A Response to the Problem of Elder Abuse: Florida's Revised Adult Protective Services Act

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IN RECENT years increasing attention has been focused on abuse of the elderly. Hearings and reports by the United States House of Representatives Select Committee on Aging and news reports of elder abuse, neglect, and exploitation have prompted many states to enact some form of adult protective services legislation. While specific provisions of these laws vary widely from state


3. Some confusion exists about exactly how many states have this type of legislation. This confusion results from varying definitions of what constitutes "adult protective services" legislation. For the purposes of this Comment, "adult protective services" legislation refers to any legislation designed to address abuse, neglect, or exploitation of elderly persons in noninstitutional settings.

to state, most include reporting of suspected abuse and provision of social services to abused adults. States without such laws generally rely on traditional statutory guardianship procedures.4

Adult protective services legislation is usually a compromise between the desire to protect individuals and respect for rights of privacy, liberty, and self-determination. Unlike children, who are considered incompetent under the law, adults are vested with full civil rights,5 and only when the state's interest in protecting the individual from abuse outweighs an individual's rights may the state interfere.6

It is difficult to assess the true extent of the elder abuse problem because prior to the implementation of protective laws little data was available.7 Generalizations from existing data are troublesome because state definitions of abuse and of those who need protective services differ.8 Although several studies have been conducted on elder abuse, analysis based on their findings is inconclusive because of the varying criteria and methodologies used.9

Abuse is not confined to the elderly in nursing homes or similar institutions; it occurs at home by a relative or by an informal caretaker.10 It is estimated that as many as one million older people are abused each year.11 This number is likely to increase as the population of elderly adults increases. In 1980, more than twenty-five


Although some adult protective services statutes, including Florida’s, include disabled adults as well as the elderly, this Comment will focus only on the problems of the elderly.


6. The ability of the state to interfere in the lives of individual citizens for their own protection is based on the doctrine of parens patriae. See generally Horstman, Protective Services for the Elderly: The Limits of Parens Patriae, 40 Mo. L. Rev. 215 (1975).

7. In compiling its 1981 Report, the House Select Committee on Aging found that many states had no data on elder abuse. House Select Comm. on Aging 1981 Report, supra note 1, at xiv. Furthermore, all but one of the existing state statutes addressing the issue have been enacted since 1973. See H. Havemeyer, Adult Protection Laws: A Critique (Jefferson County, Colo., Dep't of Social Services) (July 1984) (on file, Florida State University Law Review).

8. See generally H. Havemeyer, supra note 7.

9. See NATIONAL PARALEGAL INST., ELDER ABUSE AND NEGLECT: A GUIDE FOR PRACTITIONERS AND POLICY MAKERS (1981); Katz, supra note 5, at 697; see also NATIONAL SENIOR CITIZENS LAW CENTER, ELDER ABUSE: PUBLIC POLICY OPTIONS OTHER THAN DIRECT SERVICE DELIVERY (1983).


million Americans were sixty-five years of age or older.\(^\text{12}\) By the year 2000, that number is expected to reach thirty-five million—about 13% of the population.\(^\text{13}\) Unfortunately, it has also been estimated that only one of six adult abuse cases is reported.\(^\text{14}\) Women and adults age seventy-five or older appear to be most at risk.\(^\text{15}\)

Florida has the greatest concentration of elderly adults of any state.\(^\text{16}\) Of the 22,485 reports of adult abuse, neglect, or exploitation in Florida during 1985, of which 56% were confirmed,\(^\text{17}\) 43% involved abuse in private homes.\(^\text{18}\) Of the 22,485 reports, 52% involved neglect, 18% physical abuse, 15% emotional abuse, 10% threats of physical harm, and 6% financial exploitation.\(^\text{19}\) Florida data confirm that women and adults over seventy-five are more likely to be abused.\(^\text{20}\)

There are numerous theories about the causes of elder abuse.\(^\text{21}\) The most frequently articulated is that abuse results from the emotional, physical, and financial stress of caring for the dependent elderly.\(^\text{22}\) As life expectancy increases, so does the number of elders that need care. This phenomenon requires more middle-aged adult children to assume responsibility for their parents—just when their own children have moved out of the home and they are nearing retirement age themselves.\(^\text{23}\) However, with the steady de-

\(^{12}\) Numbers Show Aging of America, Tallahassee Democrat, Feb. 17, 1985, at 1A, col. 1.
\(^{13}\) Id.
\(^{14}\) House Select Comm. on Aging 1981 Report, supra note 1, at xix.
\(^{15}\) Id. at xx; see also National Paralegal Inst., supra note 9, at 11.
\(^{17}\) Florida Dep’t of Health & Rehab. Servs., Selected Characteristics of Reports of Abuse, Neglect, or Exploitation of Adults Received in Florida (Table 1) (1986) (on file, Florida State University Law Review). Because Florida’s Adult Protective Services Act includes disabled persons, these figures reflect abuse of the disabled as well as abuse of the elder.
\(^{18}\) Id.
\(^{19}\) Florida Dep’t of Health & Rehab. Servs., Percentages of Types of Maltreatment Reported for Indicated Cases (Table 2) (1986) (on file, Florida State University Law Review).
\(^{21}\) National Paralegal Inst., supra note 9, at 15.
\(^{23}\) See National Paralegal Inst., supra note 9, at 18; National Senior Citizens Law Center, supra note 9, at 15; Katz, supra note 5, at 702.
crease in family size and the increased geographic mobility of our society, fewer family members are available to care for elderly relatives or to support those who have accepted that responsibility.\textsuperscript{24} Aggravating this situation are the negative attitudes toward the elderly and disabled which pervade our society.\textsuperscript{25} Certainly, the complex causes of elder abuse must be considered when designing a legal response to the problem.

Florida law has included adult protective services provisions since 1977.\textsuperscript{26} Concerns persisted, however, about the adequacy of protection for due process rights of the elderly adults served. Prior to the 1986 Regular Session, House and Senate committees, the Florida Committee on Aging, and the Department of Health and Rehabilitative Services undertook the ambitious task of reviewing and revising the existing adult protective services law.\textsuperscript{27} The substantially revised Adult Protective Services Act was passed by the legislature as part of an omnibus bill, Committee Substitute for House Bill 1313.\textsuperscript{28} The revised Act clarifies definitions; provides detailed procedures and greater due process safeguards for the abused and the alleged abuser; facilitates the provision of protective services by providing easier access to victims and involuntary removal from an abusive environment in emergency situations; and mandates greater interagency cooperation in the reporting, investigation, and prosecution of elder abuse, neglect, or exploitation.\textsuperscript{29} These revisions make the Florida Adult Protective Services Act one of the most progressive in the nation.

In this Comment the author traces the history of elder abuse legislation in Florida and other states. Florida's revised Adult Protective Services Act is examined in detail with discussion of its legislative history and analysis of the revisions. The author also addresses concerns regarding the adult protective services response to elder abuse and the extent to which the new Florida legislation succeeds in answering those concerns. Finally, changes to Florida's Adult Protective Services Act and Guardianship Law are suggested for future legislative consideration.

\begin{itemize}
\item \textsuperscript{24} See National Paralegal Inst., \textit{supra} note 9, at 18; Katz, \textit{supra} note 5, at 702.
\item \textsuperscript{25} See National Paralegal Inst., \textit{supra} note 9, at 18; Katz, \textit{supra} note 5, at 703.
\item \textsuperscript{26} Fla. Stat. § 409.3631 (1977).
\item \textsuperscript{27} Staff of Fla. H.R. Comm. on Health & Rehab. Servs., HB 1328 (1986) Staff Analysis 2 (May 28, 1986) (on file with committee) [hereinafter cited as Staff Report].
\item \textsuperscript{28} Fla. CS for HB 1313 (1986). This Comment deals only with that part of the omnibus bill which revised the Adult Protective Services Act.
\item \textsuperscript{29} Staff Report, \textit{supra} note 27, at 2-9.
\end{itemize}
I. Survey of Elder Abuse Legislation

Many states have enacted some form of elder abuse or protective services legislation.\textsuperscript{30} A typical definition of protective services is: "services provided by the state or other governmental or private organizations or individuals which are necessary to prevent abuse, neglect, exploitation or abandonment."\textsuperscript{31} While state statutes vary greatly, such legislation generally includes provisions for reporting suspected abuse with assurance of immunity and confidentiality as well as facilitated access by investigators to suspected victims of abuse. Additionally, social and health services are provided either with the consent of the victim—referred to as voluntary services—or without consent—referred to as involuntary services. Safeguards are also provided to prevent inappropriate interference in the individual's rights of privacy and self-determination.\textsuperscript{32} The safeguards used vary widely among the states.\textsuperscript{33}

Like child abuse and guardianship statutes, adult protective services laws are based on the assumption that those covered by the statute need special protection.\textsuperscript{34} Under the doctrine of parens patriae, the state may impose protection if it is in the individual's best interests.\textsuperscript{35} In our society, however, an adult of any age is presumed competent to control his life without paternalistic government protection. Criminal and tort laws for assault, battery, fraud, and similar offenses are considered sufficient protection.

For this reason, most states limit the operation of protective services or adult abuse laws to those persons considered especially vulnerable. While many state statutes are restricted to abuse of the elderly,\textsuperscript{36} the trend in other states, including Florida, is to include physically or mentally disabled adults.\textsuperscript{37} States also use different criteria to determine who is protected; some states emphasize se-
nility or infirmities of aging. This approach may overly restrict the category of elderly served. Several state adult protective services statutes do not limit the statute to especially vulnerable adults, or base their definition of vulnerability solely on age. Without specific criteria, there is increased likelihood of inappropriate interference with the rights of competent persons. Moreover, such statutes could be unconstitutionally overbroad. Not all adults need the paternalistic attention of the state. Furthermore, to base such a definition on age alone merely perpetuates the stereotype of the incompetent elderly person. Some states emphasize functional incapacity, or an individual’s inability “to provide adequately for his own care or custody, or . . . to manage his property and affairs effectively, or to carry out the activities of daily living, or to protect himself from abuse, neglect or exploitation.” This is probably the best approach to defining which adults are particularly vulnerable, in that functional ability may be determined through objective observation of the individual’s recent behavior. Critics of this functional approach, however, are concerned that protective services may be involuntarily imposed on competent adults who are merely physically incapacitated.

States also differ as to what constitutes abuse, neglect, or exploitation. Physical injury is always included in the definition of abuse. In some states, the existence of an injury may be sufficient to show abuse. Other states require an injury to have been inflicted intentionally or negligently. Not all states recognize the infliction of mental anguish or injury as abuse. Some states that do include “mental injury” require that it be quantifiable. Psychological abuse should not be ignored by elder abuse statutes.

38. NATIONAL PARALEGAL INST., supra note 9, at 120.
44. See, e.g., ARK. STAT. ANN. § 59-1301(2) (Supp. 1985).
Neglect is sometimes defined simply as the failure to provide adequate food, shelter, medical care, and other basic necessities.\textsuperscript{47} However, some states require that failure to provide care must have been negligent, with some states specifying the "reasonable prudent person" standard.\textsuperscript{48} Some states include self-neglect within the definition of neglect, while others either ignore self-neglect or categorize it separately.\textsuperscript{49} It is important to include self-neglect in a protective services statute because those in need of such services are not only those abused by other people. At least one state defines neglect as a "pattern of conduct resulting in deprivation of services necessary to maintain minimum physical and mental health."\textsuperscript{50} This definition addresses an important concern. An isolated instance of a family member striking an elderly adult does not constitute abuse.\textsuperscript{51} Nor does a single occurrence of leaving an elderly individual without supervision or care constitute neglect.\textsuperscript{52} Evidence of a "repeated, deliberate pattern of mistreatment or negligence" should be required before protective services workers intervene.\textsuperscript{53} Few states, however, address this aspect of abuse and neglect.\textsuperscript{54}

States also include a definition of exploitation, generally defined as "the illegal or improper use of an incapacitated adult or his resources for another's profit or advantage."\textsuperscript{55} A few states, however, define exploitation only as the improper use of funds "which have been paid by a governmental agency to an adult or to the caretaker

\textsuperscript{47} See, e.g., WYO. STAT. § 35-20-102(a)(xi) (Supp. 1985).


\textsuperscript{50} ARIZ. REV. STAT. ANN. § 46-452(4) (Supp. 1985).

\textsuperscript{51} H. Havemeyer, \textit{supra} note 7, at 4.

\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} Minnesota is the only state recognizing that abuse is a recurring phenomenon. MINN. STAT. ANN. § 626.557(2)(d) (Supp. 1983). Minnesota's definition of neglect is also very progressive, including not merely the absence of basic necessities, but also the likelihood of absence of such necessities. MINN. STAT. ANN. § 626.557(2)(e)(2) (Supp. 1983). New Hampshire recognizes neglect as a pattern of conduct. N.H. REV. STAT. ANN. § 161-D:2(v) (Supp. 1985).

for the use or care of the adult.”\textsuperscript{56} This definition fails to protect the personal resources of the elderly.

State adult protective service laws also differ as to who may be charged with abuse, neglect, or exploitation. Many states restrict the application of their statutes to the caretaker, or one who has assumed responsibility for an elderly person.\textsuperscript{57} A typical definition of a caretaker is “a person who is responsible for the care of an elderly person as a result of a family relationship, or who has assumed responsibility for the care of an elderly person voluntarily, by contract, or by court order.”\textsuperscript{58} By limiting neglect to caretakers, the state recognizes that only someone who has accepted the responsibility of caring for an elderly person, either permanently or temporarily, should be held liable for the absence of care. Such limitations make little sense in the context of abuse or exploitation, which can be perpetrated by those without special responsibility. Equally problematic, however, are those statutes that do not limit the operation of abuse, neglect, or exploitation simply to the caretaker. As a result, it is unclear who can be charged with neglect. Theoretically, a neighbor having little contact with an elderly person could be held liable. Such a broad definition seems unworkable.

The wide discrepancy between states as to what constitutes abuse, neglect, or exploitation; who is covered by the statutes; and who is to report abuse, makes it difficult to compile uniform data on the extent of elder abuse. These dissimilarities lead to confusion as to when abuse should be reported and increase the probability of inappropriate intervention by social service agencies.

\textbf{A. The Reporting of Abuse}

A number of states require reporting by anyone who has “reasonable cause to believe” that a vulnerable person has been abused, neglected, or exploited.\textsuperscript{59} Other states require professionals, such as doctors, nurses, social workers, dentists, and sometimes clergy, to report suspected abuse discovered in their professional


\textsuperscript{58} \textit{Alaska Stat.} § 47.24.100(3) (1984).

\textsuperscript{59} \textit{E.g., Idaho Code} § 39-5203(1) (1985).}
A few states have purely voluntary reporting provisions.61 Most reporting statutes guarantee confidentiality and immunity from civil or criminal liability to those who in good faith report suspected abuse.62

Despite requirements that professionals report suspected abuse, few of the mandatory reporting laws address the problem of confidentiality of communications between doctor and patient, or clergy and confessor. Those that do provide that in cases of suspected abuse, neglect, or exploitation such communication is not privileged and may be admitted into evidence at any abuse proceeding.63 This situation creates a serious conflict between the physician's or clergyman's professional and legal responsibilities. It has been suggested that mandatory reporting provisions may discourage the elderly, who do not want governmental interference in their lives, from seeking needed medical attention.64 Also, as professionals are required to report suspected cases of abuse, physicians and clergy could allegedly be liable for civil damages for failure to report.65 This threat could also increase unfounded reports requiring investigation at state expense and result in unnecessary invasions of privacy—especially as the standard of knowledge or suspicion is the minimal "reasonable cause to believe."

Mandatory reporting laws have been criticized as an ineffective response to the elder abuse problem.66 The theory behind mandatory reporting of elder abuse, as with child abuse, is that because vulnerable adults do not as often interact in society, abuse is difficult to discover and address unless a third person, such as a

63. Ark. Stat. Ann. § 59-1312 (Supp. 1985). The privilege between husband and wife is also usually abrogated. Of course, the privilege between attorney and client is maintained even by those states abrogating all other professional privileges of confidentiality. E.g., id.
64. Faulkner, Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults, 16 Fam. L.Q. 69 (1982).
65. Katz, supra note 5, at 713. The Arkansas statute mandates that those who willfully fail to report, and are required to do so by law, "shall be civilly liable for damages proximately caused by such failure." Ark. Stat. Ann. § 59-1313(2) (Supp. 1985). On the other hand, it is very difficult to determine who failed to report. This problem means penalties designed to encourage reporting are probably ineffective. National Senior Citizens Law Center, supra note 9, at 73.
66. See Faulkner, supra note 64, at 84; Katz, supra note 5, at 711.
doctor or other professional, reports the suspected abuse. Critics of mandatory reporting charge that similar child abuse statutes have not been very successful. Despite mandatory reporting laws, many reports of suspected child abuse still come voluntarily from those not required to report. Critics question the assumption that competent elderly adults will not report abuse themselves. Yet an abused person may not report the abuse—a very rational decision because the consequence of reporting can be forced removal from the home and/or the commencement of guardianship proceedings.

The assumption underlying mandatory reporting statutes appears to be that most people over a certain age are unable to make rational decisions concerning their lives and what assistance they may require. This is surprising in a society that prizes independence and individual rights. Mandatory reporting laws may be more appropriate where an adult has been declared incompetent by a court—with full due process protection—and placed in the guardianship and care of an individual or institution. In this situation the state interest in protecting the person is great and the need to respect that person's full civil rights does not apply. Prior to a determination of incompetency, however, special care must be taken to respect individual autonomy. Once a report is filed, most states require an investigation which typically includes a visit to the elderly person's home. If the report cannot be substantiated, some states require that it be expunged to protect the rights of those accused of having abused an elder.

B. Provision of Services

Social service workers have no legal access to the premises to investigate or provide services without the consent of the caretaker or the individual believed to have been abused. If consent is re-

67. See Katz, supra note 5, at 705. Faulkner disagrees with this assumption, questioning whether elder abuse is in fact a "hidden problem." Faulkner, supra note 64, at 80.
68. Katz, supra note 5, at 706.
69. Faulkner, supra note 64, at 80.
70. Id. See also NATIONAL SENIOR CITIZENS LAW CENTER, supra note 9, at 74.
71. See Faulkner, supra note 64, at 84; Katz, supra note 5, at 711.
73. Sometimes the entire record is expunged. E.g., IDAHO CODE § 39-5203(3) (1985). In general, however, only the identifying information such as name and address are eliminated, and the other information is retained for data collection purposes. E.g., IND. CODE ANN. § 4-27-7-9(b) (Burns Supp. 1985).
74. NATIONAL SENIOR CITIZENS LAW CENTER, supra note 9, at 37.
quired, adult protective services laws generally provide a mechanism, such as an injunction, to enable the investigator to gain access to the person believed to have been abused. Some states specifically allow forced entry by law enforcement authorities if the caretaker refuses consent.

If it is determined after investigation that an elderly person is in need, appropriate services may be provided with consent. Most states do not allow protective services to be provided without consent, or where consent has been withdrawn, unless the person is found incompetent or incapacitated. A competent adult has the right to refuse treatment.

Some states require traditional guardianship proceedings before providing involuntary services. This requirement is especially disturbing when a statute provides that services be rendered for those unwilling to consent. Every state has some form of statutory guardianship. Guardianship may be of the person, property, or both. Being declared incompetent and having a guardian appointed reduces the ward to the legal status of a child.

Often there is no relative or friend to act as guardian. For this reason, some states have enacted public guardianship statutes. Even where a relative is available, particularly when the estate is large, a conflict may arise between the interests of the relative acting as guardian and those of the ward. Similarly, to avoid a conflict of interest a public guardian should not be in the social service delivery system or be able to petition for guardianship. There is also concern that individuals with public guardians will be more

75. E.g., WASH. REV. CODE § 74.34.080 (Supp. 1986); see also NATIONAL PARALEGAL INST., supra note 9, at 121.
77. E.g., WYO. STAT. § 35-20-105(b) (Supp. 1985).
82. Sherman, Guardianship: Time for a Reassessment, 49 FORDHAM L. REV. 350, 351 (1980). A guardian of property is also called a conservator. Guardianship of the person includes decisions on residence, personal care, and what the ward will be permitted to do.
83. Id.
86. Schmidt, supra note 84, at 359.
frequently institutionalized because that is the easiest way to deliver needed personal services. Public guardianship has had varying success; some state systems work very well, and others are plagued with difficulties. It should be recognized, however, that a public guardianship program is only as good as the statutory system for determining who needs a guardian.

Critics contend that guardianship proceedings may be, in many circumstances, an overreactive and inappropriate response to elder abuse. The incapacity of the elderly person may be only temporary. Deprivation of food, water, or health care may cause depression or confusion. Despite the reversible nature of their condition, wards have lost control over their lives once they have been declared incompetent. There are few appeals from determinations of incompetency. Despite the availability of procedures to terminate guardianship, legal competency is rarely restored. The greatest obstacle to restoration may be the lack of evidence that the individual is capable of managing his personal or financial affairs; this is because guardianship prevents him from doing so. Rather than resolving the situation, traditional guardianship may only increase the victimization of the elderly.

Using traditional guardianship proceedings when limited intervention would alleviate the problem is contrary to the principle of using the least restrictive alternative. Some states provide a separate procedure similar to guardianship within their protective services statutes, but this could be of even greater concern because the substitute statute may contain fewer due process protections. Other states provide for appointment of a guardian with limited authority, allowing the ward to retain most of his rights, or man-

87. Mitchell, supra note 81, at 1441.
88. Schmidt, supra note 84, at 359.
89. Id.
90. See Horstman, supra note 6, at 234.
91. U.S. DEP'T OF HEALTH & HUM. SERVICES, PROTECTIVE SERVICES FOR ADULTS 80 (Spr. 1982).
92. Mitchell, supra note 81, at 1425. Even if an appeal is taken, "the trial court decision will, in practice, be affirmed on appeal if there is any evidence in the record to support it." Id. (emphasis in original).
93. Id. at 1426.
94. Id.
95. NATIONAL SENIOR CITIZENS LAW CENTER, supra note 9, at 45.
96. See NATIONAL PARALEGAL INST., supra note 9, at 122; Horstman, supra note 6, at 263.
98. See Regan, supra note 42.
99. Sherman, supra note 82, at 367.
date that only those involuntary services which are least restrictive to liberty may be used.\textsuperscript{100}

The problems inherent in the use of guardianship when an elderly person is unwilling or unable to consent to services are compounded by the frequently overbroad and vague statutory definition of incapacity. Some guardianship or adult protective services statutes contain no definition of incapacity or similar terms.\textsuperscript{101} In some states old age alone is considered a cause of incapacity.\textsuperscript{102} Old age is not synonymous with mental incompetency, however, and such provisions threaten to deprive competent as well as incompetent adults of their constitutional rights.\textsuperscript{103} In other states the definition is tied to functional incapacity, based on a specific physical or mental condition.\textsuperscript{104} Complete reliance on medical diagnosis results in confusion between medical and legal incompetency.\textsuperscript{105} Incapacity is, in some jurisdictions, defined as "inability to make or communicate responsible decisions concerning his person."\textsuperscript{106} Rather than a factual determination of functional incapacity, this subjective, value-laden, and vague definition is open to abuse.\textsuperscript{107} Case law supports the proposition that a competent adult has the right to make unreasonable or irresponsible decisions.\textsuperscript{108} For example, the decision to refuse services cannot alone be used to determine incompetency.\textsuperscript{109} Recognizing the extreme vagueness of this standard, the Supreme Court of Utah chose to interpret inability to make "responsible decisions concerning his person" as the "decision-making process . . . being so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur."\textsuperscript{110} This interpretation diminishes the subjectivity of the standard and emphasizes


\textsuperscript{101} See, e.g., Iowa Code § 235B.1 (1985).

\textsuperscript{102} See, e.g., Va. Code § 63.1-55.2 (1980).

\textsuperscript{103} See Horstman, supra note 6, at 262.


\textsuperscript{105} Horstman, supra note 6, at 228.


\textsuperscript{107} See National Paralegal Inst., supra note 9, at 120; Mitchell, supra note 81, at 1420-21. But see Regan, supra note 42, at 1124.


\textsuperscript{110} In re Boyer, 636 P.2d 1085, 1089 (Utah 1981).
functional incapacity, which lends itself more readily to judicial fact-finding based on the individual's recent behavior.\footnote{111} By using this definition functional incapacity is not tied to an underlying physical or mental condition. Thus the confusion between medical and legal definitions of incompetency is avoided.

The serious consequences to individual civil rights in guardianship or provision of involuntary services require that special attention be paid to procedural due process. This includes sufficient notice, legal representation, the presence of the alleged incompetent at an adversarial hearing, and a constitutionally sufficient evidentiary standard of proof.\footnote{112} Not all relevant state statutes contain these provisions.

The Supreme Court in\textit{ Mullane v. Central Hanover Bank & Trust Co.},\footnote{118} held that to satisfy due process, notice of pending court proceedings must be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Notice provisions in guardianship and protective services statutes range from forty-eight hours to ten days.\footnote{114} Few states, however, address "the problem of the confused client who may not appreciate the terms or importance of the legal document conveying such notice."\footnote{115} Notice is typically only of the hearing date, without explanation of the serious consequences of the contemplated action.\footnote{118} Besides requiring clear notice of the implications of a pending hearing, another approach is to mandate notice to any known next-of-kin, as well as to a caretaker and/or attorney.

Not all states mandate that the alleged incompetent be present at the hearing.\footnote{117} Some states allow attendance or hearing requirements to be waived if injurious to the physical or mental well-be-

\footnote{111}{\textit{See supra} text accompanying note 41.}

\footnote{112}{{Horstman, supra note 6.}}

\footnote{113}{{339 U.S. 306, 314 (1950).}}

\footnote{114}{{\textit{E.g.}}, Oklahoma:\textsc{ Okla. Stat. Ann.} tit. 43A, \S 808(c) (West Supp. 1985) (48 hours); Utah:\textsc{ Utah Code Ann.} \S 55-19-4(7)(b) (Supp. 1985) (10 days).}}

\footnote{115}{{Regan, supra note 42, at 1118.}}

\footnote{116}{{Mitchell, supra note 81, at 1416. The Minnesota guardianship statute is an example of requiring more specific notice. See \textsc{Minn. Stat. Ann.} \S 525.55.2 (West Supp. 1986).}}

\footnote{117}{{\textit{E.g.}}, Arizona:\textsc{ Ariz. Rev. Stat. Ann.} \S 14-5303(b) (1956) (alleged incompetent entitled but not required to attend); Tennessee: \textsc{Tenn. Code Ann.} \S 14-25-107 (Supp. 1985) (same).}
ing of the person. At least one state, however, does provide that failure to appear shall not be used to infer a waiver of the right to appear. Only severe physical incapacity should excuse attendance, and some form of court supervision should be instituted to prevent abuse of the system.

Most states require that the alleged incompetent be represented by counsel at guardianship or involuntary services hearings, but not all mandate that counsel be appointed for those unable to afford an attorney. While many states recognize the right to adversarial proceedings or trial by jury in incompetency hearings, these practices are rarely used. This results from guardianship proceedings being based on the doctrine of parens patriae. If appearance is not required or it is alleged that appearance by the prospective ward would be injurious to his health, and no attorney is present to represent the ward's interests, there can only be a one-sided, ex parte hearing. An adversarial proceeding is essential to protect the due process rights of the individual and prevent abuse of the system.

The Supreme Court in Addington v. Texas declared that the clear and convincing evidence standard was constitutionally sufficient in civil commitment proceedings. Although the court left open the possibility of states using a reasonable doubt standard, use of that standard was discouraged because "given the uncertainty of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." Under that rationale, the clear and convincing evidence standard also would be appropriate in traditional guardianship or involuntary protective services proceedings. That evidence should not include hearsay, which is frequently allowed in incompetency hearings in the form of written medical evaluations.

121. Sherman, supra note 82, at 354.
122. Horstman, supra note 6, at 251.
123. Id. at 243.
125. Id. at 433.
126. But see Horstman, supra note 6, at 254 (arguing for use of reasonable doubt standard).
127. Id. at 252.
In emergency situations, some states allow specific emergency intervention. In states without emergency provisions, only measures for involuntary provision of services or guardianship are available. Some statutes, however, provide that emergency procedures are an alternative to full guardianship proceedings in non-emergency situations where the person is unable to consent.

Emergency is usually defined as "a situation in which an elderly person is living in conditions which present a substantial risk of death or immediate and serious physical or mental harm." A number of states provide for a separate court proceeding to obtain an order for emergency services if the social service agency has made a preliminary determination that the victim is unable to consent. Protecting due process rights in such court proceedings is slightly different than in a nonemergency guardianship or involuntary services context. In determining when the state should intervene, the state's interest in parens patriae must be weighed against the individual's rights. In imminently life-threatening situations the state has a substantial interest in protecting the individual, and the strict requirements of due process may not apply. Nevertheless, some states require as much as forty-eight hours notice of a hearing on an emergency services order. If the situation is indeed imminently life-threatening, such notice seems unrealistic. Some states do provide waiver of notice where "reasonably foreseeable physical harm" would result from the delay. Another solution is to provide the services or protective custody immediately, with a hearing promptly afterward. Of great concern, however, are provisions, such as those in the Alabama statute, allowing involuntary emergency services not only where the victim is incapacitated, but also where he is merely unwilling to consent.

In keeping with the doctrine of the least restrictive alternative, some states require that only those services necessary to remove the emergency be provided. Other states with emergency service

132. *See* In re Byrne, 402 So. 2d 33 (Fla. 1981).
134. *Id.*
provisions also require that the duration of the order be minimal and frequently reviewed to determine when the emergency has ceased and standard service provisions should apply. A seventy-two hour period is frequently used and seems appropriate. If at the end of seventy-two hours the emergency persists, the court is allowed to issue another order for an additional seventy-two hours. A determination that an elderly person is incapacitated in the context of an emergency services order is not a determination of complete incompetency. Instead it is an alternative to plenary guardianship that does not strip the individual of his civil rights. A temporary guardian with only limited authority is appointed. Finally, because of the limited and emergency nature of these orders, it may be that a preponderance of the evidence standard is sufficient.

When considering adult protective services or guardianship laws, the presumed competency of an adult, at any age, must always be remembered. One commentator cautions that "laws designed to protect the elderly must not contribute to stereotyping of the aged by treating them as incompetents who cannot make decisions regarding their own welfare." Attention must be paid to providing the services that alleviate the problem but least restrict the individual. Because of the serious consequences of involuntary protective intervention or guardianship, due process protections must be strictly observed.

II. FLORIDA'S ADULT PROTECTIVE SERVICES ACT

The history of the Florida Adult Protective Services Act began in 1973 and culminated in the passage of the 1986 Act. The history of the 1986 Act as well as its passage through the legislative process is discussed.

A. Existing Law

In 1973, the Florida Legislature began to address the problem of adult abuse in noninstitutional settings by providing legislation

140. See, e.g., VA. CODE § 63.1-55.6(4)(1980).
141. Contra NATIONAL PARALEGAL INST., supra note 9, at 129. Wyoming specifies a preponderance of the evidence standard in an emergency context. WYO. STAT. § 35-20-107(c) (Supp. 1985).
142. Katz, supra note 5, at 704.
"for the detection and correction of the abuse or maltreatment of developmentally disabled persons." 143 This Act applied to persons who suffered "from a condition of mental retardation, epilepsy, cerebral palsy, or other disability which causes the person to be substantially unable to protect himself from the abusive conduct of others." 144 The definition is based on a medical model, relying on diagnosable disabilities rather than purely functional inequalities. Arguably, only elder adults with a specific mental or physical disability would be covered by this statute.

At that time, abuse was defined as "neglect, malnutrition, physical or psychological injury inflicted other than by accidental means, and failure to provide necessary treatment, habilitation, care, sustenance, clothing, shelter, supervision, or medical services." 145 This definition lumped together neglect, abuse, and self-neglect. The statute did not address any form of exploitation.

The 1973 Act required reporting by "[a]ny person, including, but not limited to, any physician, psychologist, nurse, teacher, social worker, employee of a public or private facility serving developmentally disabled persons, or parent of such person" who believes that there has been abuse. 146 Those reporting abuse were given immunity, and the records were not open to the public. No provision was made for expunging unsubstantiated reports. The Act also disallowed the physician/patient privilege, or any other except that between attorney and client. The Department of Health and Rehabilitative Services (HRS) was required to perform "an immediate investigation" and "when appropriate, notify the state attorney." 147 The Act also referred to the responsibility of various public agencies to "protect and enhance the welfare of abused," disabled persons and those "potentially subject to abuse," but it was unclear how that responsibility was to be exercised. This ambiguity gave agencies freedom to use most any means to achieve those ends, or they could do almost nothing. 148 No provision was made for involuntary services outside the traditional guardianship context, for emergency situations, to provide access for investigation, or to perform services where the caretaker refused to consent.

143. Ch. 73-176, § 1, 1973 Fla. Laws 360 (codified at Fla. Stat. § 828.043(2) (1973)).
144. Id. (codified at Fla. Stat. § 828.043(1)(a) (1973)).
145. Id. (codified at Fla. Stat. § 828.043(1)(b) (1973)).
146. Id. (codified at Fla. Stat. § 828.043(3)(a) (1973)).
147. Id. (codified at Fla. Stat. § 828.043(6) (1973)).
148. Id.
The first Florida Adult Protective Services Act was enacted in 1977. The legislative intent behind the Act was explicitly stated:

The Legislature recognizes that there are many adults in this state, who because of the infirmities of aging, are in need of protective services. Such services should allow the individual the same rights as other citizens, and at the same time protect the individual from exploitation, neglect, abuse, and maltreatment. It is the intent of the Legislature to provide for the detection and correction of exploitation, neglect, abuse, and maltreatment, and to establish a program of protective and supportive services for all adults in need of them. In doing so, the Legislature intends to place the least possible restriction on personal liberty and the exercise of constitutional rights, consistent with due process and protection from abuse, exploitation, and maltreatment.

The 1977 Act covered those suffering from "infirmities of aging," which was defined as "organic brain damage, advanced age, or other physical, mental or emotional disfunctioning in connection therewith, to the extent that the person is substantially impaired in his ability adequately to provide for his own care or protection." This definition focused on functional disability rather than medical diagnosis. However, old age alone could cause the functional disability.

Abuse was defined as depriving or allowing one "to be deprived of food, clothing, shelter or medical treatment essential to his well-being or . . . permitted to live in an environment, when such deprivation or environment causes, or is likely to cause, the adult's physical or emotional health to be significantly impaired." This definition stressed deprivation of basic necessities and so differed little from the definition of neglect in the earlier statute. One difference was that the neglect definition imposed a reasonable person standard whereas the new abuse definition did not. Also, abuse includes not only the actual deprivation, but also placement where deprivation or injury is likely to occur. Without actual injury it is difficult to see how placement can be considered abuse and be criminally prosecuted. The Adult Protective Services Act also included exploitation—absent from the earlier developmentally disabled persons legislation.

149. Ch. 77-336, § 1, 1977 Fla. Laws 1421 (codified at Fla. Stat. § 409.3631 (1977)).
150. Id. (codified at Fla. Stat. § 409.3632 (1977)).
151. Id. (codified at Fla. Stat. § 409.3633(1) (1977)).
152. Id. (codified at Fla. Stat. § 409.3633(3) (1977)).
The 1977 Act contained a reporting provision nearly identical to that in the previous legislation, and in fact referred back to the earlier statute for the specific language. The Act also contained an immunity provision for those reporting abuse, as well as confidentiality of reports. The Act was silent, however, on the question of professional privileges.

While no mention was made in the 1977 Act of HRS investigation of reports of abuse, the Act mandated that “[a]n individual shall receive protective services voluntarily unless ordered by the court.” This provision implied that an investigation has been conducted. Protective services were defined as:

[T]hose services the objective of which is to protect individuals suffering from the infirmities of aging. Such protective services shall include, but shall not be limited to, evaluation of the need for services, arrangements for appropriate living quarters, obtaining financial benefits to which the person is entitled, or securing medical and legal services. In those situations where exploitation, prevention of injury, and protection of the person and his property are at issue, protective services shall include seeking the appointment of a guardian for the person or seeking protective placement.

This definition was extremely disturbing because it seemed to mandate, in most instances, guardianship proceedings or commitment to an institution. How many situations covered by this statute would not include “protection of the person and his property”? No procedures for involuntary provision of services in nonemergency situations were enumerated. The Act provided, however, that an HRS worker could obtain an ex parte order to provide services in emergency situations. The worker, along with law enforcement officers, could enter the premises—forcibly if necessary—and remove the person from the premises if removal was necessary to prevent a life-threatening situation. To obtain the court order, HRS must have had probable cause to presume that someone was being abused, neglected, or maltreated. A hearing was required within forty-eight hours after the emergency action in order to establish probable cause for continued provision of services. The court could then order continued provision of services for up to four days. There were no requirements that the victim be notified.

153. *Id.* (codified at Fla. Stat. § 409.3634(2) (1977)).
of a hearing, his right to representation by counsel, or to be present at the hearing. No specific effort was made to use a less restrictive alternative. Indeed, the definition of “protective service” seems to mandate just the opposite.\textsuperscript{155}

In 1980 the developmentally disabled persons statute was amended in several significant ways. The definition of those covered was expanded to include those “suffering from the infirmities of aging.”\textsuperscript{156} Furthermore, HRS was required to notify a human rights advocacy committee within twenty-four hours of a report of suspected abuse. Thus, within a specific period of time, some action was required on the report, although the mandate to investigate still contained the vague term “immediate investigation.”

In 1983, the Adult Protective Services Act was combined with the developmentally disabled persons legislation.\textsuperscript{157} At that time many significant changes and additions were made. The first, and most obvious change, was the inclusion of both aged and disabled persons. The definition of aged person was nearly identical to that of infirmities of aging in the earlier act and the definition of disabled person did not change. Abuse was modified to include “or is subject to physical or psychological injury,” a phrase taken from the developmentally disabled persons legislation.\textsuperscript{158} The mandatory reporting provisions remained; the only changes were the expansion of the list of professions required to report and the inclusion of a toll-free number to report abuse to a central registry. The confidentiality provisions were also greatly expanded, setting forth in detail exactly who could gain access to records and for what purpose. The abrogation of all privileged communication except that between attorney and client from the disabled persons legislation was also incorporated.

Several changes were made in investigative and protective services procedures. Specific provision was made for both immediate protective investigation, included in the disabled persons legislation but absent from the Adult Protective Services Act, and the requirement that the human rights advocacy committee be notified. Furthermore, the section relating to investigation was expanded. When an investigation is complete, the local office of the department was required to classify reports as either indicated or

\textsuperscript{155} Id. (codified at FLA. STAT. § 409.3634(2) (1977)).
\textsuperscript{156} FLA. STAT. § 827.09(3)(b) (1985).
\textsuperscript{157} Id. § 415.101.
\textsuperscript{158} Id. § 415.102(1).
Provision was also made for the identifying information, such as name and address, to be expunged from the records of unfounded reports, and, after seven years, from all indicated reports. The legislature in 1984 added a requirement that HRS orally notify law enforcement authorities immediately upon receiving a report of suspected abuse, so that a criminal investigation could be conducted concurrently with the protective services investigation. The primary emphasis on criminal investigation of suspected abuse clarified the purpose of the protective services investigation as protection of the victim rather than punishment of the abuser. The provision, however, required a criminal investigation, which may not always be the best response.

In 1985 the procedures for investigating suspected abuse were further refined. The legislature mandated that an investigation begin within twenty-four hours rather than immediately. The relationship between HRS and law enforcement was further defined by requiring notification of law enforcement authorities only after HRS has investigated and determined that abuse was "perpetrated by a second party." This revision alleviated the burden on law enforcement authorities by eliminating cases of self-neglect, and allowed HRS more discretion in handling the case.

Lastly, a section was added which provided that spiritual treatments do not constitute abuse. Though such treatment is not abuse or neglect, it must still be reported, may be investigated by the department, and, in certain circumstances, a court may order certain health services provided. Similar provisions for spiritual treatment are common in adult protective services statutes.

During the interim preceding the 1986 session, the Senate Select Committee on Aging, the Aging and Mental Health Subcommittee of the House Health and Rehabilitative Services Committee, HRS, and the Florida Committee on Aging appointed by the governor, reviewed the existing legislation and suggested substantial

159. Id. § 415.103(3)(c).
160. Id. § 415.104.
161. HRS was also required to follow up notification of law enforcement with a written report within five days. Id. § 412.104 (1985).
163. Id. § 415.104(1).
164. Id. § 415.113.
changes. The result is a completely revised Adult Protective Services Act which became effective October 1, 1986.

B. Legislative History

In the House of Representatives, the Aging and Mental Health Subcommittee of the Health and Rehabilitative Services Committee produced Proposed Committee Bill 1, revising chapter 415, Florida's Adult Protective Services Act. The Subcommittee adopted several amendments, including two title amendments, and unanimously sent the bill to the full committee. Proposed Committee Bill 1 was passed as revised by the full committee, filed as House Bill 1328, and then referred to the House Appropriations Committee.

In the Senate, a companion bill, Senate Bill 1005, filed by Senator Malchon, was referred to the Senate Health and Rehabilitative Services Committee. A similar bill filed by Senator Weinstein was combined with Senate Bill 1005 to create a committee substitute, favorably reported by the committee. Committee Substitute for Senate Bills 1005 and 121 was heard by the full Senate. Four amendments conforming the Senate bill to the House version were proposed by the sponsor, Senator Malchon; three amendments passed and Senator Malchon withdrew the other. With little debate, the bill passed and was sent to the House of Representatives where it was referred to the House Health and Rehabilitative Services Committee.

In the House Appropriations Committee, the House bill and several other bills were amended onto a bill to reorganize the Department of Health and Rehabilitative Services. Committee Substitute for House Bill 1371 was reported out of the Appropriations Committee and heard on the House floor. At that time several

166. Id.
167. Id.
169. Dem., St. Petersburg.
170. Dem., Coral Springs.
173. Id.
other bills were amended onto the measure.\textsuperscript{176} As part of the larger HRS reorganization bill which totaled 229 pages, there was little specific discussion on the floor about the adult protective services provisions. The House passed Committee Substitute for House Bill 1371,\textsuperscript{178} and sent it to the Senate, where it was referred to six committees.\textsuperscript{177} It passed the Senate Appropriations Committee and was withdrawn from the others,\textsuperscript{178} but was never taken up by the Senate. The House therefore amended the language of the bill onto Committee Substitute for House Bill 1313, dealing with child support, which was then passed out of the House.\textsuperscript{179} The Senate passed Committee Substitute for House Bill 1313 without revision in the waning hours of the session.\textsuperscript{180}

C. 1986 Legislation—Analysis

Precise definitions and detailed procedures are, perhaps, the most important requirements for an effective adult protective services law. Unless it is clear who is covered by the statute, and what constitutes abuse, the probability of inappropriate interference is greatly increased. Without detailed procedures, it is more likely that due process rights will be violated. In 1986 the legislature significantly revised the existing Adult Protective Services Act to clarify statutory definitions and to detail procedures. Thus, it created a law that should facilitate the investigation of abuse and provision of services by the least restrictive alternative, and provide greater protection for due process.

The definition of protective services is expanded to refer to the types of services included. Although protective placement is mentioned, emphasis is clearly on using the least restrictive alternatives, including maintenance in the home where possible. The Act applies to both aged persons and disabled adults. Aged persons are only those "60 years of age or older," with certain functional disabilities.\textsuperscript{181} Disabled adults are those over eighteen years of age\textsuperscript{182}

\textsuperscript{175} FLA. H.R. JOUR. 609 (Reg. Sess. May 29, 1986).
\textsuperscript{176} FLA. H.R. JOUR. 882 (Reg. Sess. June 4, 1986).
\textsuperscript{177} FLA. S. JOUR. 663 (Reg. Sess. June 5, 1986).
\textsuperscript{178} FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS at 383, HB 1371.
\textsuperscript{179} FLA. H.R. JOUR. 641 (Reg. Sess. May 30, 1986) (amendment 5 to Senate amendment 1).
\textsuperscript{180} FLA. S. JOUR. 747 (Reg. Sess. June 5, 1986).
\textsuperscript{181} Ch. 86-220, § 28, 1986 Fla. Laws 1603, 1629 (amending FLA. STAT. § 415.102(3) (1985)).
\textsuperscript{182} Id. (amending FLA. STAT. § 415.102(7) (1985)).
with "physical or mental incapacitation due to developmental disa-

bility, organic brain damage or mental illness." The revised law

lacks the previous catch-all provision of "other disability."

Abuse is redefined as the infliction of "physical or psychological

injury," and "the failure of a caregiver to take reasonable measures
to prevent the recurrence" of such injury. This change shifts the
emphasis from deprivation of necessities, covered by neglect, to ac-
tual physical or mental injuries, not merely those likely to occur.

Abuse is defined to recognize the caregiver's responsibility to pre-
vent abuse by others. The 1986 revisions add a fairly detailed

definition of who may be considered a caregiver, including any per-
son, relative, neighbor, or staff of facilities such as nursing homes,
who has permanent or temporary custody of an aged person or dis-
abled adult at the time of the abuse.

Neglect is redefined as failure of a caregiver to provide certain

necessary care and services, rather than merely to "exercise a de-
gree of care and caution that a prudent person would deem essen-
tial." This standard demands a higher degree of care than was
previously required. Specific items such as medicine are included
as examples of what care is necessary.

Exploitation is limited to "improper or illegal use" of "funds, as-

sets, or property" or misuse of "power of attorney or guardian-
ship." This stress only the economic and fiduciary aspects of ex-

ploitation. Exploitation of the person is not addressed.

Florida continues to mandate reporting of suspected abuse. The

1986 changes only detail the information to be included in the re-
port, and delete an unenforceable provision requiring that oral re-
ports of abuse be put in writing within forty-eight hours. As long
as Florida mandates reporting of suspected abuse of competent
adults, fundamental issues such as invasion of privacy will be
implicated.

Important changes in record-keeping procedures were made. In-
vestigation of an abuse report must begin within twenty-four
hours, and be completed within thirty days. A new provision allows

183. Id.
184. Id. (amending Fla. Stat. § 415.102(1) (1985)).
185. See supra note 57 and accompanying text. The new Florida Act uses the term,
"caregiver" instead of "caretaker."
186. See supra text accompanying note 58.
(1985)).
188. Id. (amending Fla. Stat. § 415.102(8) (1985)).
189. See supra text accompanying notes 59-71.
photographs or X-rays taken with the consent of the person or his guardian as evidence of abuse. Once an investigation is completed, HRS must notify the alleged victim, the guardian or caregiver, and the alleged perpetrator of the results and the right to appeal.¹⁹⁰ Identifying information on unfounded reports must be expunged within thirty days of determination. Another provision allows the victim or alleged perpetrator to request that records be expunged because they are inaccurate, and gives the right to an administrative hearing if the request is denied.¹⁹¹ These changes illustrate the legislature’s recognition of the rights of the alleged perpetrator. The new Act requires HRS to notify the state attorney’s office when there is reason to believe abuse has been committed.¹⁹² The existing law required notification when the HRS made a determination regarding second-party involvement. That implied a higher standard. Revisers considered a probable cause standard,¹⁹³ but the language was amended in the House Subcommittee,¹⁹⁴ despite concerns that the new standard would be insufficient to support a criminal investigation.¹⁹⁵ Because only criminal investigation is involved, rather than a specific invasion of rights such as a search, a probable cause requirement is probably too stringent a standard—one that would significantly limit the number of criminal investigations of abuse. A “reason to believe” standard requires an identifiable reason, but also gives HRS discretion in determining when a criminal investigation is warranted.

The issue of access is addressed by several provisions in the revised Act. If a caregiver denies investigators or service providers access to a suspected victim, HRS may petition the court to enjoin the caregiver from further interference.¹⁹⁶ However, there must be clear and convincing evidence of the need for an injunction. Where the victim is consenting and competent, the need for such a high standard is unclear.

¹⁹⁵. Id.
Little of the existing law relating to provision of protective services was retained in the 1986 Act. Protective services will now be provided to any consenting elder or disabled adult determined to be in need of such services. The elder may refuse services unless there is reasonable cause to believe that person lacks capacity to consent. A major deficiency in the existing law was that there was no definition of incapacity. The new Act defines "lacks capacity to consent" as being physically or mentally impaired to the extent that one "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." The value-laden term "responsible" implies a subjective evaluation based on individual values. A definition which emphasizes functional incapacity, as indicated by specific recent behavior, might be preferable.

The 1986 legislation sets forth detailed procedures by which HRS may petition the court to allow involuntary protective services. Great care was taken to protect the due process rights of the individual involved. Notice of the filing of such a petition must be given to the person allegedly lacking capacity to consent, his legal counsel, a spouse, and any known next of kin. This addresses the concern that the aged or disabled person may be too confused to understand the legal notice. The new Act recognizes the individual's right to be present and represented by counsel, which will be appointed if necessary. There is, however, no provision specifying that failure to appear does not constitute a waiver of the right to appear. Neither does the Act require a jury trial before allowing involuntary services. A jury trial would ensure adversarial proceedings and provide greater protection for the individual's rights.

The constitutionally sufficient clear and convincing evidence standard is required to determine that a person lacks capacity to consent to services. The hearing does not determine incompetency; it is a limited procedure wherein a temporary guardian is appointed for one found lacking capacity to consent to protective

198. See supra note 107 and accompanying text.
200. Id. (amending Fla. Stat. § 415.105(3) (1985)).
201. See supra text accompanying note 119.
services. That guardian’s powers include only the right to consent to provision of protective services on behalf of the individual, whose other civil rights are not disturbed. After sixty days, another hearing must be conducted to determine if the individual is either willing to consent or no longer in need of protective services, or if guardianship proceedings should be initiated. Involuntary services to otherwise competent adults may not continue indefinitely, and the individual is protected from lingering in legal limbo—neither deemed incompetent, nor allowed full control over his life. Only after sixty days—if the individual still lacks capacity to consent and it is shown by clear and convincing evidence that protective services are still needed—are guardianship proceedings instituted. To preserve continuity of care, services may be continued pending a determination of competency.

The portion of the new Act setting out emergency procedures is lengthy and detailed. One of the more significant provisions allows an HRS worker to forcibly enter a home with a law enforcement officer and remove an occupant under the following conditions: if access cannot be gained by consent, if there is “reason to believe that the situation presents a potential risk of death or immediate and serious physical harm,” and if the emergency cannot be alleviated without such removal. The previous law required a court order prior to removal; the new Act recognizes that delay can be deadly.

Within twenty-four hours after emergency removal, HRS is required to petition for court authorization—presumably based on the petition alone. The court order authorizing the removal and protective placement must be reviewed within forty-eight hours to determine if there is probable cause to continue services. If so, emergency services may be continued another four days. The new Act does not require notice of the petition or initial hearing to be given to anyone; notice is considered impractical under such circumstances. There is no specific enunciation of the individual’s right to be present and represented by counsel at an emergency services hearing. This is consistent with Florida case law indicating

203. Id.
204. Id.
206. Id. (amending Fla. Stat. § 415.105(5)(e) (1985)).
207. Id. (amending Fla. Stat. § 415.105(6) (1985)).
that due process may be relaxed in emergency situations. After four days another hearing, with proper notice, must be held to determine if involuntary services proceedings should be initiated.

These provisions emphasize that only those services necessary to alleviate the emergency may be provided, and then only when no other option is available. A preliminary draft allowed chapter 394, the Baker Act, to be used as an alternative to guardianship proceedings. Placing an elderly person in a mental institution is not usually the least restrictive alternative, so staff revisers removed that provision. The new Act prohibits using the Baker Act to take individuals into protective custody. The provisions do not cover situations threatening imminent mental injury—an area the legislature may want to address in the future.

A major issue raised in public hearings was the need for greater cooperation between agencies dealing with elder abuse. Several provisions addressing this concern were included in the revised Act. The Act mandates interagency agreements to facilitate uniformity in procedures for investigating and responding to abuse reports. The term “law enforcement” was in most instances changed to “criminal justice agency” to include the Medicaid Fraud Control Unit of the Auditor General’s Office, which has statutory authority to investigate alleged abuse and neglect in facilities receiving Medicaid funds. Another provision requires criminal justice agencies which conduct a separate investigation of abuse, neglect, or exploitation to report the results to HRS. A limited screening mechanism was also added to discover if any person applying to operate a facility for aged or disabled adults has ever been accused of adult or child abuse.

The 1986 revisions to Florida’s Adult Protective Services Act are not only an improvement over previous law, but may in some respects be considered a model for other state legislatures. Of special

208. In re Byrne, 402 So. 2d 383 (Fla. 1981).
210. There is some indication that the Baker Act was being used to commit abused adults in order to provide involuntary care, since no less restrictive mechanism was available.
211. See Staff Report, supra note 27, at 2.
213. FLA. STAT. § 409.664 (1985); see also Staff Report, supra note 27.
significance are the detailed procedures for provision of involuntary services under emergency and nonemergency conditions. Along with clarified definitions, these procedures substantially increase due process safeguards for the victim of abuse, while the confidentiality and notification provisions protect the rights of the alleged perpetrator.

III. Future Considerations

Several issues which should be addressed in future consideration of the Adult Protective Services Act are discussed. Also, because guardianship remains the solution of last resort in cases of elder abuse or exploitation, needed changes in Florida's Guardianship Law are also discussed.

A. Adult Protective Services Act

As significant as are the 1986 revisions to the Adult Protective Services Act, several issues should be considered for future review. First, further study is needed on the effectiveness of mandatory reporting statutes for both child and elder abuse. There is some evidence that ninety-five percent of elderly abuse victims sought help voluntarily.\(^{215}\) Mandatory reporting statutes presume that those being abused are unable or incompetent to ask for help. But adults of any age in our society must be presumed to be competent until proven otherwise in a court of law. Where the effectiveness of mandatory reporting provisions are in doubt, the intrusion on individual privacy is indefensible.

The 1986 revisions emphasize criminal prosecution of the abuser—even modifying legislative intent to include correction of abuse “through social services and criminal investigation.”\(^{216}\) The legislature has sent a message that elder abuse is a crime that will not be tolerated, even where committed by a family member. The primary purpose of adult protective services laws, however, should be to aid the victim, not to prosecute the abuser. In many cases a criminal “solution” may make the situation worse. The victim may face retaliation from the abuser.\(^{217}\) The abuser may be the victim's only means of support, and arresting and incarcerating the abuser could result in institutionalization of the victim. As with other do-

\(^{215}\) NATIONAL SENIOR CITIZENS LAW CENTER, supra note 9, at 74.


\(^{217}\) NATIONAL SENIOR CITIZENS LAW CENTER, supra note 9, at 31.
Domestic violence, the causes of elder abuse are complex. Recognizing this complexity, emphasis should be placed on alternative responses such as counseling and respite care. Criminal prosecution could, in many cases, be a simplistic response to a complex problem.

On a larger scale, consideration should be given to shifting adult protective services legislation to a model based on spouse abuse. Adult protective services legislation evolved from child abuse legislation.\textsuperscript{218} There are many similarities in the situations of children and elderly people—such as a dependency on others for a certain amount of care.\textsuperscript{219} There are also significant differences. Unlike children, adults are considered competent under the law. Furthermore, unlike children, adults expect confidentiality in their communications with physicians.\textsuperscript{220}

There are also similarities between an abused elder and a battered spouse.\textsuperscript{221} Some statistics indicate that approximately one-fifth of elder abuse is among elderly couples.\textsuperscript{222} It has never been seriously suggested, however, that battered spouses be institutionalized or forced to defend their competency at guardianship proceedings. Neither are there mandatory reporting provisions to detect spouse abuse. A response similar to that used in spouse abuse and other domestic violence laws stressing crisis intervention, shelters, and counseling for both abuser and abused might better protect individuals, while respecting civil rights and allowing the elderly greater self-sufficiency.

\section*{B. Guardianship in Florida}

Guardianship in Florida is governed by the Florida Guardianship Law.\textsuperscript{223} A guardian is defined as "one to whom the law has entrusted the custody and control of the person or property, or both, of an incompetent."\textsuperscript{224} Florida's statutory guardianship provisions are the weak link in the system of protection to elderly and other vulnerable adults, and deserve the same attention and revision as the Adult Protective Services Act. Until the 1986 Regular Session, Florida had only private guardianship. As a result, "a sub-

\begin{enumerate}
\item[218.] \textit{See} Katz, supra note 5, at 710.
\item[219.] \textit{Id.} at 716.
\item[220.] Faulkner, supra note 64, at 82.
\item[221.] \textit{Id.} at 86.
\item[222.] \textsc{National Senior Citizens Law Center}, supra note 9, at 16.
\item[223.] \textsc{Fla. Stat.} § 744.101 (1985).
\item[224.] \textit{Id.} § 744.1029(1).
\end{enumerate}
stantial number of persons adjudicated incompetent have not had a guardian appointed on their behalf." In 1986, the legislature passed the Public Guardianship Act to provide guardians for incompetent persons who have "no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian . . . and such person does not have adequate income or wealth for the compensation of a private guardian." A majority of states currently have some form of statutory public guardianship. "The consequences of guardianship may be serious, but the effect of legal incompetence without a guardian, or of functional incapacity without guardianship assistance, is total lack of protection."

The new Florida law creates a separate office of the Public Guardian, thereby preventing any conflict of interest. There is still work to be done in the guardianship provisions. Due process protections in the Florida Guardianship Act are minimal; there is little evidence of the doctrine of least restrictive alternative. If an adult is adjudged incompetent but is employed and earning wages, the court may appoint a limited guardian to administer only those funds and property not earned through the ward's wages. In all other circumstances, the guardian gets complete control of the ward's person, property, or both, and the ward retains no rights. Frequently, an elderly person can still perform some functions and make some decisions. The guardianship concept should be expanded to allow appointment of a guardian responsible for only those functions of which the individual is incapable.

The revised Adult Protective Services Act, in an effort to use the least restrictive means of aiding the individual, made guardianship the method of last resort. The concern which motivated the major revision of Florida's Adult Protective Services Act should now be focused on the Florida Guardianship Law. Major problems exist as the law now stands, and the failure adequately to protect individual rights can have devastating consequences. It is crucial that proposed wards be presumed competent until proven otherwise by

226. Ch. 86-120, § 1, 1986 Fla. Laws 355 (to be codified at FLA. STAT. § 744.702).
228. Schmidt, supra note 84, at 359.
229. Ch. 86-120, § 1, 1986 Fla. Laws 355, 356 (to be codified at FLA. STAT. § 744.703 (1)).
231. Id. § 744.303(2).
clear and convincing evidence in an adversarial proceeding before a court of law.

IV. Conclusion

Having more elderly citizens in proportion to its population than other states, Florida is in a position to lead the way in responding to elderly concerns. As life expectancy and the number of elderly in this country increases, these issues will require more and more attention. The reality of a "graying America" will force recognition of the special needs of older people in medical, social, and political arenas.

During the 1986 Regular Session, the Florida Legislature substantially revised the Adult Protective Services Act. By clarifying definitions used in the statute, providing detailed procedures for the provision of voluntary and involuntary services, and mandating greater interagency cooperation, the Act should facilitate protection of abused elderly and disabled persons while providing substantial safeguards for their due process rights.

Care must be taken that in our zeal to protect the elderly, we do not rob them of their fundamental rights. Protection at the expense of dignity may harm the elderly more than abuse or self-neglect. When considering this Act in the future, lawmakers should remember that elderly and disabled persons are adults, not children, and are presumed competent under the law. Consideration should be given to whether the existing Adult Protective Services Act sufficiently recognizes this difference. Furthermore, until substantial changes are made to the Florida Guardianship Law to provide greater due process protections, the legal response to the needs of vulnerable adults will be, at best, imperfect.