

Protecting the Mentally Retarded:
An Empirical Survey and Evaluation
of the Establishment of State
Guardianship in Minnesota

Robert J. Levy

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Protecting the Mentally Retarded: An Empirical Survey and Evaluation of the Establishment of State Guardianship in Minnesota⁺

Minnesota's program of state guardianship has gained national attention in the search for devices to protect and care for mentally deficient and epileptic persons. While not finally assessing the actual supervision of wards by the state commissioner of public welfare, this report scrutinizes the standards and procedures utilized by the probate courts and welfare departments in establishing guardianship. This article stresses the need for reform of current practices to ensure proper cooperation between judicial and behavioral authorities, and to ensure proper safeguards for the individual rights of persons who may be subjected to governmental authority. Likewise, the author concludes, the device of guardianship should not be employed as a convenient tool for treatment of a variety of social problems which do not involve mental retardation.

Robert J. Levy*

The Congress of the United States, a number of state legislatures, even the community at large, have apparently overcome their traditional indifference — or embarrassment, perhaps — about the problems of the mentally retarded. Great strides are being taken to obtain adequate treatment and protective programs; research of enormous variety is burgeoning; experimentation with new educational, treatment, and custodial methods is

⁺ The factual data reported in this essay were gathered while the author was engaged in a study of state guardianship in Minnesota, as a consultant to The Mental Competency Study (U.S. Public Health Service Grant, MH 1088, Director, Richard C. Allen, Professor of Law, The George Washington University Graduate School of Public Law), which is supported by the National Institute of Mental Health in cooperation with the National Law Center, The George Washington University, Washington, D. C. The author takes sole responsibility for the data and conclusions.

*Professor of Law, University of Minnesota.

in progress.¹ Retardation is obviously in the public spotlight. It is not surprising that legal doctrines concerning the retarded have also attracted fresh inquiry: "particularly in recent times, the law has expressed its concern for the weak, 'the naturally disabled,' in a rapidly expanding body of statute and opinion."² Much of the recent interest has been lavished upon an ancient legal device — "guardianship." Legislation in most states authorizes judicial (commonly probate court) appointment of a private individual as the personal protective agent of an incompetent.³

Guardianship is a mechanism through which the court, acting for society, "guards" the rights and liberties of a retarded person when he cannot guard them for himself. It accomplishes this by transferring the legal power of choice in certain personal . . . matters from the retarded person to another who is able and willing to exercise it.⁴

Because guardianship eliminates or circumscribes the ward's "power of choice," of course, the guardian can also minimize the retarded person's ability to jeopardize the rights and liberties of others. Although protection and control are valuable goals, the method used to attain them cannot be ignored — the retarded person is deprived of his discretion.

National attention has been focused on Minnesota because its Probate Code permits "mentally deficient" and "epileptic" persons to rely upon, or be subjected to, the "guardianship" of a government official. The Minnesota statute could not go unnoticed; since professional observers have found community retardation programs inadequate, especially when the retardate has not been able to rely upon his parents' protection, any promising device deserves consideration. Thus, the President's Panel on Mental Retardation suggested:

The protection of guardianship should not be denied where there is no suitable relative to undertake it One possible solution is the establishment, perhaps through the State Protective Agency . . . , of a program of public guardianship of the person. Although guardianship

1. See generally Maternal and Child Health and Mental Retardation Planning Amendments of 1963, 77 Stat. 275, 42 U.S.C. §§ 1391-94 (Supp. V, 1964); Mental Retardation Facilities and Community Mental Health Centers-Construction Act of 1963, 77 Stat. 284, 42 U.S.C. §§ 2661-96 (Supp. V, 1964); U.S. PRESIDENT'S PANEL ON MENTAL RETARDATION, A PROPOSED PROGRAM FOR NATIONAL ACTION TO COMBAT MENTAL RETARDATION (1962) [hereinafter cited as PROGRAM FOR NATIONAL ACTION].

2. TASK FORCE ON LAW, U.S. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT 1 (1963) [hereinafter cited as TASK FORCE ON LAW].

3. See generally LINDMAN & MCINTIRE, THE MENTALLY DISABLED AND THE LAW 225-51 (1961).

4. TASK FORCE ON LAW 24.

might then be formally vested in a State agency, duties would actually be carried out by individual staff members. The experience of Minnesota with such a program might well be studied by other States.⁵

In addition, Minnesota "state guardianship" has received the commendation of nationally recognized experts in the field.⁶ But empirical data has been lacking.

This essay reports part of a survey of the Minnesota program — observations of the standards applied and the procedures followed by probate courts in "committing" persons to the guardianship of the commissioner of public welfare.⁷ The wisdom of commitment policies cannot be finally assessed, of course, without an examination of the benefits and disadvantages of the guardian's actual supervision of his wards. Nonetheless, it seemed appropriate to publish this part of the study separately; proceedings to establish guardianship have not attracted the attention their importance to individual liberties warrants, and they have too often been conducted without minimal safeguards. Other states considering a state guardianship program should be apprised of the risks; the local bar should be apprised of current practices and the urgent need for reforms. In any event, the commitment process illustrates in microcosm the importance and difficulty of two problems which pervade social program planning for the mentally or emotionally disabled: (1) how to insure that the judicial hearing permits cooperation between the judicial officer and the behavioral experts who participate, without sacrificing the rights of the subject of the hearing; (2) how to resolve "the critical issue between the law and the care taking professions" — who should have ultimate authority "to impose 'superior' judgment on an unwilling, unconscious, unprotected or uninformed subject."⁸

It may be useful to begin by suggesting, very generally, the safeguards which an ideal guardianship program would incorpor-

5. PROGRAM FOR NATIONAL ACTION 152.

6. Dr. Elizabeth M. Boggs, a member of the President's Panel and a past president of the National Association for Retarded Children, wrote: "I have always considered that the Minnesota guardianship program was twenty years ahead of most other states in recognition of these basic concepts (of responsibility)." The remark, dated July 28, 1957, was quoted in Advisory Board on Handicapped, Gifted and Exceptional Children, Report — The Trainable Retarded Child in Minnesota 23 (June 18, 1958).

7. The term "commitment" is used in this essay to signify *only* the probate court order establishing the commissioner of public welfare as a person's guardian. That is the common meaning of the term in Minnesota. "Institutionalization" is used throughout to describe a person's removal from the community.

8. TASK FORCE ON LAW 19.

ate. These ideas are by no means original. Many of them were included in the *Report* by the Task Force on Law. Of utmost importance was the general principle framed by the Task Force:

It is a basic democratic principle that no diminution of human rights and human dignity can be countenanced by the law for any person — let alone any class of persons—except for good reason, following due process, and then to the minimum degree necessary and for the shortest period possible.⁹

The process by which guardianship is established must be safeguarded. The statute should state its boundaries with clarity. The retardation program suffers if judges are given no valid method of identifying retardates who require community concern: a guardian may not be available to exercise supervision if a retardate jeopardizes his own safety or the community's. The risks, to the guardian and to wards, are equally substantial if the legislation does not adequately specify those who were to be excluded from the guardianship program: welfare departments may have to squander precious resources, especially personnel, supervising wards who would be as well off entirely on their own; those wards who require, or could profit from, closer supervision may be denied the maximum benefits of guardianship; the guardian's powers may be used to impose unjustly on individuals who should not have been deprived of their discretion. Safeguards must also surround the guardian's use of his powers in supervising and controlling his ward — protecting the ward while permitting flexibility in program operation. A ward's freedom should be maximized consistent with his abilities; the scope of the guardian's powers should be specified in the order appointing him; the court should regularly, if not automatically, review the ward's condition and should require reports from the guardian during intervening periods; involuntarily institutionalized wards should have some independent protector who could terminate unnecessary detention. In short, "the law must . . . protect the rights of the retarded; it cannot rely exclusively on the good intentions of those who manage institutions and other programs."¹⁰

I.

The Minnesota probate courts are authorized to commit "mentally deficient" and "epileptic" persons to the guardianship of the

9. *Ibid.*

10. PROGRAM FOR NATIONAL ACTION 149-50. This essay focuses on the risks of guardianship by a government agency. This is not to suggest that similar safeguards are unimportant when a private guardian is appointed.

commissioner of public welfare, an appointive official who administers all state welfare programs. The institutionalization of "mentally ill" persons is also accomplished by probate court proceedings; but the commissioner's responsibility to persons institutionalized as "mentally ill" is much more limited. The statutory framework of the state guardianship program is described below. Initially, a brief historical survey may be helpful.

A. THE LEGISLATIVE BACKGROUND

Minnesota's program for the mentally retarded began in 1851, at the first meeting of the then territorial legislature. Probate court judges were delegated care and custody of the person and property of "idiots, lunatics, and other persons of unsound mind. . . ." An institution for the feeble-minded was authorized at Faribault. Subsequent legislatures prohibited placement of the mentally retarded in the state hospital for the insane, required the Faribault institution to provide the retarded with proper "training and instruction," and established additional schools and hospitals for "idiots and imbeciles," "defectives," and for the "epileptic."¹¹ In 1910, the Board of Control (whose powers are now exercised by the commissioner of public welfare) employed a well known psychologist, Dr. Fred Kuhlmann, to devise a mental testing program for use in state institutions and to provide better classification of retardates. Dr. Kuhlmann became the director of research at Faribault. His views were influential in the subsequent development of Minnesota's retardation program; the policies he favored are still reflected in the county welfare departments' administration of state guardianship.¹²

A 1916 Governor's Commission on Child Welfare recommended legislation authorizing the Board of Control to exercise guardianship of the feeble-minded. The commission believed that ultimate

See generally TASK FORCE ON LAW 25-26; LINDMAN & MCINTYRE, *op. cit. supra* note 8.

11. This material is based upon an undated mimeographed statement discovered in the files of the Section for Mentally Deficient and Epileptic, Minnesota Department of Public Welfare. A copy has been placed on file in the University of Minnesota Law Library. For a more detailed description of the historical development of the program, see THOMSON, PROLOGUE 1-5, 14-32 (1963) [hereinafter cited as THOMSON]. Miss Thomson was the supervisor of the Section for Mentally Deficient and Epileptic from 1924 to 1959.

12. Miss Thomson commented that Dr. Kuhlmann "influenced me, but I could never wholly agree with him . . ." THOMSON 32. Nonetheless, under Miss Thomson's leadership, state policies concerning the guardianship program were consistent with Dr. Kuhlmann's views. See particularly notes 71-79, 104-23 *infra* and accompanying text.

responsibility for the handicapped should rest with a state agency rather than with private individuals and organizations.¹³ In addition, the "commitment" provision was designed to permit the agency to exercise authoritative control of retarded persons:

Almost every community in the state furnishes examples of hereditary feeble-mindedness. Our present laws do not permit the compulsory commitment of feeble-minded persons to, nor their detention in, the state school for the feeble-minded at Faribault. Cases are not infrequent of mentally subnormal children whose presence in the community is a serious public menace, and for whose own welfare the wise and kindly segregation of the state institution is needed, but whose parents cannot be induced to take the simple steps necessary for their admission. For such, and especially for girls and women of child-bearing age, there is needed a compulsory commitment law. . . . This measure is both remedial and preventive in its purpose.¹⁴

The statute defined a "feeble-minded person" as one "who is so mentally defective as to be incapable of managing himself and his affairs, and to require supervision, control and care for his own or the public welfare."¹⁵

The 1917 statute had not been substantially modified when, in 1933, the Minnesota Bar Association began a thorough study of the guardianship provisions and the other sections of the Probate Code. Although the 1935 Code revised the provisions governing appointment of private guardians of the person,¹⁶ only two major changes were made in the state guardianship program. Commitment to the commissioner's guardianship was authorized for any "epileptic person";¹⁷ the term was left undefined, and the 1917 definition of "feeble-minded person" was deleted.¹⁸ The decision to forego definitions was a product of the judges' unhappiness with the prior statutory language and their assurance that they would be able to "determine whether or not a patient is . . . feeble-minded, without a statutory definition."¹⁸ Moreover, the

13. Minn. Child Welfare Comm'n, Report (1917); see THOMSON 16-17.

14. Minn. Child Welfare Comm'n, Report 11-12 (1917).

15. Minn. Sess. Laws 1917, ch. 344, § 1.

16. See Pearson, *Guardianships and Commitments Under the Probate Code*, 20 MINN. L. REV. 333 (1936).

17. See Minn. Sess. Laws 1935, ch. 72, §§ 173-84.

18. *Ibid.*; see 2 PATTON, MINNESOTA PROBATE LAW AND PRACTICE § 551 (1955).

19. Undated Memorandum From the Honorable Albin S. Pearson, Chairman, to Other Members of the Bar Association Probate Code Committee (approximately December, 1934). This document, and other working papers of the committee are on file in the Ramsey County Probate Court. The published explanations focused on the difficulties of the prior definitions. See 2 PATTON, *op. cit. supra* note 18, § 551; Pearson, *supra* note 16, at 342-44.

experts could not agree on an appropriate method of categorizing defectives. The American Medical Association took the position that incompetents should be classified only when the most appropriate institution had to be chosen:

As I see it, if a person is mentally unsound from a legal standpoint, he requires the appointment of a guardian for himself or for his estate, or for both, and possibly commitment to an institution. It matters not whether his incapacity is due to heredity, defect, habits, disease, injury, or old age, or any or all of them.²⁰

The AMA could not have known — although local doctors should have — that this suggestion required basic modification of either the retardation or the mental illness program. Retardates are committed to the commissioner's guardianship for life, while the mentally ill receive his protection only during their stay in an institution.²¹ The theory is that "the mentally ill are to be made well. . . . But the needs of the mentally retarded continue year after year, changing but with ever-present needs — even those of many who can become self-supporting."²² So long as the programs differ, retardates *must* be distinguished.

The Board of Control objected to the doctors' recommendation, but offered no alternative.²³ The drafting committee apparently agreed with the chairman's reason for leaving the terms undefined: "if there can be no agreement as to what the definition should be, why not avoid it."²⁴ The problem was much more difficult than the committee appreciated: the relationship of organic to psychological and sociocultural elements in retardation was known to be complex; retarded wards were left to the mercy of the county welfare departments and the institutional staffs; and the probate judges had exhibited no special competence for de-

20. Letter From William C. Woodward, M.D., to Honorable Albin S. Pearson, July 24, 1934, on file in Ramsey County Probate Court.

21. Compare MINN. STAT. § 525.753(1) (1961) with MINN. STAT. § 525.753(2) (1961). The commissioner exercises general supervision of state hospitals for the mentally ill. MINN. STAT. §§ 246.01, .013 (1961). But MINN. STAT. § 246.01(9) (1961) specifically constitutes him guardian of "all feeble minded or epileptic persons"

22. THOMSON 234.

23. Both 2 PATTON, *op. cit. supra* note 18, § 551, and Judge Pearson, *supra* note 19, at 342, claimed that the Board of Control agreed to the elimination of definitions. The drafting committee told a different story: "We assure you we have done everything in our power to secure agreement between the Medical Profession and the State Board of Control, but we have failed." Undated Memorandum From Drafting Committee to "General Committee and Members of the Bar," on file in Ramsey County Probate Court.

24. Memorandum From Honorable Albin S. Pearson to Drafting Committee, July 24, 1934, on file in Ramsey County Probate Court.

termining "whether or not a patient is . . . feeble-minded" even with a statutory definition.²⁵ The 1945 legislature partially reinstated the 1917 definition of a "feeble-minded person"; the term "epileptic person" was finally defined in 1959.²⁶

B. THE CURRENT STATUTORY FRAMEWORK

A "mentally deficient person" is now defined as anyone "other than a mentally ill person, so mentally defective as to require supervision, control, or care for his own or the public welfare."²⁷ A commitment proceeding may be initiated by a relative or by any reputable resident of the county.²⁸ The county welfare board must investigate the subject of the petition — the "patient" — and file a report in advance of the hearing "for the use and guidance of the examiners"²⁹ The probate courts in the three counties containing cities of the first class (Hennepin, Ramsey and St. Louis) *may* order such an investigation,³⁰ and the welfare departments in these counties always provide some type of prehearing reports, even though a formal request is seldom made. In the absence of waiver, the commissioner of public welfare is given 10 days notice of all commitment hearings.³¹ In rural counties, the probate judge usually handles mental deficiency hearings personally; in Ramsey County (which includes St. Paul) and Hennepin County (which includes Minneapolis), hearings are conducted by a specially designated official.³² The county attorney must ap-

25. See note 51 *infra* and accompanying text.

26. See note 200 and text accompanying note 108 *infra*.

27. MINN. STAT. § 525.749(6) (1961). For the definition of "epileptic person," see the text accompanying note 200 *infra*. Unless otherwise indicated, this discussion of the commitment provisions and the commissioner's guardianship powers is equally applicable to "epileptic persons."

28. MINN. STAT. § 525.751(1) (1961). Adequate notice is required. MINN. STAT. ANN. § 525.752(2) (Supp. 1964); *In re Wretlind*, 225 Minn. 554, 32 N.W.2d 161 (1948).

29. MINN. STAT. § 525.752(1) (1961). The quoted phrase goes on to say "and the institution to which such persons may be committed." This concluding clause suggests that the report was designed for mental illness hearings. But the provision is uniformly interpreted to apply to mental deficiency commitments as well. Interview With Miss Francis Coakley, Supervisor of Section for Mentally Deficient and Epileptic of the Minnesota Department of Public Welfare, in St. Paul, July 7, 1963 [hereinafter cited as Coakley Interview, July 7, 1963].

30. MINN. STAT. § 525.752(1) (1961).

31. MINN. STAT. § 525.752(2) (1961).

32. Ramsey County holds mental deficiency commitment hearings one day each week; they are conducted by a referee appointed by the probate judge. In Hennepin County, the hearings are monthly and are always conducted by

pear to represent the petitioner.³³ If the patient requests the service, "the court shall appoint counsel for him, if he is financially unable to obtain counsel."³⁴ Although the patient is almost never provided counsel under this provision, the probate courts do appoint a "guardian *ad litem*" — usually an attorney — to represent the patient's interests.³⁵

During the hearing the patient is evaluated by an examining board which must include "two licensed doctors of medicine ...",³⁶ The probate court may add to the board a "person skilled in the ascertainment of mental deficiency" to assist in the examination.³⁷ Hennepin County's interpretation of this provision is probably unique; the court commissioner insists that the examining board include one local psychiatrist who claims that he is qualified to administer one of the standard I.Q. tests.³⁸ Findings must be made jointly by the examiners and the court.³⁹ Either the commissioner or "any person aggrieved, other than the commissioner," may appeal the probate court's decision to the district court.⁴⁰ If the patient is found to be "mentally deficient," the probate court need do no more than "appoint the commissioner guardian of his person and commit him to the care and custody of such commissioner."⁴¹

The commissioner's responsibilities to his wards are actually fulfilled by social caseworkers employed by the 87 county welfare boards. The county boards "administer a program of social serv-

the court commissioner — a constitutionally created judicial officer. MINN. CONST, art. 6, § 15. MINN. STAT. § 525.763 (1961) permits the court commissioner to act upon a petition "when the probate judge is unable to do so." The Hennepin County practice is justified if the statutory provision refers to the probate judge's work load.

33. MINN. STAT. § 525.751(4) (1961).

34. *Ibid.* The court may provide counsel "in all other cases . . . if it determines the interests of the patient requires counsel." *Ibid.*

35. This practice has become uniform since the decision in *In re Wretlind*, 225 Minn. 554, 32 N.W.2d 161 (1948). See notes 247-50 *infra* and accompanying text.

36. MINN. STAT. § 525.752(1) (1961).

37. *Ibid.* The probate courts often appoint at least one psychiatrist. The 1935 Probate Code required the appointment of "two persons skilled in the ascertainment of mental deficiency" rather than doctors. Minn. Sess. Laws 1935, ch. 72, § 175; see note 252 *infra* and accompanying text.

38. Interview With Frank Bessen, Esq., Court Commissioner of Hennepin County Probate Court, in Minneapolis, Sept. 20, 1963; see note 253 *infra* and accompanying text.

39. See 2 PATTON, *op. cit. supra* note 18, § 554.

40. MINN. STAT. § 525.79 (1961). For details of the appellate procedures, see MINN. STAT. §§ 525.71-.74 (1961).

41. MINN. STAT. § 525.753(2) (1961).

ices and financial assistance," "supervise wards of the commissioner and, when so designated, act as agent of the commissioner of public welfare" ⁴² The commissioner's powers as guardian at least equal those traditionally enjoyed by private guardians of the person: he must consent to the ward's adoption; ⁴³ he may hold limited sums of the ward's estate and expend them for the ward's benefit; ⁴⁴ under some conditions the commissioner may be able to arrange a mentally deficient ward's sterilization; ⁴⁵ a ward cannot marry without the commissioner's permission. ⁴⁶ The commissioner's authority has not been ignored. Recently, a member of the commissioner's staff was asked to approve a ward's plans for marriage:

42. MINN. STAT. §§ 393.07 subd. 1(a), subd. 2 (1961).

43. MINN. STAT. § 259.24(1) (1961).

44. MINN. STAT. §§ 256.88-93 (1961). Insurance benefits and other funds can be placed in a "Social Welfare Fund"; such deposits earn interest. In addition, the probate court can authorize the commissioner to take possession of the ward's personal property, liquidate it, and invest the proceeds in the Social Welfare Fund. MINN. STAT. § 256.93 (1961). The attorney general ruled that this provision is applicable only if the value of the ward's personal property does not exceed \$1,000. See Op. Att'y Gen. Minn. 88-A-27f, Sept. 24, 1948.

45. MINN. STAT. § 256.07 (1961) The commissioner must consult "a reputable physician, and a psychologist" and must obtain the written consent of the ward's spouse and nearest kin. See Op. Att'y Gen. Minn. 88-A-27-E, Sept. 25, 1941. But if no spouse or near relative can be found, the commissioner's consent is sufficient. At one time sterilization of wards was common. In the first three years after the statute's passage in 1925, 157 females and 8 males were sterilized. During 1940-1942, 155 females and 63 males were sterilized. The incidence decreased thereafter, in part because of changes in attitudes toward both the retarded and sterilization. THOMSON 55-57, 143, 182-83. Although the commissioner's staff now discourages sterilization, the county welfare departments have not forgotten the statutory provision. See, *e.g.*, text accompanying note 52 *infra*.

The sterilization statute does not apply to wards committed as "epileptic persons." *But see* MINN. DEPT OF PUBLIC WELFARE, MANUAL — MENTAL DEFICIENCY AND EPILEPSY 8 (1959) [hereinafter cited as DPW MANUAL]. The *Manual* recommends that persons who are both mentally deficient and epileptic should be committed as mentally deficient — because mental deficiency is a "more basic condition" and because sterilization will be permissible.

46. MINN. STAT. ANN. § 517.03 (Supp. 1964). The commissioner *may* grant his consent "if it appears from his investigation that such marriage is for the best interest of the ward and the public." *Ibid*.

The Minnesota constitution disenfranchises any person under guardianship. MINN. CONST, art. 7, § 2. In addition, wards may be subject to discrimination— for example, a ward may find it difficult to enlist in the armed services unless the commissioner is willing to commend his reliability and predict his success. Coakley Interview, July 7, 1963.

As ----- did not seem to understand too well I repeated many times the law says he could not get married while he is under this guardianship but if he proved himself to be a really good citizen, no drinking, and employed steadily, then maybe he could apply and see if he could get special consent. He wanted to know what a good citizen did. I told him about being steadily employed and definitely setting up a savings account, and not running around with the fellows that are always getting drunk and getting into trouble with the law, etc.⁴⁷

The commissioner is also permitted to control his ward's environment. He administers all institutions for the mentally deficient,⁴⁸ and the Probate Code expressly authorizes the commissioner to place any mentally deficient ward "in an appropriate home, hospital, or institution or [to] exercise general supervision over him anywhere in the state outside of any institution through any child welfare board or other appropriate agency thereto authorized by the commissioner."⁴⁹ In 1962 the state's three largest institutions contained 6,162 inhabitants, almost all of them wards of the commissioner.⁵⁰ Of course, many of these wards probably chose institutional life — but some of them certainly did not. During the depression, for example,

When the new county boards and their executives found some households living under deplorable conditions, they requested mental tests, and in many instances whole families were then committed to

47. File # 1, July 8, 1963. This citation (and others like it hereinafter cited) refers to dated dictation in either the county's or the commissioner's casework file on an individual ward. The numbers have been assigned in accordance with the order in which they appear in this essay. A chart correlating these numbers with the actual file numbers has been filed with the supervisor, Section for Mentally Deficient and Epileptic, Minnesota Department of Public Welfare.

Of course, many wards go across state lines to marry. But this is not necessarily the end of the matter. A nonward spouse is often "counseled very strictly" to obtain a divorce because of the risks of marriage to a retardate; occasionally the county attorney is used as an "authority figure" in such endeavors. See Interview With Miss Frances Coakley, Supervisor, and Miss Shirley Bengston, Director of Casework Services, Section for Mentally Deficient and Epileptic of the Minnesota Department of Public Welfare, in St. Paul, July 8, 1963 [hereinafter cited as Coakley-Bengston Interview].

48. MINN. STAT. §§ 252.025-.03 (1961).

49. MINN. STAT. § 525.762(2) (1961).

50. See MINN. GOVERNOR'S ADVISORY COMM. ON MENTAL RETARDATION, REPORT 36 (1962). Very few of the institutional inmates are not under guardianship. See notes 129-43 *infra* and accompanying text. In fiscal 1962-1963, 280 persons were institutionalized for the first time; 32 persons were re-institutionalized. Interview with Miss Frances Coakley, Supervisor, Section for Mentally Deficient and Epileptic of the Minnesota Department of Public Welfare, in St. Paul, Nov. 26, 1963.

guardianship as feeble minded. The Department . . . was powerless to relieve these situations after commitment had taken place, but apparently the boards were satisfied that they had taken some kind of action. . . . Later some of these families were difficult to work with; not all those tested and committed to guardianship under the circumstances proved to be really feeble minded and their frustrating experiences made them resentful.⁵¹

The commissioner's authority to institutionalize wards has been utilized to reinforce his other powers. As recently as the late 1950s, according to the commissioner's staff, the marriage of an unsterilized ward often influenced local welfare departments to arrange the ward's emergency placement in an institution and to hold him there until he agreed to sterilization; occasionally, the ward was forcibly moved to another part of the state for a period sufficient, it was hoped, to encourage the spouses to lose interest in each other.⁵² There is some evidence that such practices have not been forgotten. In 1960, an institution caseworker informed the county welfare department of his effort to obtain a 25 year-old ward's consent to sterilization:

Finally,-----asked if she had to have the operation, and she was told that no one would insist upon it. She then asked if she did not have it if she would have to remain in the institution. She was told that that would be a matter for your Agency to decide. It was suggested to her that it might possibly take a longer time to make plans without the operation than with it.⁵³

Until it was abolished by the 1963 legislature,⁵⁴ one of the institutions supervised by the commissioner was the "Annex for Defective Delinquents" (ADD) — a floor of the St. Cloud State Reformatory; the ADD housed some 40 "upper level" retardates who were "serious behavior problems."⁵⁵ One ward, committed to

51. THOMSON 80. In 1968 the commissioner's staff discovered one inmate at Faribault, institutionalized since the 1930's, who was not — and probably had never been—mentally deficient.

52. Coakley-Bengston Interview.

53. File # 2, Sept. 22, 1960. Although the DPW *Manual* discourages "pressure" to obtain consent to sterilization, it does indicate that sterilization may facilitate community placement of an institutionalized ward: "Under some conditions a sterile person may be supervised in the community when under the same conditions if he were not sterile, he should have a longer period in the institution." DPW MANUAL 60.

54. Minn. Sess. Laws 1963 ch. 214, § 1 (amending MINN. STAT. ANN. § 243.75 (Supp. 1964)).

55. See DPW MANUAL 41. The Annex had a capacity of 75-80 men; from the time it was opened in 1945 until its abolition, almost 300 wards had been placed there. Minn. Governor's Advisory Comm. on the Annex for Defective Delinquents, Report and Recommendations, June 12, 1962.

guardianship in 1929, had not tested below "dull normal" since 1949; nonetheless, he was placed in the ADD, without judicial hearing, on three different occasions between 1950 and 1960.⁵⁶ Release from the ADD was a matter for the commissioner's discretion. Even after his release, the ward had reason to conduct his affairs circumspectly: "If the ward becomes delinquent or any situation arises that requires his immediate removal from the community, the ADD will send for him immediately if notified that he is held in custody" ⁵⁷

Some of these cases, no doubt, are atypical. Indeed, it is likely that most wards never discover the extent to which the commissioner can control their behavior.⁵⁸ Nonetheless, an evaluation of the commitment process requires a clear understanding of several aspects of state guardianship: the commissioner's powers are broad; his powers have been exercised; the Probate Code provides no post commitment judicial review of any kind — even of a decision to institutionalize a ward;⁵⁹ most wards do not have the sophistication to seek a method of testing the commissioner's use of his authority.

56. See File # 3, memorandum dated Feb. 15, 1963. Later, the commissioner made an effort to have the man restored to capacity, but the county attorney opposed the petition and the probate judge denied it. See note 85 *infra*.

57. DPW MANUAL 39.

58. "Contacts should be planned with all wards at least every six months to determine what services are needed." *Id.* at 20; see text accompanying notes 86, 143 and 191 *infra*.

59. A ward could probably test the propriety of his confinement in an institution by writ of habeas corpus. See MINN. STAT. § 589.01 (1961). To free an institutionalized "mentally ill person," a petition seeking restoration to capacity, rather than habeas corpus, is usually the appropriate method, see State *ex rel.* Anderson v. United States Veterans Hosp., 268 Minn. 213, 223-25, 128 N.W.2d 710, 718-19 (1964), but that alternative is not always available to a ward. The ward may be "mentally deficient" but not in need of institutional care; the statute seems to contemplate such a possibility. See note 49 *supra* and accompanying text. Therefore, a ward may be unnecessarily institutionalized although he is not eligible for restoration. State *ex rel.* Raymond v. Lawrence, 86 Minn. 310, 312, 90 N.W. 769, 770 (1902), held that habeas corpus is always available to test the propriety of any "attempt . . . by a [private] guardian . . . to exercise any restraint over the person of any one within this state" An argument can be made that even if habeas corpus is available, procedural due process entitles the ward to a judicial hearing prior to institutionalization. Cf. Armstrong v. Manzo, 33 U.S.L. WEEK 4349 (U.S. April 27, 1965). See generally LINDMAN & MCINTYRE, THE MENTALLY DISABLED AND THE LAW 23-37, 226 (1961); Kadish, A Case Study in the Signification of Procedural Due Process — Institutionalizing the Mentally III, 9 WESTERN POLITICAL Q. 93, 110-15 (1956); Weihofen &

A ward can be freed of the commissioner's supervision either by "restoration to capacity" or by "discharge." A restoration petition can be filed by "any reputable person or the commissioner."⁶⁰ If the probate court finds that the ward is not "mentally deficient," he must be restored to capacity. Any person may contest the petition; the county attorney is specifically authorized to oppose restoration "if he deems it for the best interest of the public."⁶¹ The procedure followed is apparently the same as for commitment hearings. Only the commissioner can file a petition seeking the ward's discharge — "when it appears to the commissioner" that his ward "is no longer in need of guardianship or supervision," or when the commissioner can no longer exercise supervision because the ward has left the state or cannot be found.⁶²

Local welfare department personnel have occasionally delayed

Overholser, *Commitment of the Mentally III*, 24 TEXAS L. REV. 307, 346-48 (1946). It is not at all clear whether habeas corpus would be available to protect the ward against the commissioner's improper use of his other guardianship powers. (As to the possible relevance of the federal Civil Rights Act, see 78 HARV. L. REV. 684 (1965).) The Task Force on Law suggests that the court should not supervise the discretion of a plenary guardian, but recommends that plenary guardianship be reserved for those who are "judicially determined to be incapable of undertaking routine day-to-day decisions and who are found to be incapable of basic self-management." TASK FORCE ON LAW 25.

In any event, habeas corpus is not likely to be an effective, or even an available, remedy for a substantial percentage of the commissioner's wards: the scope of inquiry in habeas corpus proceedings is limited, see *State ex rel. Anderson v. United States Veterans Hosp.*, *supra* at 223, 128 N.W.2d at 718; most of the commissioner's wards do not seek and cannot afford an independent attorney. The commissioner's staff can recall only one effort in recent years to obtain judicial review of the commissioner's use of his guardianship powers. *In re Silbert*, Ramsey County District Court, Civ. No. 329138, Minn., July 26, 1963, involved a five year-old ward who had been left in his mother's custody following commitment. When the county welfare department forcibly removed the ward, his mother filed a writ of habeas corpus. The welfare department moved to dismiss the petition, arguing that commitment gave the commissioner sole discretion to determine who should have physical custody of his ward. The trial judge postponed decision of the motion, and held, on the merits, that the child's best interests warranted removing him from his mother's custody. Interview With Allen H. Aaron, Esq., in Minneapolis, July 25, 1963.

60. MINN. STAT. § 525.78(1) (1961); see, e.g., *Masters v. State*, 216 Minn. 553, 13 N.W.2d 487 (1944). Restoration is delayed 30 days if someone other than the commissioner petitions. MINN. STAT. § 525.78(2) (1961).

61. MINN. STAT. § 525.78(4) (1961).

62. MINN. STAT. § 525.611 (1961). This section was added in 1955 to the private guardianship provisions. The commitment provisions also contain a discharge section which does not include the second clause quoted in the text. MINN. STAT. § 525.78(5) (1961).

termination for lengthy periods — not always to accomplish goals germane to the retardation program. In one case, a county caseworker first reported that a female ward had made an adequate community adjustment in 1953; although the caseworker recommended discharge, and no adverse reports were subsequently received, the ward was not discharged until June, 1963.⁶³ In another case, a 16 year-old boy was committed and immediately institutionalized in September, 1960; a week later, the institution psychologist reported that he was not mentally retarded. Although the boy was never diagnosed as retarded, and although the commissioner's staff made regular efforts to have the boy restored, the county did not file a petition until May, 1963. During the winter of 1962, the boy was placed with a relative on a trial basis; when the arrangement proved unsuccessful, the county returned the boy to the institution. One of the institution's caseworkers explained:

We do not want ----- discharged until some definite and suitable plan for supervision can be worked out. . . .

We realize that ----- is not testing in the mentally deficient range; however, he is in need of supervision, protection and guidance. We do not feel we would recommend discharge from guardianship until a substitute plan can be devised to meet these needs. ----- has been under guardianship for almost 2 years and we do not see any emergency in discharging guardianship if such action may do more harm than good.⁶⁴

Once again, these cases may not be typical. But the commissioner's files suggest that wards have not often sought independent counsel, relying instead on the advice of local caseworkers; and few guardianships have been terminated without the active cooperation of the county welfare department. When the commissioner makes even incomplete surveys of those under guardianship, a great number of discharge or restoration petitions are immediately filed. The last such survey resulted in seven hundred discharge petitions.⁶⁵ Even if termination is not always administered

68. File # 4, June 4, 1963. On the following dates the county welfare department had contacts with the ward; on each occasion, the caseworker reported either that the ward was continuing her excellent adjustment or failed to comment adversely: Aug. 10, 1951 (situation "ideal" for termination); July 9, 1955; Dec. 28, 1956; Feb. 14, 1958 (stable and good family; "doing amazingly well"; should be considered for restoration); April 1, 1960 (no recommendation of discharge because ward may have more children); April 4, 1963 (ward does not want to take I.Q. test; recommend discharge).

64. File % 5, June 6, 1962.

65. Coakley-Bengston Interview. Miss Thomson reported a three year survey of wards which ended in 1948 with the filing of 605 discharge petitions: "While the accomplishment of this survey did not mean that active

in this fashion, however, the fact remains, that some wards who were eligible for restoration or discharge have been subjected to the commissioner's supervisory powers.

II.

In fiscal 1962-1963, 464 persons were committed to the guardianship of the commissioner of public welfare; these commitments brought the total under guardianship as of July 1, 1963, to 10,985. Despite the size of this group, if common projections of the total retarded population are acceptable, most of Minnesota's mentally deficient have not been committed. One study group concluded, for example, that 102,416 retarded persons resided in the state in 1960.⁶⁶ The commissioner does not actively seek retardates who need a guardian. As the total number of wards suggests, however, retarded persons and their families are constantly arriving at the local welfare departments by all the diverse routes traveled by social problems on their way to initial or resumed public concern. An intake interview (the initial contact with the retarded person or someone interested in him) does not lead ineluctably to commitment. At any stage of the casework process, alternative courses are available to the caseworker and to the retardate or his family. Nonetheless, county welfare department policies may be critical in determining who among the retarded population will become wards of the commissioner: handicapped persons and their families, having sought the welfare department's guidance, are often motivated to follow its suggestions; the department can file its own petition; and if a petition is filed, it is highly probable that the subject of the petition will become a ward.⁶⁷ Because welfare department officials are so influential, the criteria they utilize in selecting retardates for guardianship provide an appropriate background against which to sketch the commitment process.

Although any premise as to proper state guardianship policies is likely to be controversial, one assumption seems warranted: guardianship should not be utilized for every person who may for some purpose be classified as "retarded." Administrative problems

supervision would or could be given every ward, it did mean that we knew more about them, and about what should be done." THOMSON 139.

The commissioner's files also indicate that the county welfare departments apply the definition of "mentally deficient person" much more rigorously for purpose of restoration than they have in seeking commitment. Cf. notes 110-25 *infra* and accompanying text.

66. See MINN. GOVERNOR'S ADVISORY COMM. ON MENTAL RETARDATION, REPORT 6 (1962).

67. See text accompanying notes 110-25 and 234-58 *infra*.

alone probably make a more liberal policy impractical. Moreover, the legislature seems to have contemplated some selectivity: the legislative history of the 1917 act refers to "mentally subnormal children whose presence in the community is a serious public menace . . ." ⁶⁸ and the statute now authorizes guardianship only for the person who is "so mentally defective as to require supervision, control, or care for his own or the public welfare." ⁶⁹ With a few important exceptions, the commissioner now strongly supports a selective commitment policy. The basic goals of the retardation program — maximum development of the retardate's capacities and his adequate adjustment in the community — can usually be obtained without guardianship. A variety of resources — foster care, medical and psychiatric consultation, casework support, even institutional training — should be freely available to retarded persons without commitment. Guardianship should be utilized only if the welfare department must exercise some measure of "authority" to accomplish the program's goals. It may be necessary to compel conduct by the retardate, to coerce the cooperation of his family or other members of the community, or "to accomplish therapeutic purposes authoritatively when other measures have failed." ⁷⁰ In short, guardianship should be established with reticence.

But the commissioner's current policies do not fairly describe the guardianship program — because the county welfare departments still subscribe to views which were universal — and which were promoted by the commissioner's staff — until a few years ago. ⁷¹ County officials usually recommend guardianship for every

68. Minn. Child Welfare Comm'n, Report 11-12 (1917). See THOMSON 17: "This [guardianship] provision had been included in the law as passed, but the reason for it — fear that the feeble-minded would become a social menace — was fortunately omitted."

69. MINN. STAT. § 525.749(6) (1961). Hereafter, this definitional provision is quoted without footnote citation.

70. Coakley Interview, July 7, 1968. These views parallel the recommendations of the President's Panel. See TASK FORCE ON LAW 17-18.

71. Miss Thomson was the supervisor of the Section for Mentally Deficient and Epileptic from 1924 to 1959. She reported: "The philosophy of basing the amount of service given by social agencies on an early readiness of the client for self-responsibility was becoming accepted as I left; it seems to me to bear out my concern for attitudes toward the mentally retarded." THOMSON 234. She was influential in the founding of the Minnesota Association for Retarded Children and shared the views of that organization. See text accompanying note 77 *infra*. Finally, she was one of the authors of the DPW *Manual* which, although it first appeared in 1959, reflects almost none of the commissioner's present policies. See, *e.g.*, text accompanying notes 75 & 138 *infra*.

retarded person — emphasizing (at least prior to commitment) the "protective" nature of guardianship rather than its "authority" aspects. Even if his family is currently providing the retardate with adequate protection, guardianship is useful as an "insurance policy" which assures him "long term closeness" with the agency. In any future emergency, the welfare department will know the retardate and his problems and will be able to provide him immediate and complete protection. The counties also focus on custodial care for retardates in institutions; this traditional approach to long-term care for the retarded is, incidentally, to the counties' financial advantage.⁷²

One illustration should suffice to suggest the differences in commitment practice which the counties' views produce. In a recent case, the behavior of a 19 year-old youth had caused family and community concern. The youth's mother petitioned to establish guardianship after a conversation with a Hennepin County caseworker; the caseworker reported:

This [decision to petition] all happened after we discussed what might be possible for-----in view of the problems he might be presenting. It appeared that some of the things that we could offer would only be available after guardianship, such as boarding home or institutional placement. Mrs. _____ seemed to be very agreeable to this. She seemed to take satisfaction in that something could be done.⁷³

The commissioner's policy is that foster care and institutionalization should both be available without commitment. Yet the supervisor of the Hennepin County Mental Retardation Unit stated that the county uniformly requires guardianship prior to the retardate's placement in foster care; the commissioner's policies are irrelevant, the supervisor added, because the county bears the entire cost of foster care and is entitled to establish its own standards without interference from the Department of Public Welfare (DPW).⁷⁴

The commissioner's staff is engaged in a continuing program to persuade the county welfare departments of the wisdom of his policies; but the task is not an easy one. In the first place, the DPW *Manual* reflects the counties' views. It lists as one of "seven

72. See text accompanying notes 129-82 *infra*.

73. File # 6, July 10, 1963.

74. Interview With Miss Alice Dumas Smith, Supervisor of the Mental Retardation Unit of the Hennepin County Welfare Department, in Minneapolis, Dec. 6, 1963. *But cf.* MINN. STAT. § 39S.07(1)(c) (1961): "A county welfare board shall make the services of its public child welfare program available as required by . . . the commissioner"

reasons for guardianship . . . , any one of which may make such action advisable," the parents' need for consultation or aid "in planning for and caring for retarded or epileptic children" ⁷⁵ This suggestion would obviously expand the group for which the commissioner considers guardianship appropriate. There are precious few parents of retardates who do not need such consultation or aid. The commissioner's staff assert that *Manual* statements should not be taken at face value ⁷⁶ — but the *Manual* has been influential. In addition, a number of special interest groups reject the commissioner's policies; they consider state guardianship to be the nucleus of the state's retardation program, and vehemently oppose any DPW effort to limit the number of retardates eligible for commitment. The local chapters of the National Association for Retarded Children (NARC) urge their parent members to take advantage of state guardianship. ⁷⁷ In 1958, an Advisory Board on Handicapped, Gifted, and Exceptional Children urged commitment of "all trainable individuals at an early age, regardless of whether or not the child is living at home and attending public schools." ⁷⁸ Because the commissioner assumes that some retardates do not need the "protection" of state guardianship, his policy has incurred the disapproval of those who perceive a legislative and administrative tendency to discriminate in favor of programs for the "curable" handicapped. ⁷⁹ Finally, inertia alone has deterred acceptance of the commissioner's policy; for 40 years the commissioner's staff promoted what are still the counties' practices. In the future, perhaps, the commissioner's policies will be implemented; the fact that for the years 1961-1963 annual commitment totals remained stable, suggests that at least some of the counties have not yet modified their practices.

The commissioner would find it difficult to *compel* acceptance of his policy. His staff is usually informed of a county's intention to establish guardianship only when the probate court serves notice that the hearing will be held in 10 days; although the

75. DPW MANUAL 6; see *id.* at 7: "Guardianship is usually needed before ... [foster] placement is planned."

76. Coakley Interview, July 7, 1963. The DPW *Manual* was designed, in part, as a public relations device to encourage the establishment of guardianship. *Ibid.*

77. Interview With Gerald Walsh, Executive Director of the Minnesota Association for Retarded Children, in Minneapolis, July 18, 1963.

78. Advisory Board on Handicapped, Gifted and Exceptional Children, Report — The Trainable Retarded Child in Minnesota 18 (June, 1958).

79.

THOMSON 234.

See

county welfare department sends DPW a "referral history,"⁸⁰ it is difficult for the state office to prevent a commitment on such short notice.⁸¹ The commissioner's staff is not large enough to expect a careful review of every referral history received; it would certainly be impossible for the state office to verify the conclusions of the history or to negotiate with the family, the county welfare department, or the probate court. (Hennepin and Ramsey counties, which account for a large percentage of the commitments, have not been subjected even to this minimal supervision; due to a mistaken reading of the statute, neither county sends referral histories to DPW prior to commitment.)⁸² In any event, an effort by the commissioner to influence probate court decisions might not be successful; in one recent case an epileptic boy was committed in Hennepin County despite a plea at the hearing by the director of the DPW Children's Mental Health Service (a psychiatrist) that the boy was not eligible for guardianship.⁸³ The commissioner encourages the counties to seek advice from his staff before a petition is filed. When DPW has recommended against guardianship in one of these "evaluation cases," its advice has usually been followed.⁸⁴ But this procedure is utilized in a very small percentage of the cases. Once guardianship has been established, the commissioner is not completely free to obtain the ward's restoration — occasionally because the county attorney threatens to oppose the petition.⁸⁵

III.

Any attempt to describe a decision-making process is hazardous. Yet a discussion of the establishment of guardianship must include an outline of the circumstances, social or personal, of the

80. The "referral history" is the report of the county's investigation of the patient which is prepared for the probate court's use. See text accompanying notes 29-30 *supra*.

81. Coakley Interview, July 7, 1963.

82. *Ibid.* The commissioner's staff had interpreted MINN. STAT. § 525.752(1) (1961) — giving the probate courts in counties containing cities of the first class discretion to order referral histories — to apply to county welfare department reports to the commissioner. When the error was pointed out, the commissioner's staff indicated that they planned to require reports from Hennepin and Ramsey counties in the future.

83. File # 7, July 20, 1962; see text following note 211 *infra*.

84. Coakley Interview, July 7, 1963; see text accompanying note 158 *infra*.

85. See text accompanying notes 61, 63-65 *supra*. In File # 3, the county attorney objected to restoration of a ward who had not tested in the mentally deficient range since 1949. See note 56 *supra* and accompanying text. When the commissioner petitioned, the county attorney warned that it would be

retardates who are likely to become wards of the commissioner. The impressions reported below were gathered from several sources: interviews with county personnel and the commissioner's staff (their attitudes should reflect — with some distortion, perhaps — the way they handle their caseloads); personal observation of probate court hearings; a review of a limited number of casework files.⁸⁶

A. "...MENTALLY DEFECTIVE..."

1. *The Commissioner's Policy and the Counties' Practices*

Only a "mentally deficient person" may appropriately be made a ward of the commissioner. The intellectual element of the term is not described with precision: a mentally deficient person is someone "other than a mentally ill person," who is "mentally defective." Yet it is clear that *some* degree of intellectual impairment was to be a "jurisdictional" prerequisite to commitment. Intelligence level also plays a vital role in the commissioner's selective commitment program: need for protection and supervision are often correlative with intellectual achievement and potential.⁸⁷

Both the 1917 law and the 1935 Probate Code permitted judicial delineation of the content of the intelligence criterion: com-

necessary for a member of the commissioner's staff "to be here in person and testify and be subject to cross-examination." No appearance was entered for the commissioner and the petition was denied. File # 3, June 11, 1963.

86. No effort has been made to achieve statistical precision. In the course of this study, I attended more than 20 commitment hearings (all of them in Ramsey and Hennepin counties), and read either the county welfare department's or the commissioner's file on each of them; I interviewed some 25 persons who take part or have an active professional interest in Minnesota's retardation program. Finally, I read the commissioner's complete file on some 20 additional wards; the files were chosen by the commissioner's staff to illustrate specific aspects of the state guardianship program — *e.g.*, institutionalization, sterilization, a ward's marriage. Needless to say, the impressions left by these files may not be representative; but the information provided by the persons interviewed, the commitment hearings attended, and the written material on the program, were all consistent with these impressions. Some of the conclusions reported here were reached in a similarly impressionistic study of the guardianship program conducted under the auspices of the United States Public Welfare Association. Although the report of this study could not be found, Miss Thomson reported: "[The report] . . . was more than critical — it was devastating Dr. Kirkpatrick [the investigator] disapproved of a guardianship law, indicating that its administration was responsible for the large waiting list [for institutional placement] He stated that supervision in Minnesota existed mainly on paper." THOMSON 127.

87. Coakley Interview, July 7, 1963.

mitment hearings could be held without the aid of a board of examiners if the individual was found to be "obviously feeble-minded."⁸⁸ Qualified psychologists were not available for commitment hearings in the rural counties and behavioral data was considered relevant. Dr. Kuhlmann informed the probate judges that "obvious feeble-mindedness" could be proved by such evidence as: "(1) physical appearance; (2) opinions of relatives; (3) opinion in community; and (4) observations on the acquisitions and ability to do the ordinary things of everyday life, which may in part be tested directly on the child."⁸⁹ No doctrinal development occurred. Certainly, no one should mourn the absence of a body of doctrine adopting Dr. Kuhlmann's analysis of the reliability of "opinion in community."⁹⁰ How helpful his other categories were, or how they fared in probate court hearings, is unknown.

Currently, intelligence is measured by one or more of the standard I.Q. tests. The counties usually order a test whenever a person who might be retarded comes to their attention.⁹¹ I.Q. tests possess a special magic. A low score usually influences the caseworker to urge the parents to petition, and is often determinative when the welfare department must decide whether to file its own petition. Regardless of surrounding circumstances, the lower the person's I.Q., the more likely it is that a petition will be filed. The probate judges have also relied (or purported to rely) to an Astonishing degree on the fragile certainty of an I.Q. score. In one case, for example, a 10 year-old girl was committed, despite a month-old adjudication that she was not feeble-minded, because a "recent mental test.. .said----- had deteriorated by about 4 or 5 points

88. See Minn. Sess. Laws 1917, ch. 844, § 6; Pearson, Guardianship and Commitments Under the Probate Code, 20 MINN. L. REV. 338, 345 (1936).

89. Kuhlmann, Determination of Feeble-Mindedness as Related to the Courts 6 (address to the State Association of Probate Judges, Jan. 15, 1920) [hereinafter cited as Kuhlmann].

90.

Common denial of feeble-mindedness is no proof of normality, but only very good evidence that the case is not a very low grade of feeble-mindedness. Usually when the neighbors are agreed that the case is not very bright, that he is a little odd, peculiar, and so on, but not so bad as to be called feeble-minded, the case will be found, on special examination, to belong to the high grade imbecile, or low grade moron class. The reasons for these facts need no detailed discussion. They are the deductions from common observations that reveal their own explanations. . . .

Id. at 7.

91. DPW MANUAL, 11. Very infrequently, if the family refuses to cooperate, the county may file a petition so that the probate judge can order testing.

in her IQ."⁹² DPW files indicate that time and again a low I.Q. score has been considered conclusive evidence that the person was "mentally defective."

More than 40 years ago, Dr. Kuhlmann formulated standards for determining the intellectual impairment requirement:

We may safely put the lower limit at .70, and the upper limit at .85. I myself, practice putting the lower limit at .75. . . . *The first practical and very important conclusion we arrive at is then, that, if the court . . . finds the intelligence to be below .70 or above .85, this result alone may be taken as conclusive.* . . . This applies to children as well as to adults.⁹³

His formulation needs very little alteration to describe current attitudes and practices.

2. *The Counties' Practices Assessed*

Even at the time Dr. Kuhlmann wrote, the available data should probably have suggested the dangers of relying solely on I.Q. scores for the establishment of guardianship. Dr. Kuhlmann's thesis was that persons who test below 75 "... will not be able permanently to make an independent honest living, without supervision and guardianship, under any and all circumstances they are likely to meet in their lives."⁹⁴ His argument assumed that current I.Q. scores could be projected for extended periods. But Dr. Kuhlmann recognized that "for a very few [defective children, the intelligence quotient] . . . increases, and in very, very rare instances it increases enough in time to take a child out of the class of mentally defective and place him in the class of normal."⁹⁵ Today, psychologists seem sure that I.Q. scores cannot be used with reliability for prediction: "Even for the non-institutional group, school and agency judgments of retardates rendered during the formative years are often belied by the retardate's performance in adulthood — delayed though it may be."⁹⁶

92. File # 2, March 11, 1945. The probate judge was probably primarily interested in other aspects of this case. See notes 184-85 *infra* and accompanying text.

93. Kuhlmann 15. (Emphasis from original.)

94. *Ibid.* For further discussion of this remark, see text following note 173 *infra*.

95. Kuhlmann 14. Dr. Kuhlmann suggested that restoration or discharge was designed to take care of such cases. But this obviously ignores the interest in protecting "wards" from the commissioner's use of his extensive authority.

96. Ober, *Some Aspects on Legal Guardianship for the Adult Mentally Retarded*, 68 AMERICAN J. MENTAL DEFICIENCY 15, 21-22 (1963); see BLOOM, STABILITY AND CHANGE IN HUMAN CHARACTERISTICS 88 (1964).

Nor are I.Q. scores necessarily reliable indicators of a person's current intellectual capacity.⁹⁷ The commissioner's files contain numerous examples of discrepant results for tests administered within reasonably short time intervals by examiners whose competence was not questioned: (a) 71-86-92; (b) 71-69-88-76; (c) 58-76; (d) 73-78-84-99-81-86-84; (e) 58-68-70-71-62.⁹⁸ The causes of these fluctuations may include socio-cultural factors, reading handicaps, anxiety caused by the testing situation, and emotional instability.⁹⁹ Exhaustive exploration of the causes is unnecessary; it suffices that substantial I.Q. variations can occur. When the legislature authorizes local welfare departments to interfere with parental prerogatives, and permits possibly life-long deprivations of individual discretion, a single I.Q. score should certainly not be a sufficient jurisdictional showing.

"I.Q.ism" has had other unfortunate consequences. The statute defines as "mentally deficient" any person, "*other than a mentally ill person, . . . [who is] mentally defective.*" The mentally ill must be differentiated. Because a person's I.Q. score may be inaccurately depressed during periods of emotional turmoil, however, the welfare departments have been encouraged to ignore the categorization problem. In one recent case, for example, a 16 year-old boy was committed and immediately institutionalized after proof that his I.Q. was 84, that he had an "emotionally unstable personality," and that the University Hospital had diagnosed his condition as "chronic brain syndrome of unknown cause."¹⁰⁰ After a week in the institution he scored 99 on another I.Q. test. Six weeks later, the institution psychologist commented:

On the basis of the present test findings . . . we are led to conclude that ----- is not a mentally deficient person and that lack of intellect-

97. See generally HUNT, INTELLIGENCE AND EXPERIENCE (1961); MASLAND, SAHASON & GLADWIN, MENTAL SUB-NORMALITY 278-310 (1958).

98. The files from which these scores were taken, listed in their order in the text, are as follows: (a) File # 8, Oct. 18, 1961-Oct. 22, 1962; (b) File # 9, undated test (approx. 1950)-June, 1959; (c) File # 6, April 25, 1960-Sept. 5, 1968; (d) File # 5, Jan. 11, 1960-Feb. 3, 1960; (e) File # 10, 1936-June 25, 1963.

99. See, e.g., BLOOM, *op. cit. supra* note 96, at 89: "Much more research is needed to develop precise descriptions . . . of environments as they relate to the development of intelligence. . . . However, a conservative estimate of the effect of extreme environments on intelligence is about 20 I.Q. points." File #11 involved a girl of Mexican origin whose family changed residences so frequently that she had been able to obtain very little formal education. Although she was committed as mentally deficient, see text accompanying notes 215-20 *infra*, she had received a score of 99 on the performance scale alone; her scores on the verbal scale were consistently lower. See File # 11, Feb. 26, 1959.

100. File # 5, Feb. 11, 1960.

ual resources has not played an important role in his poor school and social adjustment. Rather we see the following as major variables in this adjustment pattern:

1. ----- has a very obvious reading handicap
2. This boy's family background has been one of considerable disharmony, instability and friction. The father has been out of the home for long periods of time and the parents have been . . . divorced.
3. The death of close relatives, especially his twin sister, has apparently influenced----- toward impulsive, self-gratifying behavior
4. . . . [E]vidence of brain damage . . . was revealed It is very possible that-----'s reading disability is caused by some central disfunction of the nervous system. . . .¹⁰¹

In many cases, evidence of emotional difficulties which may have affected the I.Q. test results has not been sought; in other cases such evidence has been ignored.¹⁰² It is clear that most of the probate judges have made no effort to distinguish the retarded from the mentally ill in the difficult cases.

An argument might be made that in determining eligibility for a "social welfare" program, difficult problems of categorization can be ignored. It may be impossible to differentiate the hyperactivity which accompanies some congenital brain injuries — although the person's I.Q. may be high¹⁰³ — from the behavioral consequences of other types of intellectual deficiency; and it is never easy to distinguish between some types of mental illness and retardation. Moreover, prognosis and appropriate treatment methods for some of these conditions may be identical. The guardianship statute could be expanded judicially to include any person, regardless of the category in which his organic or emotional condition should be placed, whose behavior and treatment needs resemble those of "mentally defective" persons. Although there is no evidence that Minnesota probate judges have consciously

101. *Id.* Dec. 15, 1960; see text accompanying note 64 *supra*.

102. See File # 10. A 38 year-old man, who had always led a sheltered life with his parents, was committed when his low I.Q. (62 at the hearing) was established. Yet a University of Minnesota Hospital diagnosis, completed six weeks prior to the hearing and presented to the probate court with the referral history, described the man as psychotic. *Id.* Aug. 9, 1963. The parents were present at the hearing, however, and testified that their son was "mentally deficient." In File # 9 a ward committed after he stabbed a school mate was later diagnosed as psychotic.

103. "[Brain-injured child] . . . implies a child in whom the classic motor or neurological signs of brain injury are absent or minimal, who may be of any I.Q., but who displays some or all of the following: hyperactivity, destructiveness, distractibility, emotional instability and special learning difficulties, most usually perceptual or conceptual." NEW YORK STATE JOINT LEGISLATIVE COMM. ON MENTAL RETARDATION AND PHYSICAL HANDICAP, ANNUAL REPORT 20 (1961).

engaged in such an endeavor, the technique is not unknown. Yet the scope of the commissioner's powers as guardian, and even a limited survey of the use which the counties have occasionally made of those powers, argue persuasively that the guardianship provisions should be narrowly interpreted — leaving jurisdictional choices to the legislature. If a ward could rely upon post-commitment procedural safeguards, perhaps the issue would be more difficult to resolve. But the establishment of guardianship authorizes the commissioner to impose a wide range of sanctions (any other term ignores some of the commissioner's powers) at his discretion without concurrent judicial review. Under the circumstances judicial expansion of the statute's coverage is difficult to justify.

B. "... TO REQUIRE SUPERVISION, CONTROL. . . ."

*1. The Commissioner's Policies and the Counties' Practices —
The Legislative Standard*

The 1917 act seemed to include in the definition of a "feeble-minded person" two discrete elements: one intellectual and the other behavioral or environmental. To commit a person to the commissioner's guardianship, the probate court had to find him "so mentally defective as to be incapable of managing himself and his affairs, and to require supervision, control and care for his own or the public welfare."¹⁰⁴ In 1944, after the Probate Code had eliminated the definition of "mentally deficient person," the Supreme Court of Minnesota supplied its own "behavioral" criterion. *In re Masters*¹⁰⁵ involved an adult ward's petition to be restored to capacity. The probate and district courts had denied the petition because the ward's I.Q. was 64. The supreme court reversed, holding that the lower courts had utilized an improper standard. The court adopted a "sociolegal" definition of feeble-mindedness: "While psychological tests are convenient tools for indicating mental retardation, test results alone should ordinarily not be considered sufficient, much less conclusive, except at lower levels."¹⁰⁶ Since the ward was a "borderline case" — because her I.Q. was between 60 and 70 — the final diagnosis should have rested on "social history." The court commented:

The statement frequently made that all persons with I.Q.'s below 70 are feeble-minded is not justified, either from the scientific or a practical point of view. Intelligence is made up of too many factors to permit

104. Minn Sess. Laws 1917, ch. 344, § 1.

105. 216 Minn. 553, 13 N.W.2d 487 (1944).

106. *Id.* at 565, 13 N.W.2d at 493.

of such a dogmatic statement. Intelligence tests are not substitutes for insight and common sense. . . .

Most intelligence tests . . . make no attempt to evaluate such admittedly important attributes as personality or moral character, but are concerned only with the abstract aspects of thinking and reasoning. But intelligence, by the generally accepted definition, is the ability to meet and solve new problems, and many factors besides brain power enter into that.¹⁰⁷

Three years later, the legislature revived the old definition, eliminating only the "managing himself and his affairs" element of the 1917 provision.¹⁰⁸

The current definition — like the original — seems to direct attention to the individual retardate and his problems of adjustment. Evidence of his surroundings, circumstances, and previous behavior would certainly be important; an attempt to predict his future development and conduct would also seem appropriate, if not dispositive. According to the commissioner, a welfare department's decision to seek guardianship should be governed by considerations similar to those which the probate court would utilize in determining that the retardate "requires supervision."¹⁰⁹ Thus, if a retardate conducts himself properly in the community and acquiesces to the treatment program recommended for him, the commissioner would not favor the establishment of guardianship; retardation program goals can be achieved without the use of "authority." Similarly, the probate court should hesitate to commit this retardate to guardianship; there is no evidence that he currently "requires supervision." But guardianship has been established for such retardates — because the statutory language has been ignored by the county welfare departments, by the probate courts, and, occasionally, even by the commissioner.¹¹⁰

That the behavioral criterion has not appreciably limited the group subject to state guardianship is suggested by the treatment accorded two variables among all the circumstances which might be relevant to such a criterion — the retardate's age, and the wishes of his parents. The first should be an important element of a need of supervision criterion; the second, although relevant, should not be considered dispositive.

107. *Id.* at 564-65, 13 N.W.2d at 493.

108. See Minn. Sess. Laws 1947, ch. 622, § 1.

109. Coakley Interview, July 7, 1963.

110. Once again the *Manual's* instructions are inconsistent with the commissioner's policies: "The higher grade retarded person may make a satisfactory adjustment indefinitely if his environment conforms to his abilities. Nevertheless, guardianship may be an advantage because it will provide continuity of supervision in spite of changing circumstances." DPW MANUAL 7.

(a) The Retardate's Age

If guardianship is to be established selectively, the retardate's age cannot be ignored.¹¹¹ The commissioner believes that as the retardate grows older it becomes more likely that guardianship will be appropriate: other devices to protect or control him — such as the juvenile court — become unavailable; the protection he receives from his parents diminishes; he more frequently experiences taxing exposure to the community; he might have a family of his own to support. Of course, a probate court should not find that a retardate "requires supervision" simply because he has reached majority or has acquired a family; but in an assessment of a retardate's need of supervision, his age is obviously an important datum. In the casework process preceding a petition, however, the retardate's age has almost never been considered a relevant variable. The commissioner would encourage the establishment of guardianship for *any* person over 21;¹¹² it would be most surprising if the counties disagreed.¹¹³ The probate courts have not interfered.

Nor has the retardate's youth been a significant barrier to the establishment of guardianship. Of the 464 retardates who became wards of the commissioner during fiscal 1962-1963, 82 percent were less than 19 years old and about 30 percent were under 5 years of age.¹¹⁴ To be sure, these figures do not prove necessarily that the welfare departments promote guardianship for youthful

111. See TASK FORCE ON LAW 25-26. The most common distinction is made between minors, who are subject to the "natural guardianship" of their parents, and adults.

112. Coakley Interview, July 7, 1963.

113. The assistant executive director of the Hennepin County Welfare Department claimed that in the last 15 years guardianship has been used primarily for children; he doubted whether the agency would commit a person who had already reached adulthood. Interview With Arnold Gruber, Assistant Executive Director of Hennepin County Welfare Department, in Minneapolis, July 25, 1963 [hereinafter cited as Gruber Interview]. In fact, the county does not hesitate to commit adults. See, *e.g.* File # 10.

114. Interview With Miss Frances Coakley, Supervisor of the Section for Mentally Deficient and Epileptic of the Minnesota Department of Public Welfare, in St. Paul, Nov. 26, 1963. The wards' ages were as follows:

Under age 5	137
5-9 years	113
10-14 years	71
15-19 years	61
20-24 years	21
25-29 years	13
30-39 years	23
Over age 40	25

retardates. But other data support such a thesis: the local NARC chapters urge new parent members to commit their retarded children to guardianship regardless of their age,¹¹⁵ and parents often join a chapter soon after retardation becomes a family problem; doctors and professional educators of the mentally deficient uniformly advise the establishment of guardianship,¹¹⁶ and caseworkers tend to recommend guardianship as a matter of rote during the initial interview.¹¹⁷ The Hennepin County policy, is that no child younger than six months, and very few children less than a year old, should be committed to guardianship.¹¹⁸ Of the eight petitions granted in Hennepin County during October, 1963, however, four concerned children who had not reached their first birthday; one child was five months old and another, afflicted with mongolism, had been born the month before. It seems clear that the welfare departments have not considered the retardate's age a determinant of his need for guardianship. Nor have the probate courts shown any disposition to regard the retardate's age as a consideration relevant to his "need of supervision."

(b) Parental Wishes

The retardate's parents should figure prominently in the welfare department's assessment of the need for state guardianship, and in the probate court's handling of a commitment petition. If the parents are providing the retardate with the basic necessities, protecting him from exploitation, and controlling his behavior, welfare department protection or control is unnecessary. On the other hand, the retardate whose parents are inadequate is more likely to require the commissioner's supervision.¹¹⁹ In short, the parents' attitudes and behavior should be investigated with care. But parental approval of guardianship can hardly be equated with a finding that the retardate "requires supervision." A parent's consent may indicate that he has no interest in the child and will not attend to his needs; yet, the parent's petition may have other explanations as well — especially if he has not been informed of the scope of the commissioner's guardianship powers.¹²⁰ Both the

115. Interview With Gerald Walsh, Executive Director of the Minnesota Association for Retarded Children, in Minneapolis, July 18, 1968.

116. Gruber Interview.

117. Coakley Interview, July 7, 1963.

118. Gruber Interview.

119. Coakley Interview, July 7, 1963; see text following note 184 *infra*.

120. The *Manual*, see, e.g., DPW MANUAL 10, and county caseworkers emphasize the fact that guardianship normally does not disturb parental

Manual and the counties' practices assume that parents who petition are not incapable of exercising sole supervision of their retarded child. In any event, the retardate's interests are separable. Commitment eliminates *his* "power of choice"; at least as the retardate approaches or reaches majority, his parents' desire should not determine such a vital issue. Indeed, the Minnesota Supreme Court held that a guardianship proceeding entailed a conflict of interests between the parent-petitioner and her 12 year-old daughter.¹²¹

Despite the "requires supervision" criterion, a Governor's Advisory Committee on Mental Retardation recently asserted: "When desired by parents, guardianship should always be available."¹²² And so it has been! The counties have uniformly followed such a policy, and the commissioner's staff has occasionally approved. Moreover, the state office does not supervise the counties in these cases: the commissioner never opposes a commitment when a parent is the petitioner,¹²³ and the counties always encourage parental petitions. The probate courts have customarily granted the petitions.

Some of the wards committed in this fashion would probably qualify for guardianship even if the statute were properly applied. But approving all parental petitions is hardly the most efficient method of selecting the wards who are eligible. In fact, the practice magnifies the risk of establishing guardianship improperly: the pre-commitment casework process often takes place in such an atmosphere of emergency that in many cases the parents' consent to guardianship may not be informed and rational. Parents are frequently influenced to petition, for example, when a retarded child has been causing trouble in the home and temporary foster

prerogatives. It is doubtful that most parents are told of the extent of the commissioner's supervisory powers. See note 248 *infra*.

121. *In re Wretlind*, 225 Minn. 554, 32 N.W.2d 161 (1948). The issue was raised in a proceeding, initiated by the parent, seeking the daughter's restoration on the grounds that the original commitment was invalid. See text accompanying note 247 *infra* for a discussion of the role of the guardian *ad litem*.

122. MINK. GOVERNOR'S ADVISORY COMM. ON MENTAL RETARDATION, REPORT 58 (1962). (All capitals in original.)

128. Coakley Interview, July 7, 1963. In subsequent discussions of various aspects of state guardianship, Miss Coakley indicated that her views had changed — parental wishes should not be dispositive. Interview With Miss Frances Coakley, Supervisor of Section for Mentally Deficient and Epileptic of the Minnesota Department of Public Welfare, in St. Paul, Nov. 26, 1963. I have not tried to discover whether the DPW staff's practice has changed. Even if it has, unless the counties also change, commitment practices will remain the same. See notes 80-85 *supra* and accompanying text.

care seems likely to improve the situation. In a recent Hennepin County case, young parents agreed to guardianship for a four year-old daughter who had been completely immobilized since suffering a fractured skull two weeks after birth. The child had begun to create conflicts with the other children. Only the mother indicated approval of guardianship. The father had signed the petition because "that's the only way we can get any help for her — even the private homes say she has to be under guardianship." He was opposed to guardianship because his father had been involuntarily institutionalized. A caseworker reported a pre-commitment conversation with the parents:

Mr. _____ advised that they were not ready to sign any petition for commitment of -----, however, they were interested in institutional placement for her. I explained in detail what commitment meant and that it was mandatory to our institutional placement in one of the state facilities. . . .

Mr. -----inquired about other facilities available and I explained that we did have the boarding homes that we placed retarded children in and also private institutions. I explained, however, that these were rather expensive and Mr. ----- stated that they would not be able to meet this expense and he did not in any way suggest that the county might be of assistance to them in this respect.¹²⁴

The father was literally compelled to consent to state guardianship; in its absence, he was unable to obtain adequate care for his daughter or peace for his family. The many pressures to which parents are subjected have not gone unnoticed; one psychiatrist considers it part of his function as a member of the board of examiners to make sure that parent petitioners are *really* in favor of commitment.¹²⁵

2. *The Commissioner's Policies and the Counties' Practices — Behavioral Considerations*

Although neither the counties nor the probate courts have treated "requires supervision" as a prerequisite to the establishment of guardianship, the surroundings in which the welfare department finds the retardate, and his behavior, often influence the casework process prior to the filing of a petition. Even if most caseworkers recommend guardianship indiscriminately, the welfare department must decide how vigorously the parents should

134. File # 12, March 26, 1963.

125. Interview With David S. Thorsen, M.D., in St. Paul, July 15, 1963. The pressures on the parents include the "waiting list" and the need for foster placement. See text accompanying notes 78 *supra* and 129 *infra*.

be urged to petition; if the parents refuse to petition, the department must decide whether to file its own petition. The welfare departments commonly rely upon data which the probate courts might find relevant to a "requires supervision" criterion. Indeed, it might be appropriate to complain that behavior, used in this fashion, has figured too prominently in welfare department decisions. Thus, a person's conduct has occasionally been used to prove his "retardation." Referral histories reporting I.Q. scores over 70 often contain an "explanatory" comment: "... the boy is probably of normal intelligence but with the tremendous emotional problems that he has had, he just hasn't been able to function anywhere near that level."¹²⁶ The *Manual's* instructions also illustrate the technique:

... [T]here may be little problem in determining that a retarded person of I.Q. 10 will need lifelong care and supervision. . . ., but the decision will not be so easy in the case of a person with an I.Q. in the 70's who comes to the attention of the agency because of truancy or petty thievery. *In such a case social history data are primary to the psychometric findings.* . . .

Persons in the borderline range [I.Q. 70-79] generally adjust satisfactorily to society without coming to the attention of social agencies. . . . *Sometimes, however, emotional and/or personality defects added to the borderline I.Q. cause behavior which makes the diagnosis that of mental deficiency.*¹²⁷

It does seem likely that the welfare departments' discretion to establish guardianship in "borderline" cases is not unlimited; at some point within the "dull-normal" range, most probate courts would probably be unwilling to find the person "mentally deficient," regardless of his behavior problems.¹²⁸

The behavioral and environmental considerations which have influenced the welfare departments to seek guardianship have been numerous and varied. The following paragraphs examine a few of the more common factual patterns.

(a) Institutional Placement

Institutional planning for a retardate, initiated either by his family or by the welfare department, has often been the principal

126. File # 7, July 9, 1962.

127. DPW MANUAL 81-82. (Emphasis added.)

128. Two recent "referral histories" were sent, with an accompanying questionnaire, to the guardianship caseworkers in eight representative counties. One of the cases involved a 24 year-old youth, with an I.Q. of 81, who had been apprehended burglarizing a grain elevator. See text accompanying notes 156-63 *infra*. Of the 42 respondents, only half believed that the county's probate court would be willing to commit the youth as mentally deficient.

reason for the establishment of guardianship. Until very recently, for all practical purposes institutional placement could not be arranged without guardianship.¹²⁹ Moreover, priority for available institutional space — the "waiting list" — was established solely in accordance with the date on which the retardate became a ward of the commissioner.¹³⁰ The counties had (and still have) a financial stake in institutional placement policies. The county bore the cost of casework service or foster care for a retarded person; but while a dependent retardate was institutionalized, the county's liability for his maintenance could not exceed \$80 a year.¹³¹ Since the cost of foster placement was substantially higher, county welfare departments tended to produce too facile recommendations that a ward needed institutional restraint or training. Despite some inflation in the cost of institutional care, the counties have not lost interest in its financial advantages; the 1962 Governor's Advisory Committee suggested delicately:

If the state were to participate in meeting this cost [of foster care], counties would then be willing to evaluate carefully the relative merits of state institutional care versus boarding care. . . . Under the present system, the county welfare board usually elects to place the child in a state institution, at a yearly cost to the county of no more than \$120.00, as opposed¹³² to boarding care, which can run as high as \$1,800.00 per year.

The counties had good reason to seek guardianship as quickly as possible for every retardate who came to their attention: early establishment of guardianship did no harm, and, because the ward's name was automatically placed on the "waiting list," it hastened the advent of economies! The financial impetus to institutionalization probably fostered other practices inconsistent with the commissioner's present policies; the counties' only excuse for requiring guardianship as a prerequisite to foster home placement was that the ward's name would be on the "waiting list" while the county was expending funds for his benefit. Local government parsimony and legislative myopia thus combined to encourage the establishment of guardianship — in many cases, probably, either improperly or unnecessarily. The 1961 legislature revised the institutional cost of care provisions, but preserved the cost advantages enjoyed by the counties.¹³³

129. See DPW MANUAL 8, 49; text accompanying note 138 *infra*.

130. DPW MANUAL 22.

131. Minn Sess. Laws 1953, ch. 679, § 1; see note 142 *infra* and accompanying text.

132. MINN. GOVERNOR'S ADVISORY COMMITTEE ON MENTAL RETARDATION, REPORT 23 (1962).

133. MINN. STAT. § 252.041-.046 (1961).

Establishing guardianship for "waiting list" purposes is no longer consistent with the commissioner's policies. The commissioner asserts that institutional space is assigned solely on the basis of relative needs when space becomes available, regardless of the existence of guardianship; as a result, guardianship should never be established solely to authorize or facilitate institutionalization. Voluntary admission has now become a common and approved method of initiating institutional treatment,¹³⁴ and the commissioner believes that institutional facilities should be used more frequently for retarded persons who have not been made wards. Although the provision has been ignored, legislation authorizing voluntary institutionalization actually antedates the guardianship law.¹³⁵ But in 1961, the legislature clearly articulated institutional admission standards. Guardianship was not to be a prerequisite:

The Commissioner of public welfare may provide for the admission to any such state school and hospital of *any mentally retarded or epileptic person who is a resident of this state or who may have heretofore or may hereafter be committed to the guardianship of the Commissioner of public welfare.*¹³⁶

Yet the 1962 Governor's Advisory Committee on Mental Retardation advised caution: "It is recommended that careful study be made to determine whether some retarded individuals not under guardianship should be admitted to institutions"¹³⁷ The recommendation was not likely to influence the counties to modify their guardianship policies. But it was less hostile to voluntary institutionalization than the position taken by the *Manual*:

The Commissioner has first responsibility to his wards; and until there is space not needed by those under guardianship, voluntary entrance would mean an injustice to those for whom the Commissioner has definite responsibility. For both the mentally deficient and the epileptic, there is a waiting list of wards for whom space is not available.¹³⁸

134. See generally LINDMAN & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 107-15 (1961).

135. See MINN. STAT. ANN. § 525.75 (Supp. 1964).

136. MINN. STAT. § 252.03 (1961). (Emphasis added.) Not atypically, the legislature, *on the same day*, amended the succeeding section to read: "All mentally retarded persons, resident of the state, duly committed to the guardianship of the commissioner of public welfare, . . . may be admitted. . . ." Minn. Sess. Laws 1961, ch. 560, § 22. This provision was repealed at a special session of the legislature the same year. Minn. Laws, Ex. Sess. 1961, ch. 62, § 7.

137. MINN. GOVERNOR'S ADVISORY COMMITTEE ON MENTAL RETARDATION, REPORT 58 (1962). (All capitals in original.)

138. DPW MANUAL 49. Miss Thomson indicated that one of the reasons for the "waiting list" was to deter political and other pressures on the institutions to obtain placement in individual cases. See THOMPSON 25-26.

The argument involves some serious question-begging. It is only unfair to admit nonwards if the *sole* purpose of guardianship is to place retardates on a "waiting list"; otherwise, voluntary institutionalization will modify the expectations of wards, perhaps, but the practice does them no "injustice." On the other hand, the commissioner's "responsibility" to those retarded persons who have been made wards solely to be placed on the "waiting list" seems much less substantial.

The Hennepin County Welfare Department continues to assume that institutional space is assigned according to the date guardianship was established.¹³⁹ The caseworkers urge families to file a petition as soon as possible for that reason; and every petition includes a statement that one of the purposes to be served by guardianship is placement of the ward's name on the "waiting list." It is likely that Hennepin County's practice is not unique.¹⁴⁰ Why the practice persists, however, is not at all clear. The commissioner has ultimate control of institutional placements.¹⁴¹ Moreover, the legislature's cost of care policies give the county a cost advantage even if the institutionalized retardate is not the commissioner's ward.¹⁴² "Waiting list" commitments may be explained by inertia. It is also possible that the counties are anxious to influence the commissioner either to return to a "waiting list" policy — allowing the counties to institutionalize a larger percentage of their dependent retarded population — or to agree more readily to institutionalizing some individual ward for whose care the county does not want to assume responsibility. This much is certain: to the extent some *pro forma* check must regularly be made of all wards, burgeoning numbers preclude adequate casework service to those wards who need it;¹⁴³ and retarded persons (and their families) are being misled as to the necessity of guardianship

189. Gruber Interview. Mr. Gruber was aware that DPW may have modified its placement policy, but the counties had not been officially informed of the change.

140. The *Manual*, of course, incorporates the "waiting list" policy. DPW MANUAL 22. Half of the 42 caseworkers who responded to a questionnaire, see note 128 *supra*, believed that institutional placement was based solely on a "waiting list"; 11 of the remainder believed that the "waiting list" was a relevant factor in assigning institutional space.

141. MINN. STAT. § 252.025 (1961).

142. MINN. STAT. § 252.041(4) (1961); MINN. STAT. ANN. § 252.045 (Supp. 1964).

148. Coakley-Bengston Interview; Interview With Miss Irma Craven, Caseworker of the Hennepin County Welfare Department, in Minneapolis, Aug. 8, 1963; See DPW MANUAL 20 (contacts should be planned at least every six months); note 86 *supra* (results of an investigation conducted in 1940 of the guardianship program).

— perhaps to their disadvantage in some future emergency. *Manual* modifications and other rigorous endeavors to reform local practice are obviously essential.

To be sure, voluntary institutionalization is not devoid of risks. Indeed, assuring the "voluntariness" of an institutional placement is just as important as protecting the interests of long-term institutional inmates.¹⁴⁴ But in Minnesota, voluntary institutionalization deprives the retardate of no judicial safeguards he would enjoy in the commitment process under present conditions,¹⁴⁵ and if he has been made the commissioner's ward, the statute apparently authorizes his institutionalization at the commissioner's discretion. If the retardate is institutionalized voluntarily, however, he may be in a better position. He can test the propriety of his continued detention at any time by demanding release; and the commitment proceeding will then take place in a context which makes it difficult to ignore the importance of the decision.¹⁴⁶ Moreover, the retardate may be released from the institution without commitment to guardianship, avoiding the possibility of life-long status as a ward of the commissioner.

(b) Use of Authority

"Authoritative casework" — the social work approximation of parental supervision — is a useful technique for dealing with problems of the retarded.¹⁴⁷ The commissioner recognizes that the most important consideration in the determination of a retardate's need for guardianship is the extent to which authority will be needed as a therapeutic or protective device. According to the *Manual*, among the "situations ... in which guardianship is most often needed" is the following:

Authority may be needed in order to help the boy or girl or the man or woman who has become delinquent or is unable to adjust satisfactorily in the home or community. Supervision may mean changing en-

144. See generally, LINDMAN & MCINTYRE, *op. cit. supra* note 184.

145. For a description of what have been described as "typical" commitment hearings, see text accompanying notes 234-58 *infra*.

146. See MINN. STAT. ANN. § 525.75 (Supp. 1964). The superintendent must release the person within three days of a written demand for release unless the superintendent files a petition seeking the person's commitment. It is true that the person may be no more sophisticated about demanding release than he is likely to be about seeking habeas corpus. See note 59 *supra*. But at least he has avoided the commissioner's supervision during the period prior to his institutionalization.

147. Coakley Interview, July 7, 1963.

environmental factors such as family relationships. Institutional training is also often needed.¹⁴⁸

Complete exploration of the commissioner's powers is unnecessary. It is sufficient that he enjoys some quantum of authority, and guardianship has been established principally to permit its use. Thus, a petition has occasionally been filed soon after the announcement of a retardate's intention to marry.¹⁴⁹ In the past, a decision to arrange a ward's sterilization has also led to the establishment of guardianship.

Even if no immediate need for the use of authority appears, the fact that the commissioner's powers will be available probably influences the county welfare departments to seek guardianship in some cases. There is no question that the counties have made use of the commissioner's extensive powers to control his wards. Even if post commitment procedural safeguards were available, it seems clear that many wards could not be adequately shielded from the commissioner's capricious use of his powers. Certainly, in the absence of effective post commitment safeguards, the commitment hearing should provide protections commensurate with the risks which guardianship poses for the ward. Under present conditions, however, the probate courts are authorizing the commissioner's use of his supervisory authority whether or not the ward appears to "require supervision."

(c) Sexual Misconduct

Sexual exploits by retardates have often signaled the beginning of intensive welfare department efforts to obtain guardianship. The casework premises of this practice were provided by Dr. Kuhlmann:

[Mental defectives] . . . lack common sense, judgment and insight into moral situations. They do not comprehend the wrongness of immoral acts, do not foresee consequences, and above all, they have not the will power to resist temptation. . . . This tendency is nowhere more striking than in the sex-offenses of mentally defective girls. . . .¹⁵⁰

Although the welfare departments would no longer accept the logic of Dr. Kuhlmann's argument, their practice has not changed — sexual expression indicates a need for guardianship. In one case, a neighbor reported that a 19 year-old youth had been in the company of younger girls; without indicating the source of

148. DPW MANUAL 7.

149. Coakley-Bengston Interview; see text accompanying note 52 *supra*.

150 Kuhlmann 16.

her information, the neighbor suggested that "there was indication that he had sexually molested them." The report substantially quickened the tempo of casework service to the youth and his mother. The caseworker never investigated the facts of the incident— who the girls were, their ages, whether the incident had really occurred. The youth was committed within a month; the welfare department ignored a psychologist's warning that the youth's intellectual functioning was "borderline."¹⁵¹ It is obviously appropriate for the welfare departments, and the community, to be interested in the nonmarital, sexual adventures of retardates; indeed, it would be incompatible with one function guardianship can serve — protection of the retardate, especially from exploitation by others — if sexual activities were not given immediate attention. But concern for the problem can be expressed adequately, at least initially, by casework services; the counties have often utilized guardianship as the opening gambit.

A retarded girl's out-of-wedlock pregnancy often creates a crisis atmosphere which leads to guardianship. This problem, of course, has been favored with specific legislative history.¹⁵² Nonetheless, the commissioner's policy is to investigate carefully whether a pregnancy presents a problem of "unwed motherhood," or a situation in which a retardate is being exploited. His argument proceeds as follows: although many economically deprived, out-of-wedlock mothers may test within the mentally deficient range, their pregnancies need not have resulted from sexual exploitation; no matter what her intellectual capacity, every unwed mother is entitled to receive, without sanctions, any state service that may benefit her personally and make her a more responsible member of society; retardates can be taught social controls by "casework service in depth"; therefore, a retardate should not be committed simply because she is pregnant out of wedlock, but only if guardianship can accomplish some therapeutic purpose with respect to her retardation.¹⁵⁸ But the counties have followed the practice of committing any unwed mother who obtains a satisfactorily low I.Q. score.¹⁵⁴ The *Manual* includes "retardation of parents" among the "situations of persons in the higher levels of mental retardation" in which guardianship is most often needed.

151. File * 6, Sept. 5, 1968.

152. See note 14 *supra* and accompanying text.

158. Coakley-Bengston Interview.

154. Compare Kuhlmann 16-17: "Reliable statistics have shown that more than one half of the professional prostitutes are feeble-minded. Probably about the same figure holds for . . . the mothers of illegitimate children."

"Prospective parents who are retarded may need help not only to aid them to make a community adjustment but also to prevent child neglect and the birth of children."¹⁵⁵ These comments, and a number of the case files, suggest that many commitments of unwed mothers can be explained more accurately by reference to the counties' child welfare programs than they can be justified by the purposes of the state guardianship program.

(d) Delinquency

Many retardates who become wards of the commissioner are referred to the county welfare departments because of delinquent or criminal behavior. When state guardianship was instituted, retardation programs commonly assumed that "the tendency to delinquency of all mental defectives is a well established fact."¹⁵⁶ Although criminological and retardation theorizing is now much more sophisticated, the counties still seem to assume that guardianship is appropriate for any retardate who has engaged in minor criminal or delinquent conduct. For the most part, the probate courts have granted the petitions. It does seem likely, however, that the welfare departments would not intervene if the criminal offense were relatively serious — although the serious offender might also be marginally "retarded."¹⁵⁷ In a recent case, a 24 year-old youth had been convicted of grand larceny and sentenced, with a stay, to an indeterminate term in the reformatory. Six months later, he was apprehended breaking into a grain elevator; he was jailed and referred to the welfare department. The caseworker recommended guardianship because the youth — whose I.Q. was 81 — was "retarded both intellectually and socially;" placement in a sheltered workshop was thought to be "a more logical place" for him than the reformatory:

155. DPW MANUAL 7. Until recently, the counties, with the support of the commissioner's staff, followed the uniform practice of refusing restoration or discharge to any female ward of child bearing age who had not been

sterilized. See *id.* at 68; note 63 *supra*.

156. Kuhlmann 16.

157. Coakley-Bengston Interview. However antisocial the person's behavior, the community's response has been extremely influential in determining whether a commitment petition would be filed. In one recent case, the juvenile court judge informed the welfare department that if he received any more complaints about a seven year-old, brain damaged and epileptic boy, and the department took no action, he would do something himself to help the situation. A commitment petition was filed almost immediately. File # 18, March 30, 1960. The commissioner believes that although community feeling has been a factor in commitment decisions, it should be considered irrelevant. Coakley Interview, July 7, 1963.

Though some people can manage with . . . [his] I.Q. . . . in a community, -----with his lack of social training has a difficult time. He has a poor conception of right and wrong and even now while sitting in jail he cannot conceptualize that his acts have put him there. Therefore, I do not feel time spent in a state reformatory would be of any benefit to him nor help the community in rehabilitation.¹⁵⁸

But the youth was at best marginally "mentally deficient." More important, the caseworker had not really considered whether the "corrections" program might have been more useful to the youth than guardianship. That he suffered from a "poor conception of right and wrong" was hardly sufficient evidence that the youth would not have been helped most by a reformatory sentence or by the supervision of a probation officer. The commissioner's staff urged the county not to commit, but to leave the youth to the criminal process and the discretion of the district judge.

The available evidence indicates that local caseworkers have been too quick to assume that the state's criminal process has no therapeutic value.¹⁵⁹ The grain elevator case and others like it also suggest that a critical problem — how to distinguish rationally those retardates who should not be held criminally "responsible" for their behavior — has not yet been examined either by the welfare departments or by the county attorneys. The problem is a most difficult one, of course,¹⁶⁰ but it cannot be ignored — if only because the proper scope of the retardation program must be clarified. The commissioner would reserve guardianship for intellectually impaired persons whose antisocial behavior indicates that they can be expected to derive more benefit from guardianship than from alternative state programs.¹⁶¹ Although this policy obviously cannot serve as the judicial standard for determining responsibility, at least it affords some guidance for the county's decision to seek guardianship. That decision, especial-

158. File # 12, June, 1963. This was an "evaluation case" — the county was seeking the advice of the commissioner's staff. See note 84 *supra* and accompanying text. The caseworker did not explain the meaning of her observation that "he cannot conceptualize . . ." Considering the youth's I.Q., it is doubtful that she intended the comment to be taken literally.

159. The county caseworker's report in File # 12 was sent to mental retardation caseworkers in a representative sample of the state's counties. See note 128 *supra*. Sixteen of the respondents indicated that they would seek guardianship for the youth. Of the 26 caseworkers who disapproved commitment, only five thought that his immediate supervisor and the county welfare board would agree with the decision. Half of the caseworkers thought that, if a petition were filed, the probate judge would commit the youth despite his I.Q. score.

160. See generally TASK FORCE ON LAW 36-41.

161. Coakley Interview, July 7, 1963.

ly if it precedes prosecution,¹⁶² may vitally affect the retardate's interests: county attorneys are often unwilling to prosecute the commissioner's wards.¹⁶³ On the other hand, a retardate may be better off taking his chances in a criminal prosecution. At least he has the benefit of procedural protections — none are likely to be available if he is under guardianship and the commissioner decides to incarcerate him.

3. *The Counties' Practices Assessed*

The *Manual's* suggestion that "persons in the borderline range" may be considered "mentally deficient" if they do not "adjust satisfactorily to society without coming to the attention of social agencies,"¹⁶⁴ must be rejected. But because such welfare department stratagems have not been questioned frequently enough by probate judges, guardianship has been established for persons whose intellectual capacities and behavior can hardly be distinguished from that of the average prison or delinquency institution inhabitant.¹⁶⁵ Certainly, "impairment in adaptive behavior"¹⁶⁶ is an essential element of a functional definition of mental retardation. Yet the guardianship program cannot be considered appropriate simply because a person does not conform to community behavioral standards. The Task Force on Law made the point effectively:

The use of social incompetency as the single criterion of mental retardation is indefensible: for all behavioral abnormalities represent impairments in adaptation, and regarding this as the sole defining characteristic of mental retardation leaves no basis for distinguishing the latter condition from other disorders of human behavior¹⁶⁷

162. MINN. STAT. § 525.753(5) (1961) permits a district court to refer the defendant in a criminal proceeding to the probate court for examination. "A duplicate of the findings shall be filed in the probate court, but there shall be no petition . . . or commitment unless otherwise ordered."

163. Interview With Galen Cadle, Esq., Assistant Attorney General for the Department of Public Welfare, in St. Paul, July 18, 1963.

164. DPW MANUAL 81-82.

165. According to a study made for the commissioner in 1962, of the felons incarcerated in the state reformatory for men, approximately 75% were classified as "borderline" and 25% were classified as "defective"; of Annex-for-Defective-Delinquents inmates during the same period, 10% were classified as "dull normal," 32% were classified as "borderline," and 56% were classified as "defective." See Coakley, Collins & Mandel, An Evaluation of the Post-Institutional Recidivism of Individuals Remanded to the Annex for the Defective Delinquent for Felonious-Type Behavior 3 (July 6, 1962).

166. See TASK FORCE ON LAW 5, quoting Heber, *Modifications in the Manual on Terminology and Classification in Mental Retardation*, 65 AMERICAN J. OF MENTAL DEFICIENCY 499 (1960).

167. TASK FORCE ON LAW 5.

In short, although the two criteria of retardation — intellectual disability and maladaptive behavior — are to some extent correlative,¹⁶⁸ both must be satisfied in every instance. Imposition of the protective and control features of mental health programs should require evidence of a causal relationship between the person's intellectual incapacity and his behavior. Thus, since law-abiding conduct does not seem to be a function of intelligence alone,¹⁶⁹ a person with a "borderline" I.Q. should not be made a ward of the commissioner simply because he has engaged in delinquent or criminal behavior. The difficulties of proof cannot be ignored, of course; but some effort must be made to distinguish "mental retardation" from "criminal behavior."¹⁷⁰ A similar analysis is applicable to the problem of out-of-wedlock pregnancies. The commissioner's approach to the low I.Q., unwed mother is based much more sensibly on the policies of the guardianship statute than are the county welfare departments' practices.¹⁷¹

Nor is it proper for the probate courts to establish guardianship, as they have, without any concern that "requires supervision" is a jurisdictional prerequisite. Dr. Kuhlmann read the second half of the definition of "mentally deficient person" out of the statute, at least for any person whose I.Q. score was lower than 75.¹⁷² Dr. Kuhlmann's standard ignored the implications of his accompanying statement:

168. The higher a person's I.Q. (assuming the test is accurate, of course), the more severe and chronic the "adaptive behavior" impairment should be to justify commitment. Per contra, the lower a person's I.Q., the less need there is to show some behavioral difficulties for purposes of commitment. But this does not mean that the behavioral criterion should disappear. See note 172 *infra* and accompanying text.

169. "The study of the success and failure of groups of high grade feeble minded at large in society has recently shown that failure in meeting social requirements is as much if not more dependent on direct moral traits, temperament, and home training than on the exact grade of intelligence." Kuhlmann 17. And this was when the guardianship program was just beginning!

170. See TASK FORCE ON LAW 39-40.

171. See note 152 *supra* and accompanying text.

172. See note 93 *supra* and accompanying text. Dr. Kuhlmann did recommend that the probate judges look to behavioral factors in deciding whether to commit "borderline cases" — persons with I.Q.'s between 70 and 85. But his discussion indicates that he viewed these considerations in much the same fashion as the welfare departments now view them, rather than as a jurisdictional, "requires supervision" prerequisite to commitment. For example, he urged the judges not to permit testimony that the person "has been remuneratively employed and perhaps to the satisfaction of his employers, and so on.

This does not mean that there are not some mentally deficient adults with an intelligence quotient somewhat below .72 or .70 who for the time being are making good. We know that there are a great many. It only means that such adults will not be able permanently to make an independent, honest living, without supervision and guardianship, under any and all circumstances they are likely to meet in their lives. The chances of their doing so are practically nil, and the risk of leaving them unprovided for is too great. . . .¹⁷³

These remarks take no account of several considerations essential to a sound guardianship program: intelligence tests are not sufficiently reliable to base such sharp distinctions on five point differentials; the "retardate's" measured intelligence may change over time; considering the number of state wards and the amount and quality of welfare department supervision of most of them, the "risk of leaving them unprovided for" is usually not decreased by commitment. Nor did Dr. Kuhlmann appreciate what seems implicit in the statutory definition and in the *Masters* opinion: guardianship cannot be established unless the person has a *present* and a *life-long* need of supervision.¹⁷⁴ Although conditions may arise, at some unspecified time in the future, which will prevent a person's making "an independent, honest living," that hardly constitutes justification for depriving him of discretion now. Such an analysis leads us back to the abuses of Depression years. Since the commissioner's guardianship is for the ward's life, moreover, commitment can be justified only if the person's "impairment in adaptive behavior" is chronic rather than situational. The Task Force on Law recommended: "Plenary guardianship should be reserved for those who are judicially determined to be incapable of undertaking routine day-to-day decisions and who are found to be incapable of basic self-management."¹⁷⁵ Without these strictures, the guardianship program violates the "basic demo-

When all this has been established as a fact . . . it proves nothing either in regard to the mental deficiency of the case, or the need of state guardianship." Kuhlmann 15-16.

178. *Id.* at 15. And see *id.* at 16:

Mental deficiency even below an intelligence of .70 is very frequently not recognized by associates In fact the majority of cases of about this intelligence are not recognized definitely as feeble-minded until after the case meets some social disaster Most entirely unskilled labor requires no greater intelligence than this for moderate success.

174. See *In re Masters*, 216 Minn. 553, 563, 13 N.W.2d 487, 493 (1944): "inadequate social adjustment at one time is not conclusive that such mal adjustment will continue indefinitely."

175. TASK FORCE ON LAW 25.

cratic principle" that governmental compulsion should be permitted only "to the minimum degree necessary and for the shortest period possible."¹⁷⁶

If "requires supervision" were recognized as an independent prerequisite to guardianship, the probate court would at least be compelled to give individualized attention to the subject of the petition. Moreover, conduct is appropriately an important determinant of the propriety of governmental interference with personal privacy and liberty. (Perhaps it should not be as important a determinant of the wisdom and utility of governmental interference which a person freely and rationally requests; but it requires incredible naiveté to conclude that the petition in many commitment proceedings is in fact voluntary — even when an adult, "borderline" retardate petitions in his own behalf.) A behavioral criterion could hardly make the task of categorization any more intricate; indeed, the evidence introduced to satisfy a "requires supervision" standard would probably add to the usefulness of the I.Q. data. And the standard may well be applied more intelligently than I.Q. test scores have been: judges are familiar with the methods, and the risks, of assessing a person's past and likely future behavior.

There is no rational reason for welfare department opposition to an interpretation of the statute which respects the legislative standard. Indeed, the introduction of a behavioral prerequisite will probably improve the guardianship program. Retardation case loads are now so large that, in practice, caseworkers manage to protect or supervise only those wards who are currently living through emergencies; previously well-adjusted wards are usually strangers when an emergency does occur.¹⁷⁷ Any significant reduction in the number of wards would permit the welfare departments to improve their supervision of the remainder. A "requires supervision" criterion would surely preclude a great many of the commitments which now occur. Commitment as a "mentally deficient person" adds nothing to the commissioner's ability to supervise a child who has become his "ward" following a dependency or neglect adjudication; by virtue of the prior juvenile court decree, the commissioner is authorized to exercise all necessary parental authority until the child reaches majority.¹⁷⁸ Some spe-

176. *Id.* at 19.

177. See authorities cited note 148 *supra*.

178. The Juvenile Court Act permits the judge, following an adjudication terminating parental rights, to appoint the commissioner "guardian" of the child. The purpose of the appointment is to permit protection and to authorize placement of the child for adoption if that is feasible. See MINN. STAT.

cial safeguard might be required if the child needed institutional training — not to authorize placement, but to insure the child's right to demand release. The "requires supervision" standard should be applied even more rigorously: since intelligence levels and behavioral problems are least likely to be permanent for children as a group, mental deficiency guardianship should not be established for any child under 18 if his difficulties can be handled by a juvenile court.¹⁷⁹ The retarded persons who are experiencing situational and temporary difficulties — the unwed mothers, for example — could also be excluded.

A "requires supervision" standard is no panacea. Dr. Kuhlmann suggested the risks:

But there is no objective method of evaluating [the many factors other than lack of intelligence]. . . . When we are dealing with the borderline case . . . our conclusions must in the end be based chiefly on personal judgment. We are in a realm in which the "experts" will inevitably sometimes disagree.¹⁸⁰

§ 260.241(1) (1961). "This guardian has the right to make decisions affecting the person of the child, including but not limited to the right to consent to marriage, enlistment in the armed forces, to medical, surgical, or psychiatric treatment and adoption." MINN. STAT. § 260.241(2) (1961). But the commissioner's "parental" authority ends when the child reaches majority.

One of the sample cases sent to county caseworkers, see note 128 *supra*, involved a five year-old illegitimate child with multiple physical deformities. He had earned I.Q. scores of 40 and, three months before, 50. His mother's parental rights had been terminated. Forty of the 42 caseworkers responding indicated that they would recommend commitment.

179. The Juvenile Court Act gives the juvenile court broad authority to supervise and protect "delinquent," "dependent," and "neglected" children. MINN. STAT. §§ 260.185, .191 (1961); see MINN. STAT. ANN. § 260.015 (Supp. 1964). If "authority" is needed to compel parental behavior, the juvenile court can provide it; if "authority" is needed to protect the retarded child in the community, the welfare department can obtain it if the juvenile court awards the department "legal custody" of the child. See note 237 *infra*. If the child needs help in the community but the parents are not "neglecting" the child, the welfare department can still interpose itself between the retardate and those who might otherwise exploit him. See note 193 *infra* and accompanying text.

In the absence of Probate Code revisions, the exemption suggested in the text would provide the child with incidental advantages. Juvenile court processes include procedural safeguards — such as an attorney and periodic reviews of the child's situation — which are unknown following commitment. In the rural counties, the probate judges exercise juvenile court jurisdiction; the review might therefore be *pro forma*. Nonetheless, the fact that there will be review may deter some improper supervision; and the child and his parents will regularly have an opportunity to complain about the welfare department's treatment without the need to obtain their own lawyer and seek habeas corpus.

180. Kuhlmann 19.

Dr. Kuhlmann concluded that what he called the "social criterion" should not be stressed; he urged the probate judges "to give more weight to the degree of mental deficiency, which can be more accurately established" ¹⁸¹ It is clear, however, that the absence of a criterion other than I.Q. score has too often permitted inaccuracy and abuse. In the absence of post-commitment procedural (and perhaps substantive) safeguards, the risk of probate court caprice seems preferable. Such a choice is more consistent with the general outlines of our political system. Moreover, if the probate judges are informed of the importance of the commitment decision to the ward, their errors in applying the "requires supervision" standard may be in the direction of establishing guardianship for too few retarded persons rather than too many. It would not seriously wrench our "basic democratic principle" to assign the burden of risk in this fashion.

C. "... TO REQUIRE ... CARE ..."

1. *The Commissioner's Policies and the Counties' Practices*

An important purpose of a retardation program is to afford retardates the protection which they cannot provide for themselves— protection from physical injury, from emotional harm, from exploitation by those more favorably endowed, from economic want. The guardian provides protection by personally intervening between the retardate and any threatening aspect of his environment. This protective function has often played a part in welfare department decisions to seek guardianship. Its importance in the precommitment casework process is best illustrated by the commissioner's belief that "parental adequacy" is a primary determinant of the need for guardianship. ¹⁸² With respect to this consideration, at least, the historical tradition, ¹⁸³ the commissioner and the counties are all in agreement.

The welfare departments have been quick to seek guardianship when they have discovered a retarded child being denied the basic necessities or an adequate environment. ¹⁸⁴ They have also responded quickly to a retarded child left untended. In one

181. *Id.* at 5.

182. Coakley Interview, July 7, 1963.

183. See note 14 *supra* and accompanying text.

184. In File % 9, Feb. 27, 1952, the school social worker reported just before a 14 year-old boy was committed:

The various teachers who have worked with _____ have all described him as a friendly, cooperative boy who has always shown a desire to achieve. . . . He has shown some emotional instability on occasions but always we have felt that he could be quite easily con-

case, guardianship was established for a 10 year-old girl after her widowed mother's death. The sequence of events dramatically illustrated the importance of neglect to the commitment process: the girl was committed on March 20, 1945; less than a year before, a psychologist had reported the girl's I.Q. to be 69 — "----- is seriously retarded, to the extent of bordering on feeble mindedness"; in February, 1945, while the girl's mother was still alive, her aunt petitioned to have her committed; the petition was denied — "the County Attorney and Judge were not convinced she was feeble-minded because she could write her name and also her birth date and knew how far her school was from home and how far the farm was from town"; after her mother's death, however, the girl's grandmother brought her to the county court house, filed another petition, and refused to take the girl back to her home; a new psychological study reported an I.Q. of 64 and strongly recommended guardianship; the Probate Judge committed the girl after deciding "to dispense with having the Doctors at the hearing in view of the recent mental test which said ----- had deteriorated by about 4 or 5 points in I.Q."¹⁸⁵

Parents often reject a handicapped child. If the welfare department did not intervene, rejection might exaggerate the child's handicaps and lessen his chances of making an adequate community adjustment. The counties have petitioned in cases of this kind and guardianship has usually resulted. Parental inadequacy may be much less obvious if the problem involves over-protection. But the commissioner believes that the risks for the retardate are substantial and he would recognize over protection as a relevant factor in determining the need for guardianship. Most caseworkers would probably concur. Nonetheless, signs of over protection have not disposed the counties to urge guardianship as aggressively as has been customary in other situations. Of course, guardianship is usually recommended; but if the parents are uninterested, the issue is not always pursued. For example, one caseworker decided during a home visit in 1957 that loving, attentive, and protective parents were not "in the mood to face up to the . . . mental limitations" of their 13 year-old daughter.

trolled. Never has he been considered a serious behavior problem nor have we seen any indications of anti-social tendencies.

We have always been concerned about the conditions in _____'s home. Our contacts with the mother lead us to believe that she is quite inadequate in taking care of this child. Often _____ has shown a desire to get away from his home. . . . _____'s personal appearance shows very clearly that there have been no standards of cleanliness set for him in the home.

185. File # 2, March 11, 1945; see text accompanying note 92 *supra*.

The caseworker urged the parents not to petition if they were unsure. One home visit was made in 1958 and another in 1959, but the parents still had no interest in guardianship. The case then remained completely dormant for four years; the quiet was not broken until the parents asked the welfare department to commit their daughter to guardianship because she had just been raped.¹⁸⁶

The inevitable concomitants of poverty have often been mistaken for "inadequacy" or "neglect." But the commissioner's commitment policy would require a careful distinction. The commissioner believes that a retardate's financial situation, or his parents', is not a valid measure of his need for guardianship.¹⁸⁷ Financial support under poor relief or child welfare legislation, day-care facilities, foster homes, and other community services for retardates may all be utilized without guardianship. In principle, of course, the counties might not disagree. But the "facts of life" often make principle a luxury; and tax rates and expense management are important facts of government officials' lives. Because the counties have tried to save money by maximizing institutional care of the retarded, poverty has often been the effective reason for the establishment of guardianship.

If a physical disability accompanies the person's intellectual deficiency, commitment seems highly probable.¹⁸⁸ The views of medical and psychological experts have been influential in these cases. It is common, for example, for an obstetrician or pediatrician to advise parents to leave an obviously impaired baby in the hospital after delivery; the doctor recommends immediate commitment to state guardianship and refers the parents directly to the welfare department.¹⁸⁸

"Protection" may also describe a quite different function which guardianship theoretically serves. The notion is that guardianship will operate as an "insurance policy" — as a device to permit "long term closeness" to the retardate so that the welfare department will be able to step in immediately when an emergency occurs.¹⁹⁰ When parents are urged to petition, guardianship is al-

186. File * 14, Sept. 3, 1968.

187. Coakley Interview, July 7, 1963.

188. See note 178 *supra*.

189. Gruber Interview.

190. Advisory Board on Handicapped, Gifted and Exceptional Children, Report —The Trainable Retarded Child in Minnesota, 23 (June 18, 1958); Coakley Interview, July 7, 1963; Interview With Gerald Walsh, Executive Director, Minnesota Association for Retarded Children, in Minneapolis, July 18, 1963.

ways described as protective in this sense; caseworkers, parents whose children have already been committed, educators of the retarded, officials of the Minnesota Association for Retarded Children and its local chapters, all repeat the "insurance policy" slogan. It is impossible, of course, to determine how many commitments have been based solely on this view of the function of guardianship. The substantial number of wards whose only contact with the welfare department is a caseworker's semi-annual or annual home visit provides some evidence that "insurance policy" guardianship is prevalent.¹⁹¹

2.

The Counties' Practices Assessed

No one would question the importance of the guardian's protective function. Nor is there any doubt that the welfare departments have in fact protected individual wards from a host of difficulties which they might not have been able to resolve as well on their own. But this is, after all, only part of the issue. Assume that if a retardate's parents neglect him physically or emotionally, he "requires care" and is therefore eligible for guardianship. Nonetheless, more sophisticated analysis should precede the decision to establish guardianship in cases of this kind. Welfare department caseworkers should remember that guardianship is for life, and the commissioner's authority to protect cannot be separated from his authority to supervise and control. "[F]ormal legal intervention should be regarded as a residual resource and should not occur where social or personal interests can be adequately served without it."¹⁹² If parental neglect is the problem, the juvenile court is available. There is no reason to believe that the welfare departments are likely to ameliorate neglect more successfully when they act as agents of the commissioner than they can as administrators of the state's child welfare program.¹⁹³ That is equally true if the child is a dependent or neglected "ward" of the

191. See authorities cited note 143 *supra*. In File # 17, Sept. 6, 1963, see text accompanying note 232 *infra*, the caseworker wrote immediately prior to the commitment hearing: "Since the _____'s are seeking commitment . . . to enable them to have [their son] placed at the _____ Home in Nebraska . . . and since there is no apparent real need for service . . . there does not seem to be a need for contact on this case except probably on an annual basis."

192. PROGRAM FOR NATIONAL ACTION 149.

193. In many of the rural counties, the welfare departments have such small staffs that the same caseworkers handle child welfare as well as mental retardation cases. In the three metropolitan counties, there are separate staffs; but employees are chosen, basically, from the same group. Caseloads are, if anything, larger in the retardation program.

commissioner.¹⁹⁴ If the retardate's problems result primarily from his inability to avoid exploitation, guardianship should be considered only if the welfare department can provide better protection by claiming the authority of a guardian than it can provide by relying on its normal status as a government agency. Moreover, the counties should realize that a state agency can provide a retardate very little protection against the everyday problems of community adjustment; guardianship should be established only when, whether the retardate is an adult or a child, his family cannot equal that limited protection. In fact, it is not impossible that the establishment of guardianship may encourage parental rejection of the child;¹⁹⁵ and the retardate will certainly profit more from his parents' love, devotion, and feeling of responsibility than he will from semi-annual visits by a welfare department case-worker.

"Insurance policy" guardianships are in a separate category. Simply because a retardate may profit from "long term closeness" with the welfare department, he does not necessarily "require . . . care." In any event, representations about "long term closeness" are, at best, inaccurate. The "insurance policy" image seems to be, by and large, a method of selling guardianship to parents who might otherwise be unwilling to petition. Even if their inconsistency with the statute could be ignored, "insurance policy" guardianships should be eliminated. Decreasing the number of wards might permit the welfare department to approach, for the first time, performance of a truly protective function for retardates who are properly under guardianship. D. EPILEPSY

The 1935 Probate Code authorized the use of state guardianship for an undefined class of "epileptic" persons. The initiative for the amendment did not come from the Board of Control. Miss Thomson recalled: "I did not know the content of the revised laws until they were discussed at the annual meeting of the probate judges in January, 1935. . . . Problems had arisen with epileptic persons too bright to be committed as feeble-minded but unwilling to apply for entrance to Cambridge even though they were unable to adjust to community life."¹⁹⁶ The probate judges

194. See notes 178-79 *supra* and accompanying text.

195. Coakley-Bengston Interview. See File # 15 in which parents of a Mongoloid child lost interest after the child was placed in a foster home and eventually asked that their parental rights be terminated.

196. THOMSON 98-99.

were, indeed, concerned about non-retarded epileptics; but they were also concerned about welfare department practices:

[O]ur Welfare Board brings in a petition for an epileptic under the same proceeding as if the epileptic were feebleminded. I do not believe we should call an epileptic feebleminded any more than we should call then [sic] insane or drunkards in order to get them into some state institution for medical treatment.¹⁹⁷

The drafting committee's decision not to define the term was the product of general dissatisfaction with the prior definitions, dissension among medical and Board of Control consultants, and a persistent belief that the task was likely to prove impossible.¹⁹⁸ Yet the committee's correspondence contained an important warning from the American Medical Association:

The need, it seems to me, is not for a definition of "epilepsy" or "epileptic," but for a definition of that state of the epileptic that calls for intervention of a probate court. . . . It seems to me that for practical purposes the epilepsy of which a probate court may take cognizance may be defined as follows:

A person is epileptic . . . when because of his suffering from epilepsy, he is incapable, in the ordinary relations of life incident to his position, of behaving himself and conducting his affairs in a manner consistent with safety to his person or property or the persons and property of others.¹⁹⁹

This statement might have sufficed — although, if applied, it would have limited the group of epileptics subject to guardianship.

The 1959 legislature finally added a provision paralleling the definition of mental deficiency: " 'Epileptic person' means any person suffering from epilepsy and in need of treatment, supervision, control or care."²⁰⁰ The language is not very informative, but it does seem to establish some behavioral prerequisite to commitment. A good argument can certainly be made that the definition contemplates a finding that the epileptic needs supervision and that the need has some "proximate cause" nexus to his epileptic condition.²⁰¹ Although epileptics have never been com-

197. Letter From Honorable William J. Archer to Honorable Albin S. Pearson, April 3, 1934, on file in Ramsey County Probate Court.

198. See text accompanying notes 19-25 *supra*.

199. Letter From William C. Woodward, M.D. to Honorable Albin S. Pearson, July 24, 1934, on file in Ramsey County Probate Court.

200. MINN. STAT. § 525.749(7) (1961).

201. The use of the word "treatment" is one clue. There may be some need to compel an epileptic to take medication, or to keep him from harm if he refuses medication. It is difficult to believe that the legislature would have wanted the commissioner to supervise a person who would otherwise be

mitted in great numbers,²⁰² the probate courts have ignored the 1959 amendment. In much the same fashion as the "requires supervision" provision has been read out of the definition of mental deficiency, the welfare departments and the probate courts have been satisfied by proof of epilepsy alone. The *Manual* suggests as a reason for guardianship "either the rejection or the overprotection . . . [the epileptic person] may be subject to at home or in the community."²⁰³ Nonetheless, the usual purpose of commitment, according to the *Manual*, is to make the epileptic eligible for institutional care. The commissioner's attitude toward voluntary institutionalization of epileptics parallels his policy for retardates. Yet there have been only about a dozen voluntary admissions since 1960,²⁰⁴ and the county welfare departments seem to believe that voluntary placement is in fact very difficult to arrange.²⁰⁵

The commissioner would eliminate state guardianship for epileptics. His thesis is: medical treatment for epilepsy can be provided in the community without governmental supervision; an epileptic's need for hospitalization is temporary and so obviously in his interests that it will not have to be compelled;²⁰⁶ although epilepsy is frequently accompanied by emotional illness or retardation, these problems themselves permit the use of any necessary authority; since epilepsy is an organic disease, it cannot be distinguished, for purposes of guardianship, from any other possibly incapacitating, organic disease.²⁰⁷ The commissioner's position is unacceptable to segments of the medical and professional community. Thus, a 1958 special study committee, although willing to authorize marriage for epileptic persons,²⁰⁸ refused to recommend deletion of the guardianship provision: "There was general agreement that there were some epileptic persons not mentally ill or mentally retarded but definitely in need of help or perhaps removal from the community. Guardianship for these was still

considered a criminal, simply because he regularly takes a tranquillizer to eliminate seizures.

202. Of the 464 commitments in fiscal 1962-63, 14 were both mentally retarded and epileptic, and 8 suffered from epilepsy alone.

203. DPW MANUAL 7.

204. Coakley-Bengston Interview.

205. File # 8, Oct., 1961.

206. Occasionally a person suffering from epilepsy has to change his tranquillizing drug; often this entails hospitalization. Coakley-Bengston Interview.

207. *Ibid.*

208. See generally MINN. STAT. § 517.03 (1961).

the solution."²⁰⁹ Its supporters perceive guardianship as a means of protecting epileptic children from the parents who make them recluses, and from the rejection and cruelty which is often their lot in school and in the community.²¹⁰

The commissioner has the better of the argument. During the epileptic's childhood, the juvenile court can exercise supervision of him. It is doubtful that parental rejection or over protection and community prejudices can be significantly ameliorated by a governmental protective service; in any event, there is certainly no reason to believe that the commissioner can be any more successful in such an endeavor than the juvenile court is likely to be. If the epileptic is an adult, the chances are: (1) he will want any medical treatment which improves his physical condition; (2) if his social and emotional problems have not been treated previously, he will be incapable of significant help; or (3) his other problems will authorize the use of some state program — guardianship, perhaps, if he is also retarded — to control his behavior.

The most persuasive reason for abolishing guardianship for epileptics is that the device has been abused by the welfare departments; moreover, adequate safeguards are difficult, perhaps impossible, to construct. Epilepsy, *qua* disease, has often furnished a syndrome and a legal excuse for commitment; much less frequently has it furnished justification for the establishment of guardianship. In one recent case, a 12 year-old boy presented a severe behavior problem; his exploits included fire-setting, stealing, temper tantrums, building climbing, television antenna scaling. Commitment machinery was set in motion when he took shotgun potshots at pedestrians from a downtown roof and tried to demolish the Juvenile Detention Center after his apprehension. The welfare department planned an emergency hearing to commit him as mentally deficient! Deprived of this device because the boy's I.Q. turned out to be 115, harried caseworkers turned to his seizure history. Two months before the shooting, the boy had been diagnosed as an epileptic; since that time he had regularly taken anti-convulsive medication.²¹¹ The boy could not be placed in a local residential treatment center because of his seizures, no foster home would take him, and the personnel in the Juvenile Detention Center could hardly be criticized for declining the task of supervision. The juvenile court judge sug-

209. THOMSON 224.

210. Interview With Annie L. Baker, Casework Supervisor of University of Minnesota Hospitals, in Minneapolis, Sept. 25, 1963.

211. File # 7, May 24, 1962.

gested that the boy's parents commit him to guardianship as an epileptic. A local psychiatrist, after reading the case record, agreed:

[H]e does appear to me to be a boy who can be helped with treatment, and I feel that a Cambridge placement would afford the best chance for this. If he is in Cambridge, he will be associating with other children, will be able to get continued education, and will not be exposed to as much emotional pathology as he would in a state hospital.

Another important reason for considering commitment as epileptic is the long-term control this will give us over this boy. His dangerous behavior is such as to make me concerned about the possibility that he might improve in a state hospital sufficiently to be discharged, but then will not be under close supervision from any responsible agency.²¹²

The probate court committed the boy although a DPW psychiatrist argued at the hearing that epilepsy had nothing to do with his problems, that he was mentally ill and should be committed to a state mental hospital.²¹³ Eventually, the boy was diagnosed as a "psychopathic personality." The commitment in this case was obviously designed to obtain control of the boy and to prevent his antisocial conduct. The boy came within the Code's definition of an "epileptic person" — but only if the "need of supervision" criterion does not have to be causally related to the boy's epilepsy. Certainly the welfare department was not concerned with his organic condition. Rather, his seizures were used as an excuse for seeking therapeutic goals irrelevant to the condition. Such a technique is unpleasant whether it is the Appalachian fiasco,²¹⁴ a Mann Act prosecution designed solely to jail a hoodlum, or commitment of an epileptic. Misuse of the guardianship law seldom gets as much publicity as other examples of the technique.

In another case, a 17 year-old Mexican girl, already a ward of the commissioner as a neglected child,²¹⁵ became pregnant out of wedlock. She intended to marry a 19 year-old negro youth who was willing to assume responsibility for the child. At the end of October, 1959, during the fourth month of the girl's pregnancy, a welfare department caseworker tried to prevent the marriage: " ----- said that she and ----- are hoping to be

212. *Id.* July 17, 1962. At the time the state had no residential treatment center for emotionally disturbed children. When this study was made, such a facility had been opened, and the boy had been placed there.

213. *Id.* July 20, 1962.

214. See *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

215. See note 178 *supra*.

married in December. I again reminded her that she was not allowed to marry as long as she is a dependent ward of the state. ----- says that she understands this. . . .²¹⁶ The case worker must have suspected that this somewhat inaccurate representation²¹⁷ might not be successful; in any event, one week later the welfare department recommended the girl's commitment both as mentally deficient and epileptic. Her I.Q. scores had ranged from 78 to 99; in the examination which produced the highest score, she had tested at least "dull-normal" on every part of the test. In November, 1958 she had been diagnosed as an epileptic after one seizure. The hospital had reported her condition as "idiopathic mild" epilepsy, controllable with medication, and had predicted that no mental "deterioration" would occur during the girl's youth. Anticonvulsive drugs had been prescribed and the girl had taken them regularly. The file recorded no subsequent seizures. Obviously, the welfare department's primary interest was to prevent the girl's marriage and to protect her unborn baby. The referral history concluded:

She has been diagnosed as having idiopathic epilepsy with a course of slow but appreciable deterioration. On psychological examinations she scored in the borderline mentally deficient range with additional problems of emotional interference. . . . She is pregnant. . . . _____ is determined to be married in the near future and plans to take care of her baby when it arrives. It is felt that due to-----'s epileptic condition, the fact that she is functioning at a low intellectual level, with the probability of further deterioration, and that she has consistently shown an inability to plan realistically, that -----should be committed to State guardianship as epileptic and/or mentally deficient. Further, it is thought that ----- should be institutionalized for a period of training and that her baby should be committed as a dependent child to be placed for adoption if and when found suitable.²¹⁸

She was committed on November 18, 1959 and kept in a locked room at the county hospital for three weeks until trans-

216. File # 11, Oct. 27, 1959.

217. It is true that the commissioner must consent to the marriage of his neglected ward. See note 178 *supra*. But the Juvenile Court Act should be interpreted to authorize the commissioner's use of parental prerogatives only when a parent would be able to exercise them. MINN. STAT. ANN. § 517.02 (Supp. 1964) permits any female who has attained the age of 18 to marry; parental consent is not required to obtain a license. See MINN. STAT. ANN. § 517.08 (Supp. 1964). The girl could have married as soon as she reached her eighteenth birthday. In addition, most young people know that they can be married without difficulty before their eighteenth birthdays simply by crossing state lines.

218. File # 11, Nov. 3, 1959.

ferred to Faribault. The baby was born in March, 1960; in May, the institution reported her seizures under control, no deterioration, and a prognosis of no mental change.²¹⁹ The baby was placed in a foster home, and in November, 1960 the county petitioned to terminate the girl's parental rights. The commissioner, informing the juvenile court that the girl had recently scored 86 on an I.Q. test and that he planned to file a restoration petition with respect to her status as a mentally deficient ward, recommended against termination of parental rights. His report also indicated that the girl was to remain an epileptic ward and would not be released from Faribault until the staff determined that she could adjust adequately to the community. The juvenile court denied the parental termination petition. The girl was finally released from Faribault in May, 1961 after a 16 month stay, and promptly married her fiancé. Subsequent to the original diagnosis of epilepsy, she suffered only one minor seizure — and the Faribault staff was not unanimous that she had experienced a seizure on that occasion!²²⁰

Unfortunately, there is no evidence that these cases are atypical. Even if they are, however, the risks to which commitment of epileptics are subject clearly outweigh any benefits which may accrue from guardianship. The epilepsy experts and the legislature were willing to permit epileptics complete freedom to marry; any epileptic who has had no seizures for two years may obtain a driver's license,²²¹ even epileptics under guardianship may drive if "the department is satisfied that such person is competent to operate a motor vehicle with safety to persons or property";²²² epileptic children may be protected adequately by the juvenile court. In short, state guardianship of epileptics serves no purpose which is not irrelevant to the disability furnishing the basis for its establishment. The "epileptic person" provision should be repealed.

219. *Id.* May 2, 1960. The memorandum indicated that a staff committee had discussed the case: "[I]t was pointed out that while she was in the community she presented a serious problem, in a poor environment where she had very little supervision. It was also brought out that _____ is young and quite immature. After . . . careful consideration the members of the committee were in agreement that _____ would benefit by a period of supervision and training here." *Ibid.*

220. *Id.* Sept. 12, 1960; May 2, 1961 (memorandum from institution to DPW).

221. Letter From D. J. Besaw, Chief Driver Evaluator of the Minnesota Department of Highways, Nov. 19, 1963; see MINN. STAT. § 171.04(9) (1961).

222. MINN. STAT. § 171.04(5) (1961).

IV

No legislative program can be completely free of error. It is not surprising, then, that even a limited exploration of the commitment process has exposed an assortment of unsound, even improper, practices. Yet the critical issue is whether, despite the errors, the purposes of the retardation program can best be accomplished by guardianship;²²³ and, if so, how to minimize the risks of improper commitment. The importance of safeguards cannot be underestimated: guardianship subjects the ward to a variety of serious disabilities and to the extraordinary supervisory powers held by the county welfare departments; for all practical purposes, the initial proceeding in the probate court provides the only judicial oversight of the welfare department's use of its authority.

In fact the need for safeguards has been almost entirely ignored. To be sure, it is not easy for the probate judges to make satisfactory choices within the present legislative framework. The commitment provisions of the Probate Code are hardly models of careful legislative drafting; and appeals are so uncommon that the supreme court cannot be expected to provide adequate guidance. Nonetheless, neither the county welfare departments nor the probate courts have made any serious effort to improve the commitment process. The inadequacies go deeper than failure to apply the legislative standard: the welfare departments have misused the guardianship program; many probate judges have completely abdicated their judicial responsibilities.

The problems have not been exposed to public attention, although they have troubled the commissioner; the problems have not been solved, although the commissioner sees signs of gradual improvement. The data reported here do not justify the commissioner's optimism.²²⁴

A. PRACTICES OF THE COUNTY WELFARE DEPARTMENTS

Because the commissioner's staff has been unable to exercise

228. As the introduction to this essay indicated, no final evaluation of state guardianship can be made until the risks (and the number of wards likely to be subjected to those risks) can be weighed against the advantages of the program. The discussion which follows assumes that the program is worth saving.

224. Other representations made by the commissioner's staff have been extremely reliable. If improvement has occurred, it should be attributed to the sensible attitudes and fierce determination of DPW personnel.

effective supervision of their policies,²²⁶ the counties have often manipulated the guardianship program to achieve therapeutic goals for non-retarded persons with "problems." On at least one occasion, for example, a psychologist was asked to obtain a low I.Q. score for a brain damaged girl; the welfare department thought that guardianship might help to curtail her promiscuous behavior.²²⁶ A psychologist recently warned the Hennepin County Welfare Department that "approximately six percent of the general population would score lower" than 76 on the Wechsler I.Q. test; yet the 19 year-old youth whose testing furnished the occasion for this warning was committed to guardianship two weeks later.²²⁷ In another case, a 16 year-old boy with an I.Q. of 84 had been a severe behavior problem in his school and in the community; he was committed and immediately institutionalized. A week later, the institution psychologist reported that the boy was emotionally disturbed, and the stigma of commitment for mental deficiency would interfere with his community adjustment.²²⁸ A subsequent memorandum from a DPW caseworker read:

As you know, the case of ----- was a borderline one for commitment in mental deficiency. At the time of referral, however, after quite a bit of discussion, it was agreed that he [sic] was in need of some plan immediately and our program seemed to be the best one according to the material presented on him.²²⁹

These cases and others like them suggest that the counties have made use of the *carte blanche* provided them by the pro-

225. See notes 75-85 *supra* and accompanying text. The Probate Code permits the commissioner to waive the 10 day notice of a commitment hearing. MINN. STAT. § 525.752(2) (1961). Although the commissioner's staff is loathe to waive notice, Coakley Interview, July 7, 1963, the pressures to do so are often great — especially when an emergency condition has somehow been created. And emergencies, of course, pose the most substantial risk of improper commitment. See notes 211-20 *supra* and 228-29 *infra* and accompanying text.

226. Interview With David S. Thorsen, M.D., in St. Paul, July 15, 1963.

227. File # 6, Sept. 5, 1963.

228. File # 5, Nov. 15, 1960. At the county welfare department's request, the commissioner waived 10 days notice of the commitment hearing. See note 225 *supra*.

229. *Id.* at Dec. 22, 1960. Although the commissioner's staff has tried to achieve reform, sensible attitudes are not always adequate protection, in individual cases, against a strong desire to "help" a person with "problems." See text accompanying notes 112 & 123 *supra*. Although the commissioner's staff subsequently tried to have the boy restored to capacity, the county dragged its feet; a restoration petition was not filed for two and one-half years. See text accompanying note 64 *supra*.

bate courts — and misuse of the guardianship program has been the result. These practices can be attributed, in part at least, to the caseworkers' sincere belief that retardation program resources will be most useful in the solution of pressing and difficult social problems; the belief has been most marked when the only alternative state program has been "corrections." Certainly, legislative refusal to provide resources in adequate variety is unfortunate; but legislative failings should not be corrected by *sub rosa* misappropriations of existing programs — especially when personal liberty and discretion may be at stake.

The temptation to misuse guardianship has been magnified because guardianship decisions have often been made in a crisis atmosphere created by the behavior that brought the person to the welfare department's attention. It is not uncommon for a person to be described as retarded if he has sufficiently taxed a caseworker's patience and imagination and exhausted the other resources of the welfare department. In one case a promiscuous 16 year-old girl had achieved I.Q. scores of 77 and 82. She had adjusted poorly to a group home for delinquent girls and had run away from the home on several occasions. The juvenile court judge was considering whether to place the girl in the state institution for delinquents, although neither he nor the welfare department expected the experience to help her. A member of the group home staff remembered a girl with similar problems who had been aided by a period at the Owatonna State School; with this information, the caseworker decided that the girl's problems were primarily intellectual — and the girl was committed to guardianship.²³⁰ The commissioner refused to authorize the girl's placement at Owatonna because she tested as "dull-normal" and seemed to be a "socio-pathic personality."²³¹

The welfare departments have sought guardianship to serve a variety of other purposes which were not within the scope of the state's retardation program. On two occasions recently, for example, Hennepin County sought and obtained guardianship of a retarded child to facilitate his parents' arrangements for private institutional care after their deaths. Both couples had

230. File # 16, May 15, 1963.

231. *Id.* June 12, 1963. For another example of a guardianship decision made under crisis conditions, see notes 211-20 & 225 *supra* and accompanying text. For an example of the effectiveness of neighborhood campaigns, see File # 13, May 2, 1960; the caseworker called the boy's grandmother: "I told her . . . this was just what the neighbor had said, and that . . . when you have the number of complaints we have had regarding _____, then you begin to believe some of them." And see note 157 *supra*.

adequate life insurance and estate plans to provide care for their child, and they were not interested in state guardianship for protective purposes. But the private Nebraska institution with which the parents were contracting had insisted that the children be committed. The institution's staff wanted assurance that Minnesota would have financial responsibility if the children's resources were ever depleted.²³² The uses to which the "epileptic person" provision has been put provide one more illustration of the tendency to misuse the guardianship program.

The welfare departments should not bear sole responsibility, of course; in many (if not most) of these cases, the commitment petition should have been denied. But the county welfare departments share the obligation to foster an effective guardianship program — and, by and large, that obligation has been ignored.

B. PROBATE COURT PROCEDURES

One of the functions of the judiciary in a democratic society is to protect citizens against abuses of governmental authority. Unfortunately, the probate courts have not served this function in guardianship proceedings. When a mentally ill person or an alcoholic is committed to a state hospital, the probate judge, the board of examiners, the guardian *ad litem*, all seem to be alert, aware that there is a substantial risk that a person's liberty may be jeopardized improperly if the petition is granted. No wife testifies as to her husband's insanity or alcoholism without being questioned closely to insure that the petition is not one more round in a bitter inter spousal vendetta. In mental deficiency hearings, on the other hand, the judge and the board of examiners are relaxed, unconcerned; the observer detects a group feeling: "We can do no wrong; no harm can come from commitment."

The Hennepin County hearings are described as typical.²³³ They are conducted in a standardized fashion: The court commissioner's assistant escorts the parents and the retardate into the hearing room and introduces them to all the other participants; the county attorney asks the parents if they recognize the petition and if they signed it willingly; after receiving an affirmative answer, the county attorney asks the welfare department's "court unit" caseworker²³⁴ to describe the facts of

232. File # 17, April 17, 1963; File # 18, Sept. 20, 1963; see note 191 *supra*.

233. Coakley Interview, July 7, 1963.

234. Hennepin County Welfare Department assigns three caseworkers to "represent" the department in judicial proceedings. In the juvenile court, the

the case; after the caseworker's cursory recitation, the court commissioner turns to the medical examiners, seated immediately behind him, and asks for the mental age and I.Q. of the subject of the petition; one member relays the information and the court commissioner asks: "Are you Doctors in agreement that ----- is committable as a mentally deficient person?"; the doctors respond affirmatively; he then asks the guardian *ad litem* if he has any questions; the guardian usually has none; the court commissioner then pronounces the commitment order. In one recent session in Hennepin County, 13 persons were committed in 55 minutes.²³⁵ Since the probate courts are not provided with court reporters, the proceedings are not recorded.²³⁶

If the probate courts all operate in this fashion, the commitment hearing could be eliminated. For all practical purposes, the probate court simply provides signatures and a seal for an exercise of discretion by the welfare department. So much has been emasculated that the hearing provides no safeguards to the "patient." In the first place, the evidence introduced to justify guardianship is usually untested. Caseworkers in the welfare department and the court commissioner can recall *only one contested proceeding* in Hennepin County.²³⁷ (The court

unit aids the assistant county attorney; in mental deficiency commitment hearings, although a representative of the county attorney's office attends, see text accompanying note 33 *supra*, the court unit caseworker actually handles presentation of the case. In rural areas, the county attorney probably presents the case.

235. The hearing date was Sept. 20, 1963. The author attended the session.

236. Some of the attitudes about procedural formality are implicit in a caseworker's remark about an attorney's methods in one very unusual case: "Mr. _____ [the attorney] took the lead at the hearing, defended _____ [the patient], and even carried it to the extreme where he had a court reporter in to take down everything that was said." File # 13, June 24, 1960.

237. Interview With Frank Bessesen, Esq., Court Commissioner of the Hennepin County Probate Court, in Minneapolis, Sept. 20, 1963. The Hennepin County court unit supervisor indicated that if it seems likely that parents of a retardate will oppose a commitment which the welfare department believes to be essential (on occasion, even if the parents are unwilling to sign the petition), a petition is filed in the juvenile court alleging the child's dependency or neglect. It has not been difficult to make a case that the child is "... without the special care made necessary by his ... mental condition because his parent ... neglects or refuses to provide it" MINN. STAT. ANN. § 260.015(10) (e) (Supp. 1964). Or the petition might allege that the child is "... in need of special care ... required by his ... mental condition and ... [his] parent ... is unable to provide it" MINN. STAT. ANN. § 260.15(6)(b) (Supp. 1964). After the child has been adjudicated either neglected or dependent, and "legal custody" has been awarded to the welfare department, MINN. STAT. ANN. § 260.015(8) (Supp.

commissioner "settled" the case by dismissing the petition without prejudice.)²³⁸ The *Manual* indicates that in most instances certified copies of the psychologist's report will satisfy the probate court. It continues: "Probably, only in the occasional case in which commitment is strongly opposed, will a request for direct testimony from the psychologist be considered necessary."²³⁹ Very seldom is the retardate questioned, regardless of his I.Q. level; and the information elicited from parents, relatives, or the occasional caseworker who appears,²⁴⁰ is minimal. In the hearings observed during this study, neither the judicial officer nor the members of the examining board read the referral history or the psychological reports presented with each petition. It is likely that the psychiatrist who administers I.Q. tests for the hearing checks the other scores achieved by the retardate. It is also possible that rural judges pay more attention to the information at their disposal.²⁴¹ Nonetheless, it is apparent that most hearings are *pro forma*.²⁴²

1964), the parents often feel that they have no right to oppose the mental deficiency commitment — even though they may appear at the hearing and make their wishes known to the examining board. Interview With Mrs. Doris Nelson, Supervisor in the Court Unit of the Hennepin County Welfare Department, in Minneapolis, July, 1963.

238. File # 13, Oct. 28, 1960. The attorney had been representing the boy in a negligence action. A little less than two years later, the father agreed to guardianship; the boy was committed and institutionalized. *Id.* Aug. 17, 1962.

239. DPW MANUAL 82.

240. In the 13 cases heard by the Hennepin County court commissioner on Sept. 20, 1963, only four caseworkers appeared. None of them volunteered any information. The Hennepin County caseworkers seldom attend the hearings. Interview With Alice D. Smith, Supervisor of the Mental Retardation Unit of the Hennepin Court Welfare Department, in Minneapolis, July 25, 1963. It is likely that in the rural counties the caseworkers who have most intimate knowledge of the case appear and take part.

241. See, *e.g.*, the text preceding note 185 *supra*. At least some of the rural probate court hearings are more formal and more thorough. Since in every county but Hennepin, Ramsey, and St. Louis the probate court exercises juvenile court jurisdiction, it is likely that in rural areas the judge may be more familiar with the patient and his family.

242. Several persons interviewed felt that the hearing should be "less traumatic" for the retardate and his family. Miss Thomson commented:

The actual hearing from a social worker's standpoint is very hard on all concerned — this is based on "legal protection." I've always wished the higher grade persons did not have to be in court and listen to their shortcomings recounted. Then when parents bring children to the court house and . . . are sometimes questioned as though they were adversaries, it is a trying experience. . . . I've always wished legal protection could be extended in a pleasanter manner.

Letter From Miss Mildred Thomson, July 17, 1963, on file in the University of Minnesota Law Library.

Many of the probate judges lack any clear understanding of their function. The Probate Code seems to give the judge judicial responsibility; the attorney general has ruled that the examining board and the judge constitute a group and the majority's decision is binding.²⁴³ Yet the Hennepin County court commissioner ventures that he is not qualified to make "medical judgments"; if the doctors recommend guardianship, he would commit. The commissioner believes that it is his task "to see that the proceedings are conducted fairly, in an orderly fashion, and according to the rules of evidence."²⁴⁴ The psychiatrists who participate in retardation hearings apparently believe that they wield the real decisional power.²⁴⁵ In Hennepin County, the assistant court commissioner chooses the psychiatrists for the examining board, and she restricts the group to three or four practitioners,²⁴⁶ as a result, there has been no opportunity for different attitudes toward commitment policy to be manifested. This is probably not an accurate picture of all the probate judges, of course; but there is good reason to believe that the Hennepin County hearings are entirely too representative.

The appointment of a guardian *ad litem* has been standard since the Minnesota Supreme Court recognized in the *Wretlind* case²⁴⁷ that the subject's interests and those of the petitioner (either his parents or the welfare department) may be adverse. In Hennepin County the guardian is appointed from a group of lawyers whose names are provided by the bar association. In Ramsey County, one attorney acts as guardian in all cases. The caseworkers are not sympathetic to the guardian's role and seem to believe that his presence deters parents' petitions.²⁴⁸ In fact, guardians have not often disturbed the placidity of

243. See note 39 *supra*.

244. Interview With Frank Bessesen, Esq., Hennepin County Court Commissioner, in Minneapolis, Sept. 20, 1963.

245. Interview With David S. Thorsen, M.D., in St. Paul, July 15, 1963. Dr. Thorsen and several other psychiatrists who have participated as members of examining boards complained that their role at the hearing had never been explained to them.

246. *Ibid.*

247. *In re Wretlind*, 225 Minn. 554, 32 N.W.2d 161 (1948).

248. See THOMSON 176-77:

Many parents, while eager that their children be protected, feared a law that, interpreted literally, might mean that they could no longer have any control in planning for them. They . . . questioned whether the state could be trusted. . . .

My ability to understand a parent's hesitancy may have been enhanced because of ... [*In re Wretlind*]...

To me, the supreme court here showed a misconception of the significance of guardianship, which was intended to be basically pro-

commitment proceedings. Many attorneys believe that the guardian serves no real function. In a recent session in Hennepin County, during which 13 persons were committed, the guardian asked only two questions.²⁴⁹ In one case he asked the age of the petitioning father. In another, the petitioners were making arrangements for their adult son's eventual institutionalization in Nebraska; they were so concerned that the welfare department might try to take custody of their son that their own attorney accompanied them to the hearing. The guardian asked the parents whether they understood the petition and wanted state guardianship. There is hardly any doubt that if he had pursued the matter, explaining the prerogatives to which guardianship entitled the commissioner, these parents would have withdrawn their petition.²⁵⁰

Only one of the Hennepin County guardians *ad litem*, of those interviewed, seemed to understand his role. He stated that he customarily opposed commitment unless the retardate needed treatment which could not be obtained without guardianship. But this attorney lacked basic information about the retardation program: he believed that casework services, foster care, and institutionalization could be obtained only after guardianship was established; and he had been informed that priority for institutional care was based solely on a "waiting list."²⁵¹ In short, the guardian *ad litem* has not usually precluded unnecessary or improper commitments.

Many of the psychiatrist members of examining boards share the common attitude that a low I.Q. is sufficient evidence of "mental deficiency."²⁵² In Hennepin County, one member of the examining board is always a psychiatrist who claims to be skilled in administering I.Q. tests. In fact, this psychiatrist specializes

pective. . . . The probate courts had to change their procedures, however, making hearings more cumbersome and less informal — and thus more difficult for the families. . . .

249. See note 285 *supra*. The supervisor of Hennepin County's Court Unit suggested that the guardian *ad litem* does not do anything because in the usual case "there is nothing to be done." Interview With Mrs. - Doris Nelson, Supervisor of the Court Unit of the Hennepin County Welfare Department, in Minneapolis, July, 1968.

250. File # 17, Sept. 20, 1963. See text accompanying note 232 *supra*. Of course, the guardian should represent the ward's interests rather than his parents'. But if the parents are concerned about the commissioner's powers as guardian, their interests and their son's coincide.

251. Interview With Thomas Scallen, Esq., in Minneapolis, October, 1963.

252. Interview With David S. Thorsen, M.D., in St. Paul, July 15, 1963. When the issue is "mental deficiency," of course, a psychologist would probably be more helpful than a psychiatrist. And the statute permits the

(without training) in 10 minute oral examinations — with questions apparently derived from a Stanford Binet primer. He claims that his scores are usually within 10 points of prior tests,²⁶³ but 10 points is a large margin when commitment seems to turn, however improperly, on the I.Q. score alone. In any event, the psychiatrist has access to prior scores when awarding his own. The most charitable comment one can make about the Hennepin County practice is that these I.Q. tests cannot be considered a reliable safeguard against improper commitments. In the other counties, apparently, the examining board relies upon I.Q. scores reported in the petition.

Because psychiatrists who appear in commitment hearings differ in their attitudes as to appropriate retardation treatment, the hearings differ from county to county and with each change in the examining board. Some psychiatrists feel that the hearing should be a therapeutic experience for the retardate's family; others try to insure that the welfare department has "worked up" the case adequately and has explored alternatives other than commitment.²⁵⁴ These efforts may have been successful in deterring inappropriate petitions in Ramsey County, but clearly they have not resulted in many, if any, dismissals.²⁵⁵ Nonetheless, considering the Hennepin County practice, frequent changes in the examining board seem to be a good idea; it is always possible that an unseasoned member may be reluctant to establish guardianship.

It is not surprising, under these conditions, that the welfare departments' recommendations have been extremely influential. In Hennepin County, only two petitions have been rejected by the court commissioner and his examining board. The "court unit" caseworker tries to "gloss over" "bad" evidence so that the hearing will be less traumatic for the retardate and his family.²⁵⁶ As a result, the proceeding—already ineffective because the participants either do not know or will not fulfill their respon-

appointment of a psychologist to the examining board. See note 37 *supra* and accompanying text. It seems likely that psychiatrists are often appointed because mental illness and mental deficiency hearings are commonly held on the same day. Hennepin County's practice, see note 32 *supra*, is the exception.

253. See File # 13, Aug. 19, 1963 (cross-examination of psychiatrist).

254. Interview With David S. Thorsen, M.D., in St. Paul, July 15, 1963.

255. In Hennepin County, the court unit caseworker could remember only one petition, other than File # 13, see note 237 *supra*, which had been denied. The county had obtained an I.Q. score of 50 but at the hearing the psychiatrist assigned the patient a score of 100. Interview With Mrs. Doris Nelson, Supervisor of the Court Unit of Hennepin County Welfare Department in Minneapolis, July, 1963.

256. *Ibid.*

sibilities — lacks relevant information which might permit its improvement. On the other hand, the commissioner's views have not been equally influential.²⁵⁷

Probate court decisions are seldom appealed. The families who appear unwillingly seldom have the financial resources or the social sophistication to consider hiring their own lawyer, and the probate court seldom provides one for the "patient." Neither the guardian *ad litem* nor the judicial officer tells the family that they can appeal the decision. The Hennepin County court commissioner reports that none of his decisions has been appealed.²⁵⁸ The paucity of Minnesota Supreme Court decisions of state guardianship cases suggests that the experience in other counties is probably similar.

CONCLUSION

No blueprint has been provided for determining whether a person with below average intellectual capacity should be made a ward of the commissioner. Indeed, such a blueprint — even if it could be devised — would contribute little to the major purpose of this discussion. It is essential, rather, that current inadequacies be recognized. The guardianship program obviously functions with little regard for the legislature's decision as to its appropriate scope. Of course, this is not the first — nor will it be the last — exploration of the disparity between "law on the books" and "law in action."²⁵⁹ In some instances, the most appropriate response is to "leave well enough alone" — especially if no one is being injured, and legislative or judicial "reform" is either infeasible or might result in a less adequate program.²⁶⁰ But the commitment process can and should be modified: some of the commissioner's wards, and their families, are being imposed upon, and many more wards are subject to serious risk of imposition; moreover, effective reform can be accomplished.

The legislature can surely make improvements. The guardianship statute should be amended to include some post commitment safeguards;²⁶¹ at the same time, the statute's definitions should be reviewed — and modified. It would not be difficult to differentiate, at least in general terms, those retardates (if there are

257. See notes 80-85 *supra* and accompanying text.

258. Interview With Frank Bessesen, Esq., Hennepin County Court Commissioner, in Minneapolis, Sept. 20, 1963.

259. Cf. Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303 (1950); Note, 101 U. PA. L. REV. 1304 (1953).

260. Cf. Schwartz, Book Review, 96 U. PA. L. REV. 914 (1948).

261. Consider, in this connection, a suggestion that the Scandinavian *Ombudsman* be adapted to needs in the United States. Davis, *Ombudsmen in*

any) who are most likely to need the commissioner's guardianship for the rest of their lives. Retardates who need some casework supervision or protection for situational difficulties might be separately described — in a definition which circumscribes the commissioner's powers and maximizes the retardate's personal prerogatives.²⁶² More careful definitions are likely to improve the commitment process: by clarifying the behavioral and intellectual circumstances which justify the use of a protective (and authoritative) social program; and, equally important, by clarifying the roles in the hearing of members of the examining board and the judicial officer. Needless to say, no legislative definition can guarantee effective judicial implementation. But statutory precision at least gives the probate judges guidance; they may be encouraged, in turn, to fulfill their responsibilities. Effective post commitment safeguards will help to minimize the remaining risks.

Better legislative policies are not likely to correct one of the major difficulties in the commitment process — the extent to which welfare department caseworkers view guardianship as a means to "help" people with "problems." If the probate court hearing were to function properly, however, a large part of the welfare department's present discretion in obtaining guardianship powers would be eliminated; and post commitment safeguards could protect retardates properly subjected to some measure of governmental authority.

Even if legislative reforms cannot be expected, the commitment process can be improved. If probate judges appreciate the possible consequences of commitment, they may take the risks into account: hearings can elicit all relevant information about the prospective ward; the decision to establish guardianship can be made with concern proportionate to the importance and difficulty of the underlying legal and social issues. If members of examining boards, guardians *ad litem*, and especially probate judges, were better informed about the guardianship program, it is not unlikely that they would all be willing — indeed, anxious — to do a better job. This much is certain — they cannot avoid the responsibility they have to promote an effective guardianship program and to preserve the civil liberties of the intellectually deprived.

America: Officers To Criticize Administrative Action, 109 U. PA. L. REV. 1057 (1961). Exploration of the types and scope of such safeguards should accompany a detailed examination of the commissioner's actual supervision of his wards. But it is clear that some safeguard must be provided. See the text accompanying notes 42-65 *supra*. 262. See note 192 *supra*.