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Freedom of Religion and Oklahoma Guardianships: In Re Polin

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NOTES AND COMMENTS

FREEDOM OF RELIGION AND OKLAHOMA GUARDIANSHIPS: *IN RE POLIN*

I. INTRODUCTION

Guardianship is a legal relationship created by statute[1] in which one individual, the guardian, becomes a "substitute decisionmaker" for another, the ward.[2] The relationship commences following a hearing, which "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."[3]

In exercising authority over incapacitated persons, the states have often sacrificed the procedural protection afforded the alleged incompetent by the Constitution.[4] Chief Justice Burger has written that the "historic parens patriae"[5] of the state to assume authority over a person

1. *See, e.g.*, OKLA. STAT. tit. 58, §§ 851-876 (1981). An extensive tabulation of state guardianship statutes may be found in ABA COMM'N ON THE MENTALLY DISABLED, GUARDIANSHIP AND CONSERVATORSHIP 9-73 (1979).

2. *See* Sherman, *Guardianship: Time for a Reassessment*, 49 FORDHAM L. REV. 350, 351 (1980);Vargyas, *Guardianship,* LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 339, 341 (1979).

3. Comment, *Constitutional Deficiencies in Oklahoma Guardianship Law*, 13 TULSA L.J. 579, 579 (1978) (citing Kindred, *Guardianship and Limitations upon Capacity*, THE MENTALLY RETARDED CITIZEN AND THE LAW 63 (1976)). The primary purpose of Oklahoma guardianship is "to protect people from dissipating the assets of their estates by virtue of incapacity, and to protect these incapable of managing their affairs from being victimized by others desirous of depriving them of their property." *In re* Polin, 675 P.2d 1013, 1014-15 (Okla. 1983). The *Polin* court amended its original opinion by adding that "the statute also protects persons who for any reason cannot make day-to-day decisions required of them in order to function within our society." *In re* Polin, *Id.* at 1015; *Polin*, 55 OKLA. B.J. 268, 268 (Jan. 30, 1984).

4. *See generally* Sherman, *supra* note 2, at 350 (discussion of procedural and substantive inadequacies of guardianship law); Comment, *supra* note 3, at 579 (fourteenth amendment problems with Oklahoma's guardianship laws).

5. Parens patriae is the process through which the state assumes authority over a citizen similar to the authority of a parent over a child. *See* Note, In re Boyer: *Guardianship of Incapacitated Adults in Utah*, 1982 UTAH L. REV. 427, 428. One commentator has criticized the parens patriae justification, stating:

> 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,", "preventative and protective," and "parens patriae"—which are supposedly descriptive of the proceeding as well as the role of the state. Far too often, however, this

is accompanied by the inevitable consequence that the ward's personal freedom will be substantially restrained.[6] As a result of the tension between the apparent best interest of the alleged incompetent and the protection of the incompetent's constitutional rights, some state courts and legislatures are becoming more sensitive to procedural safeguards for alleged incompetents.[7] Courts must determine whether guardianships can be tailored in a way that will not infringe on the incompetent's right to the free exercise of religion.

Recently, statutory guardianship laws and a state court's application of these laws were challenged on the basis of the fundamental constitutional right to the free exercise of religious beliefs.[8] The Oklahoma Supreme Court in *In re Polin*[9] held that the district court's construction of Oklahoma's guardianship statutes violated Ms. Polin's constitutional right to the free exercise of her religious beliefs.[10] The purpose of this Note is to examine the background and reasoning of *In re Polin*, and to determine how the decision will affect Oklahoma guardianship law.

II. STATEMENT OF THE CASE

A. *Facts Alleged*

Robin Polin was an eighteen-year-old high school student who had been deaf and mute since birth. She was raised in a Jewish family. Beginning approximately March, 1982, Robin became interested in a sect of Christianity which the trial court wrote "can only be called 'fundamentalist.' "[11] Robin decided to adopt the Christian faith despite the

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language is used to conceal the significant deprivations which occur in the guardianship process. The practical effect of such language is reflected by the inordinate amount of discretion vested in the probate courts.

Comment, *supra* note 3, at 580 (footnotes omited).

6. O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring).

7. *See, e.g., In re* Boyer, 636 P.2d 1085 (Utah 1981) (scope of guardianship limited according to ward's incapacities). *Boyer* is discussed in Note, *supra* note 5, at 433-41. *See also* Cal. Prob. Code §§ 1400-3803 (West 1981) (legislature restructured statutes to protect the incompetent's fundamental rights).

8. *See In re* Polin, 675 P.2d 1013 (Okla. 1983). The constitutional right to free exercise of religion is found in U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."); *see also* OKLA. CONST. art. I, § 2 ("Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights.").

9. 675 P.2d 1013 (Okla. 1983).

10. *Id.*

11. *In re* Polin, No. PG 83-76, slip op. at 1 (Dist. Ct. Tulsa Cty. Okla. 1983). For the reader's convenience, this slip opinion is reproduced in an Appendix immediately following this Note.

objections of her Jewish parents. On April 26, 1983, Robin left home. In response, her parents brought an action in the Oklahoma District Court for Tulsa County seeking a judicial declaration that Robin was incompetent under Oklahoma statutory guardianship law.[12]

The district court found that Robin Polin was "judgementally immature," capable of being manipulated by "artful and designing" persons, and therefore incompetent under OKLA. STAT. tit. 58, §§ 851-852 (1981).[13] Robin's sister was appointed special or temporary guardian of Robin's person and estate. Any interested party was permitted to apply to the Court to be appointed permanent guardian.[14] The temporary guardian was advised of three specific restrictions:

> (1) The ward is not to be controlled directly or indirectly by Paul Polin [Robin's father] . . . .
> (2) The right to a religious preference being a fundamental constitutional right, the guardian is expressly forbidden from interfering in Robin's chosen form of religious worship. The only exception to this restriction is if said religious practice would be of immediate danger to the health or financial well-being of the ward. . . .
> (3) The guardian shall not allow the ward to travel out of the State of Oklahoma without Order of the Court.[15]

The Oklahoma Supreme Court reversed the trial court's decision, stating that the trial court had construed the Oklahoma guardianship statutes too broadly, resulting in a chilling infringement on Ms. Polin's fundamental constitutional right to free exercise of her religious beliefs.[16]

B. *Issues Presented to the Oklahoma Supreme Court*

The facts of *Polin* raise many important issues regarding guardianship proceedings. In reaching a decision, the Oklahoma Supreme Court had to determine the legislative intent as to the purpose of

12. *Id.*; *Polin*, 675 P.2d at 1013.
13. *See infra* notes 74-84 and accompanying text.
14. *In re* Polin, No. PG 83-76, slip op. at 5 (Dist. Ct. Tulsa Cty. Okla. 1983).
15. *Id.* at 6.
16. *Polin*, 675 P.2d at 1013. The Oklahoma Supreme Court's reversal allows Robin Polin to make her own decisions as to where and with whom she should live. At the time of this writing, however, the supreme court has not issued a mandate dissolving the guardianship created by the district court, as provided in OKLA. S. CT. R. 33. Until the mandate is issued, Robin technically remains under the guardianship of her sister and brother-in-law. Interview with Judge Robert D. Frank, Judge of the District Court of Tulsa County, Oklahoma (March 9, 1984). Pending the issuance of the mandate, Robin's father, Paul Polin, has petitioned the court to withhold its mandate, and has petitioned the United States Supreme Court for certiorari. *Id.*

guardianships and how to define "incompetence." Most importantly, however, the court had to consider whether a guardianship could be structured without denying the ward's constitutional right to free exercise of religious beliefs. A background of the development of guardianship law and its constitutional problems is helpful in understanding the court's resolution of these issues.

III. THE CONSTITUTIONALITY OF GUARDIANSHIP LAW

A. *Least Restrictive Alternative Doctrine*

American guardianship laws are historically rooted in pre-fourth century Roman and English law.[17] From this basis the doctrine of "parens patriae" emerged in the English Chancery Courts in the late seventeenth century.[18] The doctrine is the process by which the state assumes authority over incapacitated citizens and exercises powers similar to those of a parent over his child.[19] Parens patriae has been recognized by the United States Supreme Court as being "inherent in the supreme power of every state."[20]

The Supreme Court, however, has limited the extent to which states can exercise their parens patriae powers. In *Shelton v. Tucker*[21] the United States Supreme Court stated that when the government has a legitimate and substantial purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[22]

This approach is known as the "least restrictive alternative doctrine"[23] and recognizes that a full guardianship is overinclusive in

17. The historical background of the development of guardianship law is discussed in S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 1-14 (rev. ed. 1971); Sherman, *supra* note 2, at 352; Vargyas, *supra* note 2, at 341-42; Note, *supra* note 5, at 428.

18. *See* Beverley's case, 76 Eng. Rep. 1118 (K.B. 1603); *see also* S. BRAKEL & R. ROCK, *supra* note 17, at 2-3 (analysis of Lord Coke's opinion).

19. *See* Note, *supra* note 5, at 428.

20. Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1, 57 (1889).

21. 364 U.S. 479 (1960). *Shelton* involved associational rights of teachers.

22. *Id.* at 488.

23. *In re* Boyer, 636 P.2d 1085 (Utah 1981) was one of the first cases applying the least restrictive alternative doctrine to a state guardianship statute. The least restrictive alternative approach has also been applied to involuntary commitment proceedings in which state officials are required to make " 'good faith attempts to place . . . persons in settings that will be suitable and appropriate to their mental and physical conditions while least restrictive of their liberties.' " *Id.* at 1090 (quoting Welsch v. Likins, 373 F. Supp. 487, 502 (D. Minn. 1974)); *see* Rennie v. Klein, 462 F. Supp. 1131, 1146-47 (D.N.J. 1978); Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974), *rev'd on other grounds*, 651 F.2d 387 (5th Cir. 1981); State v. Krol, 68 N.J. 236, __, 344 A.2d

many situations.[24] It has most recently found expression in the Utah Supreme Court case of *In re Boyer,*[25] in which the ward argued that she was denied due process because the guardianship statute did not limit the guardian's powers to those necessitated by the ward's incapacities,[26] resulting in a deprivation of her fundamental rights. The Court agreed with the ward's contentions and reasoned that when the state's interest in protecting a ward's health and safety justifies imposition of a guardianship, the state must narrowly tailor the guardianship to achieve that goal.[27]

289, 303 (1975); Flaschner, *Legal Rights of the Mentally Handicapped: A Judge's Viewpoint*, 60 A.B.A. J. 1371, 1373 (1974).

Restrictions on many other constitutional rights have been affected by the least restrictive alternative doctrine. *See* Branti v. Finkel, 445 U.S. 507, 515 (1979) (right to affiliate with political party of one's choice); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267-70 (1974) (right to travel); O'Brien v. Skinner, 414 U.S. 524, 533-35 (1974) (Marshall, J., concurring) (right to vote); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 642-49 (1974) (right to procreate); *See generally* Hoffman and Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of its Senses*, 14 SAN DIEGO L. REV. 1100, 1101 n.1 (1977) (background of application of doctrine by federal courts); Sherman, *supra* note 2, at 366-71; Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L.REV. 1463 (1967) (discussion of application of least restrictive alternative doctrine as a test for the validity of economic regulations).

24. The least restrictive alternative approach is reflected in a California statute which provides for the appointment of a limited conservator as follows:

> (d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult.
>
> (1) Such limited conservatorships shall be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations.
>
> (2) The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator.

CAL. PROB. CODE § 1801 (West 1981). The least restrictive alternative approach is also found in model statutes appearing in ABA COMM'N ON THE MENTALLY DISABLED, GUARDIANSHIP AND CONSERVATORSHIP 101-103 (1979). Another model statute is proposed in G. ALEXANDER & T. LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT 141 (1972) (provides for a sliding scale of interference with an individual's right to manage his personal affairs). *But see* UNIF. PROB. CODE (contains no such provision for limited guardianship).

25. 636 P.2d 1085 (Utah 1981).

26. *Id.* at 1087. The ward argued that she was denied due process in two other respects: The statutory language was vague and the preponderance of the evidence standard for determining incapacity, rather than clear and convincing, provided inadequate protection against an erroneous decision to impose guardianship. The court accepted the latter contention. *Id.* at 1091. However, the court held that the guardianship statute was not vague if construed to adjudge one incompetent "only if the putative ward's decision-making process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur." *Id.* at 1089 (citing Fazio v. Fazio, 375 Mass. 394, 378 N.E.2d 951 (1978)). The court set aside the judgment and remanded the case to the District Court. *Id.* at 1092.

27. *See id.* at 1090-1091 (court must consider the interest of the ward in retaining as broad a

Other courts have also held that when state action affects religious beliefs or practice, the state must adopt the least restrictive alternative means to accomplish its legitimate objective.[28] Thus, when a guardianship conflicts with this fundamental, constitutionally protected right, the guardianship must be carefully designed to accomplish its legitimate objective with the least possible amount of interference with religious beliefs.

The United States Supreme Court first articulated the extent to which laws could be enacted relative to the establishment of religion in *Reynolds v. United States*.[29] The Court drew a distinction between religious beliefs and religious acts, and only bestowed absolute protection on religious beliefs and opinions.[30] Limited protection of religious acts was provided when such acts were in contradiction with generally acceptable legislation.[31] In *Cantwell v. Connecticut*,[32] the Court reaffirmed the absolute protection afforded religious beliefs and broadened the protection afforded religious acts. However, *Cantwell* still recognized that the *act* of worship can be affected by governmental action. The Court stated that "the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[33] While consistently following the *Cantwell* decision, the Supreme Court has subsequently identified the difficulty in distinguishing between belief and action. In *Wisconsin v. Yoder*,[34] the court stated that its decision did "not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and

power of self determination as is consistent with the reason for appointing a guardian of the person).

28. The first decision to influence the application of the least restrictive alternative doctrine to state action affecting religious autonomy was Schneider v. State, 308 U.S. 147 (1939). *Schneider* involved a municipal ordinance requiring acquisition of a police permit in order to solicit religious contributions door-to-door. While the Court recognized the purpose of the ordinance to be for the prevention of fraud, it noted that less restrictive means were available. *Id.* at 164. The Court in *Schneider* did not expressly connect the least restrictive alternative doctrine with concern for religious freedom. That link was provided in Cantwell v. Connecticut, 310 U.S. 296 (1940), in which the Court held that conditioning religious solicitation upon the arbitrary grant of a license "is to lay a forbidden burden upon the exercise of liberty protected by the Constitution" in light of the availability of less drastic means to attain the state's purpose. *Id.* at 307; *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-10, at 846-59 (1978).

29. 98 U.S. 145 (1878). In *Reynolds*, Mormons unsuccessfully used religious freedom under the first amendment as a defense to the practice of polygamy.

30. *Id.* at 164.

31. *Id.* at 165-66.

32. 310 U.S. 296 (1940).

33. *Id.* at 303-04.

34. 406 U.S. 205 (1972).

action cannot be neatly confined in logic-tight compartments."[35]

The concept of religious freedom evolved rapidly as the Supreme Court handed down several opinions in the ensuing years.[36] New guidelines were developed to test the constitutionality of laws affecting religious worship including balancing[37] and alternative means tests.[38] In *Sherbert v. Verner*,[39] the Court held that a state cannot deny unemployment compensation to persons whose religious beliefs render them unavailable for Sunday employment. The Court based its decision on two additional factors: the burden placed on the religion[40] and whether there is a compelling state interest which justifies denial of a religious exemption.[41]

These Supreme Court decisions present guidance in determining the extent to which a guardianship can affect religion. A reasonable inference can be drawn that a guardianship is not prohibited from affecting religion, so long as it does not invade the area of religious belief. Legislation reaching religious action can be defeated upon a showing that there is not a compelling state interest, the burden placed on the religion is not within the scope of that state interest, or that alternative means exist to achieve that state interest.[42] Furthermore, legislation that passes these tests must not be applied in a way that unreasonably interferes with religious action. The Oklahoma Courts have looked unfavorably on the utilization of guardianships for any purpose inconsistent with the state interest, and when so utilized, the guardianships have been struck down.[43]

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35. *Id.* at 220.

36. A discussion of the Supreme Court's opinion on freedom of religion may be found in Lewellyn v. State, 592 P.2d 538, 540-542 (Okla. Crim. App. 1979).

37. *See* Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944).

38. *See* Braunfeld v. Brown, 366 U.S. 599, 605-08 (1961).

39. 374 U.S. 398 (1963).

40. *Id.* at 403-04.

41. *Id.* at 406-09. The compelling state interest test was applied in Whitehorn v. State, 561 P.2d 539, 544 (Okla. Crim. App. 1977). The court in *Whitehorn* relied on *Sherbert* in reaching its decision.

42. *See* Lewellyn v. State, 592 P.2d 538 (Okla. Crim. App. 1979) (interpreting the evolution of religious freedom in Supreme Court decisions). In L'Aquarius v. Maynard, 634 P.2d 1310 (Okla. 1981), the Oklahoma Supreme Court held that denying an inmate the use of marijuana as a sacrament for religious purposes did not violate guarantees of the first amendment. The court relied on *Lewellyn* in reaching its decision.

43. *See* Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982). The court stated that use of Oklahoma's guardianship statutes for the clear purpose of getting some court protection of deprogramming is impermissible. *Id.* at 631; *see also In re* Vaughn's Guardianship, 205 Okla. 438, 239 P.2d 403 (1951). The court stated that there can be no question that the incompetency proceeding was filed in order that another lawsuit could not be removed to federal court based on a lack of diversity between the non-resident guardian and non-resident defendant. *Id.* at 440, 239

B. *Conflicts Between Freedom of Religion and Deprogramming*

The issue of "deprogramming" has recently thrust itself into the first amendment arena.[44] The claim that the use of a guardianship is an infringement upon the constitutional right to the free exercise of religion usually arises in cases involving the attempt to take custody of an individual who has been allegedly brainwashed by a religious organization, so that the brainwashing process can be reversed and the individual can be "deprogrammed."[45] Guardianship procedures have been accorded various degrees of acceptance by the courts when used as a legal tool to facilitate deprogramming.[46] However, the constitutional right to the free exercise of religion has more frequently served to impede the guardianship procedure.[47] A recurring theme in deprogramming decisions is the tension between the benefits to the individual and state afforded by guardianship and the infringement upon the constitutional right to the free exercise of religion that sometimes results from the guardianship.

Deprogramming is the process by which a brainwashed individual undergoes encounter-style therapy in an attempt to reverse the influence of the brainwashing.[48] Since the individual is brainwashed, the

P.2d at 405; *see* Hogan v. Leeper, 37 Okla. 655, 133 P. 190 (1913). In *Hogan*, the court held that a 76-year-old man's infatuation with a woman and desire to marry her was not a ground for the appointment of a guardian. The court held that in filing for a guardianship for his father the son was "actuated largely by a desire to secure the old man's property to himself and his brothers and sisters." *Id.* at 663, 133 P. at 193. *But see* Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978). *Baer* involved a civil rights action against deprogrammers. The plaintiff argued that the defendants used the California conservatorship law as a cover for the commission of tortious conduct. Plaintiff further alleged that defendants knowingly and fraudulently misused the conservatorship/guardianship process to obtain custody of him for the ulterior purpose of deprogramming. The court ruled that this private misuse was not a denial of the plaintiff's constitutional rights. *Id.* at 487.

44. Deprogramming is the rehabilitation of one who has been brainwashed by a religious cult. The existence of religious cults is not a new phenomenon. Historians, social scientists and students of religion point out that cults, though cyclical in nature, have prospered and have encountered adversity for centuries. *See* Comment, *Piercing the Religious Veil of the So-Called Cults*, 7 PEPPERDINE L. REV. 655, 655 (1980) [hereinafter cited as Comment, *Piercing the Religious Veil*]. However, the increase in the number of such groups is new. *Id.* at 655-56. What is also new is "the way some members of modern society have chosen—in a supposedly enlightened age of first amendment religious freedom—to fight new religious ideas. It is called deprogramming." LeMoult, *Deprogramming Members of Religious Sects*, 46 FORDHAM L.REV. 599, 599 (1978). *See generally* Comment, *Tort Liability for Cult Deprogramming:* Peterson v. Sorlien, 43 OHIO ST. L.J. 465, 465-68 (1982) (discussion of the development of cults in the United States) [hereinafter cited as Comment, *Cult Deprogramming*].

45. *See* notes 48-56 *infra* and accompanying text.

46. *See* notes 57-73 *infra* and accompanying text.

47. *See* notes 62-73 *infra* and accompanying text.

48. *See* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 7 (1977). One commentator described deprogramming as follows:

deprogramming is usually involuntary. Speech is the brainwashing process used by certain religious organizations in proselytizing new members. Preaching, praying, chanting and meditating are the tools of their trade.[49] These techniques present a very practical barrier to deprogrammers because they all constitute forms of speech that are heavily protected by the Constitution. Any state action used to assist the deprogramming process will be subject to scrutiny under the first amendment as an infringement on religion and speech.

With few or no legal remedies,[50] the desperate parents and friends of the brainwashed individuals often resort to lay deprogrammers who

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The term deprogramming embraces two concepts, the first requires that an individual undergo an indoctrination of a cult's beliefs, the second involves a third party's efforts to remove or "wash away" the effects of the indoctrination. The third party generally acts at the request of a concerned parent but without the consent of the subject individual, and as a result frequently encounters resistance and must therefore apply physical force to subdue the cultist. The physical removal and detention of the individual in order to restore him to the values he held prior to indoctrination have prompted cults to accuse the deprogrammers of kidnapping and false imprisonment. The deprogrammers euphemistically describe their course of conduct as a "rescue" of those who were programmed or brainwashed by suspect organizations.

Comment, *Piercing the Religious Veil*, *supra* note 44, at 656 n.4. *See generally* T. PATRICK & T. DULACK, LET OUR CHILDREN GO! (1976) (discussion of deprogramming process). The author, Ted Patrick, is one of the most controversial deprogrammers active in the United States.

49. *See* LeMoult, *supra* note 44, at 610-611. Another commentator states:

In a noncriminal context, claims of coercive persuasion or mind control have been raised with increasing frequency in connection with the activities of certain extremist, youth-oriented religious organizations, such as the Unification Church, the Children of God, the Hare Krishna, and the Love Family. These groups have come under fire from parents, church groups, and government officials for recruiting young persons by deceptive means, making them dependent on the cult for emotional support, and gradually conditioning them to accept a completely controlled, highly restricted lifestyle and a world view drastically at odds with that of the prevailing society.

Delgado, *supra* note 48, at 5-6. Cults have been differentiated from established religions by the existence of the following:

(1) Total allegiance to a powerful, living leader, often thought to be a messiah, whose pronouncements form the basis for cult doctrine and practice;
(2) The prohibition of rational thought;
(3) Deceptive recruiting techniques;
(4) The use of coercive persuasion, mind control, and brainwashing techniques to attract and retain members; and
(5) Isolation from the outside world.

Comment, *Cult Deprogramming*, *supra* note 44, at 466-67 (footnotes omitted).

50. One commentator stated:

Assuming that society may, consistently with the first amendment, impose limitations on privately imposed psychological bondage, and that meaningful distinctions may be drawn among the various degrees of influence, how are these limits to be enforced? . . . Some of the remedies that have been developed or proposed . . . under relevant first amendment doctrine . . . include conservatorship proceedings, tort actions by parents and ex-members, consumer protection legislation, and self help, including abduction and deprogramming.

Delgado, *supra* note 48, at 9.

Several possible remedies have been suggested by this commentator:

(A) *Preventive*

physically abduct cult members from street corners and religious communes and attempt to reverse the cult's influence in locked motel rooms.[51] This conduct subjects the deprogrammers to tort claims such as false imprisonment[52] and intentional infliction of emotional distress,[53] in addition to claims based on federal kidnapping and civil rights acts violations.[54] Sometimes the deprogrammers are successful in defending against these claims,[55] but more frequently the claims are upheld.[56]

One legal remedy resorted to by deprogrammers is the "temporary" or "emergency" guardianship or conservatorship.[57] Several

(1) Identification—similar to consumer protection rulings that require salesmen to identify themselves and give their affiliation at a first encounter with the candidate;
(2) Cooling off period—during which prospective members are required to leave the group to reflect and seek advice;
(3) Public education;
(4) Prohibition on proselytizing by certain groups;
(5) Licensing—not outright prohibition but a regulation of the behavior modification sciences to forbid unqualified individuals from engaging in psychologically intrusive practices; and
(6) Request for rescue—device, similar to a living will, consisting of a request to be rescued if the individual comes under the influence of a religious cult, and a statement that membership in a religious cult would be against his wishes.

(B) *Post-Induction Remedies*
(1) Self-help and deprogramming;
(2) Conservatorship and guardianship;
(3) A contract based remedy of mutual reassessments—bargaining with cult members to allow member to voluntarily spend time outside of cult; and
(4) Remedies against the cult or cult leaders—civil remedies such as tort actions and actions for return of money or property; criminal remedies such as kidnap and federal statutes forbidding slavery and peonage.

See id. at 73-97.

51. *See* Delgado, *supra* note 48, at 7; Note, *Cults, Deprogrammers, and the Necessity Defense*, 80 MICH. L. REV. 271, 272 (1981); Comment, *Cult Deprogramming*, *supra* note 44, at 469-70; Comment, *Piercing the Religious Veil*, *supra* note 44, at 670-71.

52. *See* Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982); Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980).

53. *See* Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980).

54. *See* Ward v. Connor, 657 F.2d 45 (4th Cir. 1981); United States v. Patrick, 532 F.2d 142 (9th Cir. 1976); Mandelkorn v. Patrick, 359 F. Supp. 692 (D.D.C. 1973). A detailed discussion of these types of violations may be found in Note, *Federal Regulation of Intra-Family Deprogramming Conspiracies under the Ku Klux Klan Act of 1871:* Ward v. Connor, 23 B.C.L. REV. 789 (1982); Comment, *Cult Deprogramming*, *supra* note 44, at 470-73.

55. *See* United States v. Patrick, 532 F.2d 142 (9th Cir. 1976)(necessity defense upheld); Weiss v. Patrick, 453 F. Supp. 717 (D.R.I. 1978)(subject of the deprogramming failed to prove any injury or deprivation under § 1985 of the Civil Rights Act); Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980) (court applied the plaintiff's delayed consent retroactively).

56. *See* Connor v. Ward, 657 F.2d 45 (4th Cir. 1981); Cooper v. Molko, 512 F. Supp. 563 (N.D. Cal. 1981); Mandelkorn v. Patrick, 359 F. Supp. 692 (D.D.C. 1973); People v. Patrick, 541 P.2d 320 (Colo. Ct. App. 1975); *cf. In re* Rudie 622 P.2d 1098 (Oregon 1981) (disciplinary action against attorney for participation in abduction in Washington pursuant to temporary guardianship order issued in Oregon).

57. The conservatorship is a legal relationship related to guardianship, created by statute,

states have enacted statutes[58] providing for guardianships of brief duration following a hearing at which the moving party establishes the need for protection. Testimony on radical behavior and mental change is presented to persuade the judge to issue the temporary guardianship order. "At the end of the period, typically twenty or thirty days, the individual and his guardian or conservator reappear in court, at which

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which gives the conservator power over only the estate of the conservatee. *See* OKLA. STAT. tit. 58, §§ 890.1-.11 (1981). Under Oklahoma law "a conservator has the same powers and duties as a guardian except that a conservator does not have custody of the person." 13 Op. Att'y Gen. 177 (1981)(citing OKLA. STAT. tit. 58, § 890.5 (1981)); *see also* Coston v. Kamp, 549 P.2d 124, 127 (Okla. Ct. App. 1976) (duties and responsibilities of conservator and guardian do not materially differ). The Uniform Probate Code, approved by the National Conference of Commissioners on Uniform State Laws and by the ABA in August of 1969, includes provisions for protecting persons (guardianships) and their property (conservatorships). UNIF. PROB. CODE, §§ 5-304, 5-401 (2) (1974). *But see* Board of Regents v. Davis, 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975), wherein the court stated that one reason for the establishment of a conservatorship as an alternative to guardianship is to avoid the "stigma" of the label "incompetency." In such a situation, a conservator is merely another linguistic designation for a guardian. Another reason for establishing a conservatorship is to extend the parameter of guardianship statutes to embrace one who is neither insane nor incompetent, but who, for a variety of other reasons, needed direction in the management of his affairs. *Id.* at 37-39, 533 P.2d at 1051, 120 Cal. Rptr. at 410-11. The United States Supreme Court has recognized that an individual's reputation, along with his personal liberty, are interests of immense importance which require procedural protection. *In re* Winship, 397 U.S. 358, 367 (1970) (due process required when juvenile charged with an act which would constitute a crime if committed by an adult).

58. *See* ARIZ. REV. STAT. ANN. § 14-5310 (1975). The Arizona temporary guardianship statute provides:

> If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing. If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed six months. A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of this title concerning guardians apply to temporary guardians.

Id. Similarly, the Oregon temporary guardianship statute states:

> Appointment of temporary guardian for incapacitated person. If the court finds that an emergency exists and no guardian has been appointed or that a guardian is not effectively performing his duties or that the welfare of the incapacitated person requires immediate action, the court may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period and specified purpose. A temporary guardian has the care and custody of the ward for the purpose so specified. The authority of the permanent guardian previously appointed by the court is suspended while the temporary guardian has authority. A temporary guardian may be removed at any time and shall make any report the court requires.

OR. REV. STAT. § 126.133 (1979-1980). In California, a temporary guardianship statute was held unconstitutional by the California Court of Appeals in Katz v. Superior Court of San Francisco, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977). The statute was repealed and a new statute was enacted in 1979. *See* CAL. PROB. CODE §§ 2250-2258 (West 1981). *See also* VT. SEN. COMM. FOR THE INVESTIGATION OF ALLEGED DECEPTIVE, FRAUDULENT AND CRIMINAL PRACTICES OF VARIOUS ORGANIZATIONS IN THE STATE, 54TH BIENNIAL SESS., REPORT, at 5 (1977) (committee recommended the adoption of legislation allowing ex parte appointments of temporary guardians).

time the judge decides whether the control should continue."[59] During the period of the temporary guardianship the petitioner has an opportunity to deprogram the ward.

The temporary conservatorship has been utilized on several occasions by the prosecutor's office in Pima County, Arizona, to obtain the release of cult members pursuant to legal process. The prosecutors help the families of cult members acquire a writ of habeas corpus ordering the cult leaders to produce the member for a competency hearing. As a precaution against the cult's tactics of hiding the victim or transferring him to a distant commune, the writ may be served without advance notice and in the early morning hours.[60]

Commentators on the legal barriers to deprogramming are generally in favor of the use of guardianships for such a purpose even in light of their constitutional deficiencies. One commentator writes:

> Given the resistant nature of mind control and the very low probability that a victim will leave the cult without outside assistance, a remedy like conservatorship for individuals already inside the group appears to be unavoidable. As carried out by the Arizona prosecutor's team, it also seems to accord with the least-restrictive-alternative requirement.[61]

However, the temporary guardianship has not found favor in the courts. In *Katz v. Superior Court of San Francisco*,[62] parents were appointed temporary conservators of five young adults to permit deprogramming of the conservatees from ideas allegedly instilled by a religious cult.[63] On appeal, the court stated that the conservator statute only applied to property and could not be used to control an individual's ideas.[64] The court further stated that in the absence of evidence that the conservatee is "gravely disabled," as defined by the law of the state, the processes of the state cannot be used to deprive the conservatee of his freedom of religious action.[65] The court determined that

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59. *See* Delgado *supra* note 45, at 88-89.
60. *Id.* (citations omitted).
61. Delgado, *supra* note 48, at 90.
62. 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).
63. *Id.*
64. *Id.* at 970, 141 Cal. Rptr. at 244.
65. *Id.* at 988-89, 141 Cal. Rptr. at 256. The court stated:

> The wrong of these things things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Id. (quoting United States v. Ballard, 322 U.S. 78, 95 (1943) (Jackson, J., dissenting)); *cf.* Taylor v.

the evidence was insufficient to sustain a finding that there was good cause for appointment of a temporary conservator.[66]

Similarly, in *Taylor v. Gilmartin*,[67] a Tenth Circuit opinion applying Oklahoma law, the court refused to sanction the establishment of a temporary guardianship. *Taylor* involved an action for damages in tort by a cult member against his religious deprogrammers who had gained custody over him through a temporary guardianship. The deprogrammers asserted the temporary guardianship as a defense.[68] The United States Court of Appeals held that no Oklahoma law exists permitting a temporary guardianship of an adult. Therefore, the guardianship was void.[69] The court also held, citing *Katz*, that use of Oklahoma's insanity-guardianship or conservatorship statutes for the clear purpose of obtaining court protection of deprogramming should not be allowed.[70] The court stated that "this is a situation in which there is a gross concerted interference with a very fundamental right, the right to choose one's religion, and it is this underlying factor that makes the case actionable, or which greatly aggravates it."[71]

Thus, the attempt to deprogram an individual brainwashed by a religious cult, regardless of the procedure used, will be suspect as an infringement on religious freedom. Courts that have considered the issue, including the Tenth Circuit Court applying Oklahoma law,[72] have looked unfavorably on both the abduction approach and the use of temporary guardianships.[73]

Gilmartin, 686 F.2d 1346 (10th Cir. 1982) (The *Taylor* court held that absent an Oklahoma statute expressly providing for temporary guardianship, any order by a probate court attempting to establish a temporary guardianship would be void. *Id.* at 1351).

66. *Katz*, 73 Cal. App. 3d at 981, 141 Cal. Rptr. at 251.

67. 686 F.2d 1346 (10th Cir. 1982).

68. *Id.* at 1348-50.

69. *Id.* at 1351-52. The deprogrammers took the position that the district judge derived the broad power to order a temporary guardianship from OKLA. STAT. tit. 43A, § 55 (repealed 1980). This section required a petitioner to seek an order directing the hospitalization of one who was asserted to be mentally ill. The deprogrammers, however, petitioned for only a temporary guardianship. *Id.*

70. 686 F.2d at 1361.

71. *Id.* at 1362.

72. *See* Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982)(attempt to deprogram through temporary guardianship held void).

73. *See* Katz v. Superior Court of San Francisco, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (temporary guardianship approach); People v. Patrick, 541 P.2d 320 (Colo. Ct. App. 1975)(abduction approach).

IV. DEVELOPMENT OF OKLAHOMA GUARDIANSHIP LAW

Oklahoma guardianship law is governed by a statute[74] enacted in 1910 which has since remained virtually unchanged.[75] The appointment of a guardian is provided for in the following two sections:

> 851. Petitions for guardians of incompetent or insane persons
>
> When it is represented to the court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the court shall cause notice to be given to the supposed insane or incompetent . . . of the time and place of hearing the case, not less than five (5) days before the time so appointed, and such insane or incompetent person, if able to attend, must be produced before the court on the hearing . . . .[76]
>
> 852. Guardian appointed, when
>
> If after a full hearing and examination upon such petition, it appears to the judge of the district court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article specified.[77]

These sections were first interpreted by the Oklahoma Supreme Court in 1912 in *Shelby v. Farve.*[78] In attempting to precisely define incompetency, the supreme court deferred to the California Probate Code:

> The phrase "incompetent," "mentally incompetent," and "incapable," as used in this chapter, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by *artful or designing persons.*[79]

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74. OKLA. STAT. tit. 58, §§ 850-898.3 (1981).

75. *See In re* Polin, 675 P.2d 1013 (Okla. 1983).

76. OKLA. STAT. tit. 58, § 851 (1981).

77. *Id.* § 852 (footnote omitted).

78. 33 Okla. 651, 126 P. 764 (1912) (alleged incompetent attempted to sell the land she owned for grossly inadequate consideration).

79. *Id.* at 655, 126 P. at 765 (quoting Cal. PROB. CODE § 1767 (Kerr's Cyc. Codes of California) (emphasis added). The court held that pursuant to this definition the parties were incompetent and incapable of protecting themselves and their estate and therefore, the parties were certain to be deceived by artful and designing persons. *Id.* at 659, 126 P. at 767.

In *Polin*, both petitioner and respondent made much of the *Shelby* artful and designing per-

The "artful or designing persons" definition adopted in *Shelby* has repeatedly been applied in determining whether a guardian should be appointed in a particular case.[80] The *Shelby* court wrote that "[t]his definition in our judgment fairly expresses the meaning intended by our Legislature when these provisions were passed."[81] Despite this definitive language, another definition simultaneously developed in Oklahoma courts. This second definition evolved in 1925 in *In re Winnett's Guardianship:*[82]

> Mental incompetency or incapacity is established when there is found to exist an essential privation of the reasoning powers or faculties, or *where a person is incapable of understanding and acting with discretion in the ordinary affairs of life.* When it is not shown that such mental incompetency exists, it is reversible error for the court to appoint a guardian of the estate of an adult person.[83]

The second definition has also been repeatedly applied, and some cases have even applied both definitions.[84] The *Polin* case was therefore necessary to clarify the definition of "incompetency" in Oklahoma, in addition to resolving the conflict between Oklahoma guardianship law and the free exercise of religion.

V. THE *POLIN* Decision

A. *Findings of the District Court*

The *Polin* district court proceedings involved five days of testimony and thirty-five exhibits, composed of books, financial statements,

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sons test, which was applied in the 1968 case of *In re* Bogan, 441 P.2d 972 (Okla. 1968). *Polin*, 675 P.2d at 1015. In *Bogan*, the appointment of a guardian for a woman alleged incompetent was denied even though she married a man thirty-five years her junior, contributed large sums of money to his film-making project, could not remember things about her assets, did not receive adequate rent from property she owned, had a $1200 plumbing bill and had a failure of memory on the witness stand. *Bogan*, 441 P.2d at 974-75. The court stated that "[a] person's liberty and the right to control his property should not be taken away or withheld except for urgent reasons." *Id.* at 974 (quoting *In re* Estate of Washam, 364 P.2d 896, 897 (Okla. 1961)). The trial court in *Polin* also applied the artful and designing persons test. *See In re* Polin, No. PG 83-76, slip op. at 1 (Dist. Ct. Tulsa Cty. Okla. 1983).

80. *See In re* Bogan, 441 P.2d 972, 974 (Okla. 1968); *In re* Prince, 379 P.2d 845, 847 (Okla. 1963).

81. 33 Okla. at 655, 126 P. at 765.

82. 112 Okla. 43, 239 P. 603 (1925).

83. *Id.* at 45, 239 P. at 605 (emphasis added). The primary evidence of incompetency was inequality of bargaining power in a loan transaction and having been cheated by a tenant. The court dismissed the guardianship proceeding for lack of sufficient evidence. *Id.*

84. *See In re* Prince, 379 P.2d 845, 847 (Okla. 1963); Fish v. Deaver, 71 Okla. 177, 176 P. 251 (1918).

and psychological test results.[85] The trial court made the following findings: Ms. Polin's interpersonal skills are on the level of a nine-year-old,[86] she has difficulty with spatial distinctions,[87] displays frustration,[88] and uses a childlike decisionmaking process.[89] Furthermore, Ms. Polin's "childlike decision making process" prohibits her from being able to provide for minimal necessities. The court found that she "not only cannot properly manage her own affairs, she has not exhibited to this Court an understanding that her affairs need to be handled at all."[90] In summarizing the existence of Ms. Polin's deficiencies, the trial court relied on the term "judgmental immaturity."[91]

The trial court also outlined the factors which did not contribute to the decision, which included Ms. Polin's average to above average intelligence, her academic achievement level, her employability and most importantly, her religious choice.[92]

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85. *In re* Polin, No. PG 83-76, slip op. at 1 (Dist. Ct. Tulsa Cty. Okla. 1983).

86. *Id.* at 3-4.

87. *Id.* at 4.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 3. This term was used at the trial by Dr. Catherine Burden. Judge Frank wrote that he was impressed with Dr. Burden's qualifications and demeanor, and that her testimony was unbiased, professional and competent. *Id.*

92. *See Polin*, 675 P.2d at 1014. In the decision of the court Judge Frank outlined the following noncontributing factors:

(1) First and foremost among those factual issues with which this Court is not concerned is Robin's religious choice. This State, whether acting through the legislature, the courts, or via a combination thereof cannot abridge the free exercise of religion. The only exception to that seemingly absolute rule of federal and state constitutional law is rare, minimally used, and absolutely not before this Court today.

(2) Secondly, the evidence has been overwhelming, and wholly without contradiction that Robin has an average to above average intellectual potential or I.Q. The Court cannot even consider making the requested determination of incompetency on that sort of foundation. Evidence of low I.Q. alone is insufficient, even if tied to low academic achievement and physical handicap.

(3) Thirdly, the Court has also heard much evidence that despite Robin's high I.Q. her academic achievement level is less than that for other people her age. In spite of the difficulty that educators have in testing deaf students, that fact has been clearly shown. However, such low academic achievement (compared to the population as a whole - whether deaf of hearing) is not grounds for the requested adjudication of incompetency. If that evidence were sufficient then many typical adults, including graduates of our high schools would properly be so adjudicated. Even functional illiterates cannot, merely by reason of their low academic skills be stripped of their civil rights to control their own affairs. Poor academic achievement, in and of itself, is not sufficient evidence for this Court to grant the requested relief.

(4) Fourthly, Robin's employment history shows her unable to get employment except on charitable terms. Her previous jobs have been in special environments for which deaf people were specifically provided. Once again, however, unemployability alone is not grounds for a judicial determination of incompetency. It is unconstitu-

Having determined that Ms. Polin was judgmentally immature and that her deficiencies impaired her ability to "properly" handle her affairs, it was then necessary to apply the last step of the artful and designing persons test.[93] The trial court found that the evidence indicated that Robin was susceptible to being taken advantage of by artful and designing persons, observing that Robin was surrounded by Christian friends who "have designs—at least—on what they call her 'salvation,' her 'soul' and her 'redemption'. Into this theological morass this Court should not and shall not tread."[94] The trial court also observed that these friends were "artful," because they lied to Robin's parents and encouraged Robin to lie to them as well.[95] Thus, according to the trial court, Robin met all three prongs of the artful and designing persons test for establishing incompetency.

B. *Holding of the Oklahoma Supreme Court*

Several important rules and comments relating to Oklahoma guardianship law should be noted from the majority opinion written by Chief Justice Barnes. First, the Oklahoma Supreme Court deviated from the "artful and designing persons test" by which to define incompetence, stating that the definition developed in *Winnett* is a better definition.[96] Second, the court ruled that the primary purpose of Oklahoma's guardianship law is the protection of property.[97] Third, the court held that the trial court's creation of a "judgmental immaturity" standard was an overbroad construction of Oklahoma's guardianship statutes, with its single effect being the denial of Robin Polin's right to her religious beliefs.[98] Lastly, the supreme court strictly scrutinized the trial court's factual determinations and failed to uphold the trial court's findings on the basis of a lack of substantial evidence.[99]

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tional to prohibit vagrancy, and similarly, the inability or lack of desire to be self supporting does not make one incompetent.

In re Polin, No. PG 83-76, slip op. at 2-3 (Dist. Ct. Tulsa Cty. Okla. 1983) (footnotes omitted).

93. *In re* Polin, No. PG 83-76, slip op. at 4-5 (Dist. Ct. Tulsa Cty. Okla. 1983).
94. *Id.* at 4.
95. *Id.* at 5.
96. *Polin*, 675 P.2d at 1015-16; *see infra* notes 107-08 and accompanying text.
97. *Polin*, 675 P.2d at 1014-15; *see infra* notes 100-13 and accompanying text.
98. *Polin*, 675 P.2d at 1014-16; *see infra* notes 114-124 and accompanying text.
99. *Polin*, 675 P.2d at 1016; *see infra* notes 126-39 and accompanying text.

C. *Analysis of Decision*

1. Purpose of Guardianships

Language in the Oklahoma Supreme Court's opinion in *Polin* limits the use of guardianships to the protection of property. The court states that the "primary purpose" of Oklahoma's guardianship statutes is to "protect people from dissipating the assets of their estates"[100] and to protect people from "being victimized by others desirous of depriving them of their property."[101] This language raises the question of whether Oklahoma's guardianship statutes can have secondary purposes not directly related to the protection of an incompetent's property.

Polin explicitly discusses the artful and designing persons test for incompetency, and states that the test is "too vague to be applied to the world of ideas,"[102] and that it "applies *only* to cases in which appointment of a guardian is necessary to protect an incompetent person from losing *property* to deceitful persons. . . ."[103] The court further ruled that the protection of property is the situation contemplated by the Oklahoma guardianship statutes[104] and that the court "will not permit application of this definition beyond [the protection of property] when such application invades the area of personal ideas, thoughts and beliefs."[105]

If this limiting language is strictly construed, a person who is insane and incapable of properly taking care of himself, but who does not possess property, would not be within the purview of Oklahoma's guardianship statute. This construction would be unfortunate because

100. *Polin*, 675 P.2d at 1014-15. The protection of the ward's property is an important element of the guardianship. *See* Taylor v. Gilmartin, 686 F.2d 1346, 1351 (10th Cir. 1982) (dicta); Shelby v. Farve, 33 Okla. 651, 651-53, 126 P. 764, 764-65 (1912). In one Oklahoma case, the Oklahoma Supreme Court dismissed a case involving a guardian's power to control the ward's right to enter into a marriage contract. *In re* Campbell, 450 P.2d 203 (Okla. 1966). The court pointed out that guardianships relate primarily to property rights. *Id.* at 207. *But cf.* OKLA. STAT. tit. 15, § 24 (1981) ("After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contracts, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined."); National Life Ins. Co. v. Jayne, 132 F.2d 358 (10th Cir. 1942). The *Jayne* court stated that "where a person is adjudged incompetent any conveyance or other contract attempted to be made by such person and any attempt by such person to designate a person or waive a right during the time he remains under actual guardianship is void." *Id.* at 360-61.

101. *Polin*, 675 P.2d at 1015.

102. *Id.* (quoting Katz v. Superior Court of San Francisco, 73 Cal. App. 3d 952, 970, 141 Cal. Rptr. 234, 244 (1977)).

103. *Polin*, 675 P.2d at 1015.

104. *Id.*

105. *Id.*

an incompetent may not have financial assets,[106] but such a person may still need assistance in the everyday management of his affairs.

The *Polin* court was apparently sensitive to this legal gap in remedies. Without expressing its reasoning, the court stated that the *Winnett* definition for incompetency was a better definition than the artful and designing persons definition.[107] The essence of the *Winnett* test is that a person is incompetent when he "is incapable of understanding and acting with discretion in the ordinary affairs of life."[108] Unlike the artful and designing persons test, the language of the *Winnett* test contains no reference to the protection of property. The *Winnett* test instead focuses on the inability of a person to function and to manage his affairs. While providing the potential for more favorable results in cases involving persons without property, the adoption of this definition is not consistent with the express language in the opinion limiting the use of guardianships to the protection of property.

The language limiting the Oklahoma guardianship statutes to the protection of property is further controverted by a written amendment to the court's decision. In discussing the purpose of the guardianship statute the court stated, "Additionally, the statute protects persons who for any reason cannot make day-to-day decisions required of them in order to function within our society."[109]

The reasoning for the court's application of a test that does not have a primary purpose for the protection of property is not clear in light of much of the language of the decision. Whether the decision precludes the use of the artful and designing persons test is unanswerable from a strict reading of the opinion. However, a reasonable interpretation of the decision would be to infer that the *Winnett* test is applicable in a situation in which a person needs a guardianship, but does not have property to be protected.

In *Polin*, the court applied both the *Winnett* and the artful and designing persons tests.[110] The court held that the characterization of Robin as "judgmentally immature"[111] would not withstand either test.

106. Robin Polin, although not adjudged incompetent by the Oklahoma Supreme Court, did not have any financial assets capable of being depleted by artful and designing persons. *Id.* at 1016.

107. *Id.* at 3086.

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

109. *Polin*, 675 P.2d at 1015; *Polin*, 55 OKLA. B.J. 268, 268 (Jan. 30, 1984).

110. *Polin*, 675 P.2d at 1016.

111. The trial court's finding of judgmental immaturity is discussed *supra* notes 85-91 and accompanying text.

The court stated that Robin "does not have financial assets capable of being depleted by artful and designing persons"[112] and that "the evidence clearly illustrates that Robin is 'capable of understanding and acting. . . in the ordinary affairs of life.' "[113] The court's decision does not provide the guidelines that courts will need to determine when application of each test is appropriate.

2. Denial of Robin Polin's Constitutional Right to Her Religious Beliefs

In determining that the guardianship created by the trial court interfered with Robin Polin's religious freedom, the Oklahoma Supreme Court focused on deprogramming cases, including *Katz v. Superior Court of San Francisco*[114] and *Taylor v. Gilmartin*.[115] *Polin* should be distinguished from *Katz* and *Taylor*, however, because *Polin* did not involve a deprogramming situation.[116] In both *Katz* and *Taylor*, a conservator was given almost unlimited and unrestricted control over a conservatee for the duration of the conservatorship.[117] The conservator's powers included the right to control the conservatee's body and mind for the purpose of deprogramming. Conversely, in *Polin*, the guardianship created by the trial court expressly prohibited the guardian from exercising control over Robin's religious worship.[118] The guardianship included prohibitions against control over both Robin's religious beliefs and religious acts.[119] *Polin* can be further distin-

112. *Polin*, 675 P.2d at 1016.

113. *Id.*

114. 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).

115. 686 F.2d 1346 (10th Cir. 1982).

116. The facts of *Polin* can easily be distinguished from the facts of the deprogramming cases. *See supra* notes 62-71 and accompanying text; *see also* Brief of Appellee at 27, *In re* Polin, 675 P.2d 1013 (Okla. 1983). In this brief, the appellee states, "[R]espondent's fixation on 'deprogramming' is unwarranted. No one is deprogramming anyone else. The record simply does not contain any evidence on the deprogramming of Robin Polin. A rather inflammatory argument, sounds devious and anti-God and constitution, but it is simply not happening." *Id.*

117. In *Katz*, the conservatorship order gave the conservator substantial control over the conservatee. *See Katz*, 73 Cal. App. 3d at 956 n.1, 141 Cal. Rptr. at 235 n.1. The *Katz* order required the conservator to be present with the conservatee at all times, and gave the conservator the right to choose the conservatee's residence, whether inside or outside the state. *Id.* In *Taylor*, the temporary guardianship order gave the temporary guardian the following powers: "[t]o (a) take said proposed ward into Petitioner's personal custody to have proposed ward counselled, examined, and treated by persons including, but not limited to physicians, psychiatrists, psychologists, social workers and lay persons; (b) to keep said ward in Petitioner's custody, even in the event said ward wishes to leave said custody; and (c) such further powers as are necessary to exercise those above granted." Taylor v. Gilmartin, 686 F.2d 1346, 1349 (10th Cir. 1982).

118. *See In re* Polin, No. PG 83-76, slip op. at 6 (Dist. Ct. Tulsa Cty. Okla. 1983).

119. *Id.* By expressly prohibiting all control over Robin's religious acts as well as beliefs, the guardianship properly reflected the concerns of the United States Supreme Court decisions re-

guished from *Katz* because the trial court's orders in *Katz* contained "no findings of fact which would disclose the ground or grounds on which the orders were based."[120] In contrast, the *Polin* trial court explicitly enumerated not only those factors which contributed to its decision, but also those which did not. In citing and relying on *Katz* and *Taylor*, the supreme court did not note the difference in the degree to which the guardian or conservator was allowed to influence and control the ward, or the differences in the trial courts' disclosures of facts.

A careful and strict reading of the Oklahoma Supreme Court's opinion does not reveal with certainty whether any guardianship that affects religion will be unconstitutional. Language in the opinion indicates that the court's holding was weighted heavily by its determination that infringement of religion was the "single effect" of the guardianship.[121] An inference can be drawn from this language that a guardianship can address religious practice so long as it has some other compelling objective and is closely tailored to achieve that objective.[122] This is a reasonable inference since almost every guardianship will in some way, as a necessary and practical incident of its existence, affect the ward's practice of religion.

An alternative interpretation is also possible. A strict reading of *Polin* could indicate that no matter how carefully a guardianship is tailored, and how legitimate its objective, it may be impermissible to affect religious worship at all.[123] Such an interpretation of *Polin* is in-

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garding the fundamental right of freedom of religion. *See supra* notes 29-41 and accompanying text. The guardianship also reflected the view of the Oklahoma Supreme Court. *See* L'Aquarius v. Maynard, 634 P.2d 1310 (Okla. 1981); Lewellyn v. State, 592 P.2d 538 (Okla. Crim. App. 1979).

120. *Katz*, 73 Cal. App. 3d at 963, 141 Cal. Rptr. at 240.

121. *Polin*, 675 P.2d at 1014, 1016. "The trial court's creation of a vague standard such as 'judgmental immaturity' cannot be permitted as camouflage for the single effect of its decision, the denial of Robin Polin's right to her religious beliefs." *Id. But see supra* text accompanying note 15 (language of Judge Frank's order). A literal reading of the order indicates that Robin Polin's right to her religious beliefs is the one area that the guardianship will not affect. *Id.*

122. *See supra* notes 21-28 and accompanying text (discussing the least restrictive alternative).

A clarification of this vague rule of law can be found in the Oklahoma Court of Criminal Appeals' opinion in Lewellyn v. State, 592 P.2d 538 (Okla. Crim. App. 1979). This case involved a first amendment challenge of the marijuana laws of Oklahoma by the sovereign of the Holy American Church on the basis that the laws do not provide for use of the drug as a religious sacrament. *Id.* at 539. The court stated: "Religious liberty is not an unlimited freedom, and while laws cannot interfere with mere religious belief and opinions, they may inhibit certain acts or practices . . . . The religious liberty intended by the framers of the Constitution is not a license unrestrained by law." *Id.* at 540.

123. The Oklahoma Supreme Court stated that "We will not permit application of [the definition of incompetency] beyond [the parameters of protection of property] when such application invades the area of *personal ideas, thoughts, and beliefs*." *Polin*, 675 P.2d at 1015 (emphasis added).

consistent with United States Supreme Court and Oklahoma decisions that have allowed interference with religious acts under many circumstances.[124] Because of the different possible interpretations of the supreme court's opinion in *Polin*, the Oklahoma Supreme Court has created much uncertainty regarding the extent to which a guardianship may affect religion without violating the ward's constitutional rights.

The trial court recognized that the realm of religious freedom was not the place to insert a substitute decision-maker and therefore expressly restricted the guardian's right to interfere in Robin's chosen form of worship. The finely-tailored guardianship created by the trial court was not expressly mandated by Oklahoma law, but the guardianship did exemplify the spirit behind the *Boyer* decision.[125] In reviewing such a guardianship, a reviewing court should carefully examine the trial court's order to determine the extent to which it infringes upon religious freedom. The infringement should be weighed against the need for the guardianship in that particular case. However, in reviewing the guardianship in *Polin*, it is evident that the Oklahoma Supreme Court did not properly consider the need for the guardianship or its full effect. As a result, the *Polin* decision will have the effect of undermining the efforts of trial judges to create guardianships when even the slightest possibility exists that it will interfere with the right to religious freedom. This will produce unfortunate results in situations where the facts indicate that an individual is incompetent and therefore in need of a guardianship over his person and property.

3. Sufficiency of the Evidence

Much of Oklahoma's guardianship law is derived from the laws of California[126] and South Dakota[127] and, as in those jurisdictions, discretionary powers have developed in Oklahoma's probate courts.[128] "In

124. *See supra* notes 29-42 and accompanying text. The expression of this view may be found in Lewellyn v. State, 592 P.2d 538 (Okla. Crim. App. 1979), wherein the court stated:

> Religious liberty is not an unlimited freedom, and while laws cannot interfere with mere religious belief and opinions, they may inhibit certain acts or practices. . . . One cannot stretch this liberty so as to interfere with that of his neighbor or violate police regulations or the penal laws of the land, enacted for the good order and general welfare of all the people.

Id. at 540 (citing McMasters v. State, 21 Okla. Crim. 318, 207 P. 566 (1922)).

125. *In re* Polin, No. PG 83-76, slip op. at 6 (Dist. Ct. Tulsa Cty. Okla. 1983). The guardianship order was structured to protect the fundamental rights of the ward. *See supra* text accompanying note 15.

126. *See* Kersey v. McDougal, 79 Okla. 53, 58, 191 P. 594, 599 (1920); *Polin*, 675 P.2d at 1015.

127. *See* Fish v. Deaver, 71 Okla. 177, 180, 176 P. 251, 253 (1918).

128. *See In re* Cowper's Estate, 179 Cal. 347, —, 176 P. 676, 677 (1918); *In re* Knott's Guardi-

the appointment of guardians, the county courts are vested with a sound legal discretion; and their judgments in such cases will not be overruled, unless it is apparent that there has been an abuse of such discretion."[129]

When ascertaining whether the evidence is sufficient to sustain the trial court's decision, the supreme court must give deference to the trial court's observations and findings regarding the credibility of witnesses, especially when conflicting testimony exists.[130] The court has held "that credibility of witnesses and effect and weight to be given to conflicting or inconsistent testimony are questions of fact to be determined by the trier of the facts, whether court or jury, and are not questions of law for the Supreme Court on appeal."[131] Numerous statements concerning the same principle of law have been published by the Oklahoma Supreme Court in regard to guardianship proceedings.[132]

In the guardianship proceedings in *Polin*, the trial court characterized Robin as judgmentally immature.[133] The supreme court held that the sole effect of judgmental immaturity as a standard of incompetency was an abridgment of the constitutionally guaranteed right to free exercise of religious beliefs.[134] However, the written decision of the trial

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anship, 71 S.D. 53, —, 21 N.W.2d 59, 61 (1945). An abuse of discretion or a clear deficiency of evidence will be required for the trial court's decision to be overruled. Gould v. Smith, 405 P.2d 82, 83 (Okla. 1965); *In re* Estate of Fox, 365 P.2d 1002, 1006 (Okla. 1961); *In re* Vaughn's Guardianship, 205 Okla. 438, 239 P.2d 403 (1951). *But see In re* Winnett's Guardianship, 112 Okla. 43, 239 P. 603 (1925) (Oklahoma Supreme Court reviewed all evidence and reversed judgment appointing guardian due to lack of sufficient competent evidence).

129. *In re* Estate of Fox, 365 P.2d 1002, 1006 (Okla. 1961) (quoting Brigman v. Cheney, 27 Okla. 510, 510, 112 P. 993, 993 (1910)).

130. "Where the evidence is in conflict and there is competent evidence and inferences that may be drawn therefrom to reasonably sustain the verdict rendered and the verdict rendered has the affirmative approval of the trial court, this court will not disturb the verdict." *In re* Carney's Guardianship, 110 Okla. 165, 167, 237 P. 111, 113 (1925) (citations omitted).

131. *In re* Estate of Washam, 364 P.2d 896, 897 (Okla. 1961); *see* Plumer v. Pierce, 208 Okla. 526, 257 P.2d 813 (1953).

132. This proposition has also been endorsed in California. *See Katz*, 73 Cal. App. 3d at 980, 141 Cal. Rptr. at 250-251; *In re* Walters, 37 Cal. App. 2d 239, 231 P.2d 473 (1951). The court in *In re* Carney's Guardianship, 110 Okla. 165, 167, 237 P. 111, 113 (1925) stated:

> We are also of the opinion that it was sufficient to sustain the findings of the referee, who had the parties and the witnesses before him in the taking of the testimony in this cause, and who was in a better position to weigh the testimony and give the proper weight to the testimony of each witness than is this court upon the record presented here.

In re Bogan, 441 P.2d, 972 (Okla. 1968) involved the failure of memory on the witness stand of the alleged incompetent. The court stated that "we must defer to the trial court, who observed her demeanor and was aware of her inflections and attitude and the circumstances of the questioning." *Id.* at 975.

133. *In re* Polin, No. PG 83-76, slip op. at 3 (Dist. Ct. Tulsa Cty. Okla. 1983); *see Polin*, 675 P. 2d at 1014.

134. *Polin*, 675 P.2d at 1014.

court makes it clear that the trial court did not rely solely on a vague term of psychological art, but instead based its decision on several specific mental deficiencies.[135] After a strict application of the artful and designing persons test to these factual determinations, the trial court felt compelled to adjudge Robin mentally incompetent.[136] The Oklahoma Supreme Court's attack on the trial court's terminology was not a fair review of the trial court's decision, given the facts underlying the trial court's standard of judgmental immaturity. The guardianship in *Polin* was a lengthy proceeding that involved conflicting facts and conflicting testimony. The trial court had the benefit of personally observing the proceeding to give appropriate weight to the credibility of the witnesses. The trial court even required that the petitioners prove the incompetence of the respondent by clear and convincing evidence though such a heavy burden of proof was not expressly mandated under the circumstances.[137] Even though the supreme court applied a different test for incompetency than the test applied by the trial court, it is difficult to understand how the supreme court could have made opposite conclusions of fact about Robin Polin while still deferring to the trial court's findings.[138]

VI. CONCLUSION

In re Polin involved disputed facts and difficult issues regarding sensitive fundamental constitutional rights in the context of a stigmatizing legal proceeding. It was inevitable that whatever decision would be rendered would receive contradictory reviews.

The Oklahoma Supreme Court reversed the trial court's decision in *Polin* and in so doing clarified old law and created new law. However, many uncertanties still exist concerning the application of these principles of law. It was the court's first opportunity to consider the conflicts between Oklahoma's guardianship laws and the fundamental constitutional right to free exercise of religious beliefs. By its holding in *Polin*, the Oklahoma Supreme Court has greatly disabled the power of probate courts to accommodate conflicting doctrines with a carefully created and finely tailored guardianship. The holding also left many

135. *See supra* notes 85-92 and accompanying text.

136. *In re* Polin, No. PG 83-76, slip op. at 5 (Dist. Ct. Tulsa Cty. Okla. 1983).

137. *In re* Polin, No. PG 83-76, slip op. at 9 n.7 (Dist. Ct. Tulsa Cty. Okla. 1983).

138. *Polin*, 675 P.2d at 1014-16.

collateral questions unanswered. As a consequence, the court can expect to review the same issues many times in the future.

Spencer C. Barasch

APPENDIX

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

In The Matter Of the Guardianship Of ROBIN ANDREA POLIN))) *case number PG 83-76*

Decision of the Court

12 May 1983

Robert D. Frank
Judge of the District Court*

I. ISSUES

The Court is today faced with a decision made difficult by reason of extraordinarily complex legal issues, tragic facts, and disagreement among expert witnesses. In addition, this Court's research indicates it is a case of first impression.

The facts have been shown to the Court in testimony over five days, and the Court has been offered 35 exhibits, including books, financial statements and psychological test results. Notwithstanding this great array of information before the Court, the issues—both factual and legal—can be briefly and accurately set forth.

Robin Polin is 18 years old. She has been deaf and mute since birth. She was raised in a Jewish family. Beginning in about March of 1982 she became interested in a sect of Christianity which can only be called "fundamentalist." Her interest in and desire to be converted to this strain of the Baptist, Christian religion caused friction with her Jewish parents. Finally, Robin left home and in response to that, her parents petitioned this Court to adjudicate her as "an incompetent per-

* All footnotes are the Court's. The original page numbers of the slip opinion are in brackets.

son." That phrase is defined under the statutory and case law of this State. In spite of this apparent motive, the testimony has not been limited to this religious conflict.

Before determing the ultimate issues before the Court today, it is appropriate for the Court to specify the law and the facts used by the Court to make this determination.

II. LEGAL DEFINITION OF INCOMPETENCY

Regarding "incompetency" the legislature has mandated the Court that if ". . . it appears to the judge . . . that the person in question is *incapable of taking care of himself and managing his property*, he must appoint a guardian." (Emphasis added.)[1]

Our State Supreme Court has attempted to clarify the phrase "incapable of taking care of himself and managing his property" by stating that it means that if a person, for any cause is "unable or incapable, unassisted, of properly taking care of himself or managing his property and who by reason thereof, would be likely to be deceived or imposed upon by artful or designing persons"[2] then in that event that person is "incompetent" and a guardian must be appointed.[2]

It is unfortunate that the term first used by our legislature in 1910 (ie. "incompetent") is still in use. It is offensive to modern usage, and is prone to be misunderstood by laymen, as well as to carry with it images of insanity, retardation, mental illness, and other opprobrious and incorrect terms. It would not be improper to equate the law's use of the term "incompetent" with the layman's term "disabled."[3]

In addition to the semantical problems inherent in the use of the term "incompetent" the legal definition causes one other problem. As quoted above, the Oklahoma Supreme Court has explained the statutory term by use of the qualifying phrase to the effect that one is incompetent if one cannot PROPERLY care for one's affairs without assistance. That begs the question, "Properly, according to whose standards?" Never has that question been as troublesome to this Court as it is in this case where the alleged improper management includes a religious choice. Courts do not sit to determine if one acts properly based upon religious preference.

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1. 58 O.S. 1981 sections 851, 852
2. In Re the Guardianship of Bogan 441 P2d 972,976 (Ok. 1968)
3. Bogan, supra; Mathews v. Acacia Mutual Life Insurance Co. 392 P2d 369 (Ok. 1964)

III. EVIDENCE BEFORE THE COURT WHICH CANNOT CONSTITUTE INCOMPETENCY

In determining if Robin Polin is unable, unassisted, to properly manage her own affairs, and by reason thereof is likely to be taken advantage of, it would simplify matters somewhat if the Court first sorted out what evidence and factual issues are clearly *not* of concern to this proceeding.

1. First and foremost among those factual issues with which this Court is not concerned is Robin's religious choice. This State, whether acting through the legislature, the courts, or via a combination thereof cannot abridge the free exercise of religion.[4] The only exception to that seemingly absolute rule of federal and state constitutional law is rare, minimally used, and absolutely not before this Court today.[5]

2. Secondly, the evidence has been overwhelming, and wholly without contradiction that Robin has an average to above average intellectual potential or I.Q. The Court cannot even consider making the requested determination of incompetency on that sort of foundation. Evidence of low I.Q. alone is insufficient, even if tied to low academic achievement and physical handicap.

3. Thirdly, the Court has also heard much evidence that despite Robin's high I.Q. her academic achievement level is less than that for other people her age. In spite of the difficulty that educators have in testing deaf students, that fact has been clearly shown. However, such low academic achievement (compared to the population as a whole - whether deaf or hearing) is not grounds for the requested adjudication of incompetency. If that evidence were sufficient then[3] many typical adults, including graduates of our high schools would properly be so adjudicated. Even functional illiterates cannot, merely by reason of their low academic skills be stripped of their civil rights to control their own affairs. Poor academic achievement, in and of itself, is not sufficient evidence for this Court to grant the requested relief.

4. Fourthly, Robin's employment history shows her unable to get employment except on charitable terms. Her previous jobs have been in special environments for which deaf people were specifically provided. Once again, however, unemployability alone is not grounds for a judicial determination of incompetency. It is unconstitutional to pro-

4. U.S. Constitution, Amendment One; Oklahoma Constitution Art.I, section 2

5. 51 Southern California Law Review, no. 1, pg. 1,8 "Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment by Robert Delgado, fn.#5

hibit vagrancy,[6] and similarly, the inability or lack of desire to be self supporting does not make one incompetent.

IV. JUDGMENTAL IMMATURITY

The above four (4) areas are clearly not grounds for determining Robin to be incompetent. The Court is left with one other allegation in need of inquiry where the evidence was more contradictory. That area is Robin's degree of "judgmental maturity."

Viewing this evidence in light of the rules of law mentioned previously, the Court must determine three things—if:

a) Robin is deficient in this area, and
b) if so whether the deficiency impairs her from "properly" handling her affairs, and
c) if by reason thereof she can be taken advantage of by artful and designing persons.

A. *Existence of Deficiency*

The testimony of expert witnesses varied greatly in assessing Robin's maturity in interpersonal and social relationships. The Court, when sitting as trier of the facts (eg. when no jury is present) need not surrender its determination of the facts to the expert witnesses, for the testimony of an expert, like that of any other witness is to be evaluated for weight and credit by the trier of fact.[7]

The Court hereby determines, as a matter of fact, that Robin Polin does suffer, at this time, from a deficiency in her ability to make personal decisions. In making this determination the Court was impressed with the qualifications, demeanor, and testimony of Dr. Catherine Burden. Dr. Burden's unbiased, professional and competent testimony showed that as recently as last year Robin's interpersonal [4] and decision making skills were on the level of a nine (9) year old child. She also indicated that Robin's difficulty with spatial distinctions may indicate some problems in addition to her judgmental deficiency.

B. *Ability to Properly Manage Her Affairs*

Having determined that Robin's judgmental maturity is grossly out of line with others of her age, and consistent with that of young children, the Court must now turn to the question of whether or not

6. Papachristou v. City of Jacksonville 405 U.S. 156 (1972)
7. Oklahoma Uniform Jury Instructions - Civil#3.21

this pschological/social problem prohibits Robin from "properly" taking care of herself and managing her own affairs.

Robin's testimony showed that her psychological immaturity does prohibit her from "properly" taking care of her affairs. She is subject to displays of frustration that could not be tolerated in social and commercial intercourse. While her deafness may be a contributing factor to this, her deafness is not her impediment to properly managing herself and her affairs. Her childlike decision making process prohibits her from even considering her physical wellbeing and how she can provide for even the minimal necessities of life. She is led from house to house by people she perceives as her friends, without concern or thought to her future . . . . except her vague and persistent desire to " . . . serve the Lord . . ."

She not only cannot properly manage her own affairs, she has not exhibited to this Court an understanding that her affairs need to be handled at all.

C. *Ability to be Taken Advantage of by Designing Persons*

Robin, then, does have a psychological deficiency which prohibits her from properly managing her own affairs. Some of the cases defining incompetency add the requirement that the respondent, by reason of her disability must also be able to be taken advantage of by artful or designing persons.[8] That term is no where defined nor does the Court find that it is especially helpful in determining incompetency.

Nonetheless, in order to insure that the Court properly addresses the issues the Court should comment on the "artful or designing persons" prong of the test for competency.

Robin is currently surrounded by what have been described as her "Christian 'friends.' " That they are "designing" is agreed by all. They have designs—at least—on what they call her "salvation," her "soul" and her "redemption". Into this theological morass this Court should not and shall not tread. Nor will [5] this Court of civil law editorialize on the motives or intentions of Robin's co-religionists.

That these so-called "Christian 'friends' " are artful in their tactics is also clear. In prostelytizing their religion they have determined that the conversion of young Robin justifies the violation of one of their cardinal commandments—that one should not lie. For both Donna

8. In Re the Guardianship of Prince 379 P2d 845 (Ok. 1963)

Hull and Rev. Peknik lied to Robin's parents and encouraged Robin to lie to them as well. They have thereby taken advantage of her gross judgmental immaturity.

It is not the province of this Court to moralize or rule on such behavior. But it clearly shows that persons with designs upon Robin (however good their intentions may be) are artful and deceitful in pursuit of their objective.

THE COURT WOULD HEREBY FIND THAT ROBIN POLIN IS AN INCOMPETENT PERSON, IN THAT SHE CANNOT PROPERLY MANAGE HER AFFAIRS AND TAKE CARE OF HERSELF, AND BY REASON THEREOF CAN BE TAKEN ADVANTAGE OF BY ARTFUL OR DESIGNING PERSONS.[9]

V. APPOINTMENT OF GUARDIAN

This trial has been bifurcated. Now that the adjudication of incompetency has been made, however, a guardian must be appointed. The primary applicants for that fiduciary relationship are Robin's parents: Paul and Marsha Polin.

A separate hearing will be held to make the permanent appointment. Pending that hearing and the appointment of a general (permanent) guardian, someone must immediately be appointed to take care and custody of her person and estate.

Under the evidence the Court cannot appoint Paul Polin in that capacity. Such appointment is clearly not in the best interest of Robin.

To appoint Marsha would subject Robin to the home and indirect control of Paul and therefore would also be inappropriate.

THE COURT WILL APPOINT BARBARA POLIN AS SPECIAL (TEMPORARY) GUARDIAN OF THE PERSON AND ESTATE OF ROBIN.[10]

This appointment is effective immediately, and will remain effective until further order of the Court. Any interested party may apply to the Court for appointment as permanent guardian. Upon application the Court will set a hearing date on that issue. If no applications are filed before 31 May 1983, Barbara Polin will be appointed permanent

9. The Oklahoma statutes and authorities do not duscuss the burden of proof in guardianship cases. While a guardianship is not the same as a determination of involuntary commitment in mental health proceedings, the Court nonetheless has used the more strict test of burden of proof, to-wit: that the petitioner's have proven the incompetence of the respondent by clear and convincing evidence. *See* Addington v. Texas 441 U.S. 418 (1979).

10. 30 O.S. 1981 section 5

guardian.[11][6]

VI. Restrictions of Guardian

The temporary guardian of Robin is advised of the following restrictions upon her powers and duties:

1. The ward is not to be controlled directly or indirectly by Paul Polin. The guardian serves as an officer of the Court, and shall receive necessary directions from the Court, upon application.
2. The right to religious preference being a fundamental constitutional right, the guardian is expressly forbidden from interfering in Robin's chosen form of religious worship. The only exception to this restriction is if said religious practice would be of immediate danger to the health or financial well-being of the ward. This restriction is made in spite of the personal disagreement that the guardian may have with the choice Robin may make. Other than the restrictions and exceptions set forth herein, no other interference with Robin's religious preference or worship shall be made by the guardian except upon application and order from this Court.
3. The guardian shall not allow the ward to travel out of the State of Oklahoma without Order of the Court.

VII. Limitations of Case to Facts at Bar

Having made the required findings of fact and conclusions of law the Court has discharged its duty by rendering judgment. In this particular case it is proper to add some additional clarifying comments. In finding Robin Polin incompetent this Court has not made any adjudication on the status of handicapped people, or of all deaf or hearing impaired people. To so conclude is a misstatement of this Court's ruling.

The determination of incompetency is based upon the particular evidence presented in this particular case. Each case is unique and the Court is cognizant of the individuality of each litigant who appears before it.

Today's ruling stands for one proposition and only one proposition. That is that Robin Polin is at this time, an incompetent person

11. 30 O.S. 1981 section 4; At this hearing no preferential right to appointment will be afforded Paul or Marsha Polin merely by reason of blood relationship to the respondent. See Ned v. Robinson 74 P2d 1156 (Ok. 1938); In Re Fegans Guardianship 45 Cal 176 (1872)

under the laws of the State of Oklahoma based upon the evidence before this Court.

VIII. REVIEW

Oklahoma law does contemplate the restoration to competency. Statutory procedures[12] are enacted for that expressed purpose. Robin is fortunate that[7] her disability, under the evidence, is one that she will surely out grow. The Court looks forward to the day when evidence can be presented showing a sufficient improvement in the areas discussed. At that time the Court will be happy indeed to perform its duty . . . . to enter an order of restoration.

To insure continued judicial scrutiny in that regard, this matter will be set for review on 17th the May day [sic] of May 1984 at 2:00 o'clock P.M. This, of course is without prejudice to any interested party filing an application for hearing on any appropriate ground at any time.

IX. SUMMARY OF RULING

In summary, the Court would, at this time, order that:

1. Robin Polin is unable, unassisted to properly manage her affairs and by reason thereof can be taken advantage of by artful and designing persons.
2. Robin Polin is therefore incompetent under the laws of the State of Oklahoma.
3. Barbara Polin is appointed special/temporary guardian forthwith.[13]
4. Applications for appointment of a general/permanent guardian should be filed by 31 May 1983. Upon receipt thereof the Court will set a hearing date.
5. If no applications are filed, Barbara Polin will become general/permanent guardian on 1 June 1983.
6. The guardian is prohibited and restricted from interfering with the ward's free expression of religion, except if same would be of immediate danger to the health or financial well-being of the ward.

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12. 58 O.S. 1981 section 854

13. Bond will be set in the amount of $500. Barbara Polin, upon subscribing the oath of guardian of the person, and having the Court sign the letter of Guardianship will assume her duties as guardian of the person. She shall not act as guardian of the estate until her bond is posted and approved by the Court. 58 O.S. 1981 section 853

7. The Ward is prohibited from leaving the State of Oklahoma except upon order of the Court.
8. This matter will be passed for review to 17th day of May 1984 at 2:00 o'clock P.M., without prejudice to any interested party applying for any appropriate hearing at any other time.