in confinement without the intervention of a jury and the verdict of a jury declaring him to be non sui juris.

See also *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U.S. 160, 171 (1894), where the Court in construing a special statutory proceeding said that "[a] jury trial is not in all cases essential to due process of law."

154. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (Blackmun, J., plurality). See also note 146 *supra* and accompanying text.

155. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Barbier v. Connolly*, 113 U.S. 27, (1885). As Justice Frankfurter noted in *Tigner v. Texas*, 310 U.S. 141 (1940), "The Con-

statute<sup>156</sup> specifically provides the right of a jury trial to minor wards alleged to be mentally incompetent. This right is denied to other classes of persons subject to the same proceeding.<sup>157</sup> Nevertheless, the standard for determining incompetency and the purposes of appointing a guardian are the same for both classes. In terms of fundamental rights and liberties, no difference exists between the two classes in relation to the purpose of the statute. In the absence of a rational basis to support this distinction in procedure, the state may not constitutionally grant the right to some individuals, while denying it to others.<sup>158</sup>

Support for this claim of an equal protection violation can be drawn from Supreme Court decisions dealing with similar inconsistent allocations of procedural protection in the civil commitment context. In *Baxstrom v. Herold*,<sup>159</sup> the Court dealt with a New York law which provided for the commitment of mentally ill inmates to a state hospital upon the expiration of their prison terms. The procedure used to commit inmates was similar to that prescribed for the civil commitment of other persons alleged to be mentally ill, except that the non-penal group had the right to review *de novo* in a trial by jury on the question of their sanity.<sup>160</sup> The Court concluded that because the state had created a substantial review proceeding on the issue of insanity, it could not arbitrarily withhold it from some without violating the equal pro-

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stitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* at 147. *Accord*, *Norvel v. Illinois*, 373 U.S. 420, 423-24 (1963).

156. OKLA. STAT. tit. 58 § 887 (1971), provides:

Any person having a legal guardian, and who is about to arrive at legal age, against whom a petition has been filed, asking that he or she be declared incompetent, shall have the right to have the question of competency determined by a jury under the same procedure now in force in Civil Cases . . . .

This section does not mandate a jury trial, but only confers a right to demand it. *Johnson v. Guy*, 165 Okla. 156, 25 P.2d 625 (1933). Although this statute is over 50 years old, it has never been construed by the Oklahoma Supreme Court on equal protection grounds.

157. See, e.g., *Ned v. Robinson*, 181 Okla. 507, 509, 74 P.2d 1156, 1159 (1937), *cert. denied*, 304 U.S. 550 (1938) (adults who are accused of being incompetent have no right to a jury trial on the issue of competency).

158. In addition, "[T]he distinction must have some relevance to the purpose for which the classification is made . . . ." *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the particular disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). The jury trial is not a fundamental right in this situation. See notes 138-155 *supra* and accompanying text. Nor can those adults subject to incompetency proceedings constitute a suspect class for purposes of equal protection analysis. Therefore the rational basis test is the proper standard to use in determining whether OKLA. STAT. tit. 58, § 887 (1971) denies those of legal age equal protection of the laws.

159. 383 U.S. 107 (1966).

160. *Id.* at 111.

tection clause.<sup>161</sup> In reaching this decision, the Court rejected the state's proffered distinction between the criminally insane and civilly insane. It noted that such a distinction, while appropriate in determining the type of custodial or medical care to be given to the patient, is irrelevant in determining whether the person is mentally ill.<sup>162</sup>

Recognizing the substantial similarity between the New York commitment scheme invalidated in *Baxstrom* and the current Oklahoma guardianship statute, the conclusion is inescapable that the latter denies equal protection to the alleged adult incompetent. It is difficult to perceive any rational basis upon which the state can predicate a decision to allow jury trials for persons already subject to a guardianship because of their minority, while denying the same right to adults who have as much at stake in terms of fundamental rights and liberties.<sup>163</sup>

An alternative equal protection argument can be made based on the Oklahoma statute which gives a prospective mental patient the

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161. *Id.*

162. *Id.* In addition, the Court held that *Baxstrom* was denied equal protection by the state when he was committed to a hospital maintained by the Department of Corrections because of an administrative finding of dangerousness. All others committed to a hospital maintained by the Corrections Department had their dangerous propensities judicially determined. *Id.* at 112-115.

In *Humphrey v. Cady*, 405 U.S. 504 (1972), the Court held that a state denied equal protection of the law when it provided the right to a jury trial for civil commitment generally, but denied the right for commitments based on a conviction for a sex crime. The statutory scheme provided for the commitment of criminal sex offenders in lieu of a penal sentence. At the end of the maximum allowable sentence for the criminal offense, the criminal patient was subject to renewal proceedings in the same manner as the other civilly committed patients. The renewal proceeding allowed the state to recommit any patient for five year intervals based on new findings of fact by the court that he was still dangerous to society. In effect, the criminal patient could be detained beyond his maximum term through the renewal proceeding without the opportunity of having a jury determine whether he met the standards for commitment. This renewal method, the Court found, was substantially similar to the post-sentence commitment procedure that was ruled unconstitutional in *Baxstrom*. *Id.* at 511.

In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court held that a state statute which provided for pretrial commitment of incompetent criminal defendants denied equal protection because it subjected such persons "to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses." *Id.* at 730.

163. *Cf. Lynch v. Baxley*, 386 F. Supp. 378, 395 (M.D. Ala. 1974) (granting right to a jury trial on the basis of the irrelevant factor of present confinement violates equal protection); *In re W.*, 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971) (denying the right to a jury trial on the basis of prior detention as a juvenile, while granting the right to other members of the public, denies equal protection to the former).

If, hypothetically, the law allowed the alleged adult incompetent the right to demand a jury trial on the question of his competence, and at the same time denied such a right to the minor whose guardianship will expire upon his arrival at legal age, then the denial of equal protection would fit the *Baxstrom* mold more closely. Such a conclusion, however, forcibly suggests that the converse would also deny equal protection.



right to demand a jury trial on the issue of his sanity.<sup>164</sup> Because the prospective mental patient and the alleged incompetent may suffer identical deprivation of rights and liberties, it can be argued that they are similarly situated.<sup>165</sup> This theory, however, was expressly rejected by a North Carolina federal court in *French v. Blackburn*.<sup>166</sup> There the three judge court determined that because the standards and purposes of civil commitment were "entirely different" from the standards and purposes of appointing a guardian, the two classes of individuals were not similarly situated and equal protection was not denied.<sup>167</sup>

Nevertheless, the statutes construed in *French* can be distinguished from the Oklahoma provisions in several ways. First, the Oklahoma civil commitment procedure, unlike its North Carolina counterpart,<sup>168</sup> allows the judge, upon a determination that a person is in need of treatment, to appoint a guardian for that person according to the standards enunciated in the guardianship provisions.<sup>169</sup> Therefore, if the civil commitment determination is made by a jury, then the judge has the benefit of the jury's evaluation of the mentally ill person when he makes the decision to appoint a guardian. Concomitantly, the person who is civilly committed and declared incompetent at the same hearing has had the additional benefit of a jury's assessment of his mental state.<sup>170</sup>

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164. OKLA. STAT. tit. 43A, § 54.1 (B) (8) (Supp. 1977).

165. See *Protective Services*, *supra* note 3, at 251.

166. 428 F. Supp. 1351 (M.D.N.C. 1977). In this case, the petitioner who had been civilly committed without the benefit of a jury trial, argued that since individuals subject to guardianship proceedings had the right to a jury trial, he had been denied equal protection of the laws. This is the exact opposite of the current Oklahoma statutory scheme.

167. *Id.* at 1361. The court's analysis pointed out that even if the classification did affect similarly situated individuals, the distinction in procedures would still be justified under the rational basis test. The rational relation, the court hypothesized, could be found in the legitimate legislative belief that a determination of whether a person is capable of handling his own affairs is "more susceptible to the practical wisdom of a jury" than a determination of whether a person is mentally ill and dangerous. *Id.*

168. N.C. GEN. STAT. §§ 122-58.1-58.21 (Supp. 1977).

169. OKLA. STAT. tit. 43A, § 54.1 (F) (Supp. 1977), indicates that a guardian may be appointed at the same hearing in which the individual is committed. The language of the new law is significantly broader than the provision which it supplants, OKLA. STAT. tit. 43A, § 55 (Supp. 1976), in that the latter allowed the court to appoint a guardian of the person for the mentally ill individual, provided however, that the guardianship continue only until the person was admitted to an institution. The new law, on the other hand, makes no express limitation on the duration of the guardianship. OKLA. STAT. tit. 43A, § 64 (Supp. 1977), seems to be inconsistent with the aforementioned section in that it provides that no one committed for treatment under a court order may be considered mentally or legally incompetent except those who have been adjudged incompetent in separate and independent proceedings.

170. In contrast to this situation is the possibility that a person may be judicially declared incompetent and appointed a guardian who at a later time subjects his ward to "voluntary" hospitalization. See OKLA. STAT. tit. 43A, § 58 (1971). Arguably this possibility relates to the constitutionality of § 58 and not the guardianship procedures of OKLA. STAT. tit. 58, §§ 851-854 (1971 &

The second distinguishing characteristic found in the Oklahoma statutes is that it requires the judge to appoint a guardian for a person who originally was alleged to be mentally ill and in need of hospitalization, but was instead found to be mentally incompetent.<sup>171</sup> Merely because a different proceeding was initiated, the person alleged to be mentally ill is afforded a trial by jury,<sup>172</sup> while those subject to incompetency proceedings through the guardianship statutes are not.<sup>173</sup>

These unique features of Oklahoma law create a situation where two groups of persons are subject to the appointment of a guardian. Therefore it can be asserted that the two groups are similarly situated. Nevertheless each group is subject to the appointment of a guardian through different proceedings with varying rights and safeguards. Such different treatment is constitutionally permissible only if a rational justification exists.<sup>174</sup> Because the purposes and standards for appointing a guardian are exactly the same for each class, there is no rational justification and the treatment violates the equal protection clause.

## V. CONCLUSION

The imposition of an unwanted guardianship upon an individual is a serious encroachment of his constitutional rights and liberties. In Oklahoma, this transgression occurs with minimal procedural guarantees afforded to the alleged incompetent. The sole justification for the

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Supp. 1977). Nevertheless, it points out the fact that the alleged incompetent individual and the person allegedly in need of commitment are both subject to the appointment of a guardian and commitment in an institution subsequent to an adverse determination of their respective mental conditions.

171. OKLA. STAT. tit. 43A, § 65 (1971), provides in part that:

If the Sanity Commission . . . determine[s] that the person . . . is mentally incompetent, but that it is not necessary to hospitalize him for treatment . . . they shall so state in their certificate. If after a full hearing and examination the person . . . is found to be mentally incompetent but it is found that it is not necessary to hospitalize him, the judge . . . *must* issue an order adjudging the person mentally incompetent and *must* appoint a guardian of his person and estate . . . .

(emphasis added). For discussion of judicial economy as a rational justification for a difference in treatment, see note 174 *infra*.

172. See note 164 *supra* and accompanying text.

173. See note 142-143 *supra* and accompanying text.

174. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). A possible rationale for the distinction in procedural protection between the two groups is that once a person, originally alleged to be mentally ill, is instead found by a jury or a court to be mentally incompetent, then the state should be allowed to immediately appoint a guardian in order to protect the individual and to avoid the administrative cost and inconvenience of having another hearing when the outcome would be foreordained. This type of reasoning can be attacked on the basis of Supreme Court holdings which indicate that the state cannot deprive the individual of procedural due process or equal protection of the laws merely because of expense, or judicial and administrative convenience. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (Opinion of Brennan, J.) (equal protection); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (equal protection); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (due process).

current paucity of procedural guarantees is the avowed benign paternalism of the *parens patriae* power of the state. A plethora of court opinions in analogous areas, however, have recognized that irrespective of a state's benevolent intent, it cannot deprive an individual of his liberty and property without adherence to certain procedural safeguards.

The requirements of due process in the guardianship setting should not depend upon a doctrine which has been described by the Supreme Court as "murky," and whose historic credentials are suspect.<sup>175</sup> Likewise, the mandate of due process should not depend upon a doctrine which generally has been so obfuscated with the state's police power that procedural guarantees may, and quite often do, vary from state to state. Neoteric conceptions of the fourteenth amendment compel the conclusion that Oklahoma guardianship law is sorely in need of restructuring to achieve procedural parity with analogous areas of the law. It remains then for the courts, if not the legislature, to pierce the benevolent shroud which obscures the guardianship hearing and to provide the alleged incompetent with procedural protection consonant with the rights being deprived.

*James Christopher Redding*

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175. *In re Gault*, 387 U.S. 1, 16 (1967). *Cf.* *Shaffer v. Heitner*, 433 U.S. 186 (1977), where the Court, in holding that a state's jurisdiction could not vary according to its classification of the proceeding as in rem or in personam, stated: "[t]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Id.* at 212. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950), the Court held that the requirements of the fourteenth amendment could not depend upon a state's classification of proceedings as in rem, in personam or quasi-in-rem.