

guardian of the person if it determines that a guardian is needed to supervise and protect the retarded person through the exercise of the following powers:

(1) The power to exercise general supervision over the retarded person. This includes choosing or changing the residence, care, habilitation, education and employment of the retarded person and the power to approve or withhold approval of the retarded person's request to sell or in any way encumber his personal or real property;

(2) The power to approve or withhold approval of any contract, except for necessities, which the retarded person wishes to make;

. . . .

(4) The power to consent to surgical operations in non-emergency cases as provided in section 3612 of this title.

§ 3613. Duties of commissioner when providing guardianship services

. . . .

(b) In addition to the supervisory powers vested in the commissioner by the court pursuant to section 3610 or section 3611 of this title, the commissioner shall assure that any retarded person who is under guardianship or protective supervision is assisted in obtaining those services to which he is lawfully entitled and which he needs in order to maximize his opportunities for social and financial independence. Those services include, but are not limited to:

(1) Education services for a retarded person who is school age;

(2) Residential services for any retarded person who lacks adequate or appropriate housing;

(3) Medical and dental services as needed;

(4) Therapeutic and habilitative services, adult education, vocational rehabilitation or other appropriate programs for any retarded person who is in need of such training services;

(5) Counseling and social services;

(6) Counseling and assistance in the use of and handling of money.

It appears that between May 12, 1986, and June 25, 1987, the Department exercised and provided appropriate protective services to the petitioner. On June 25, 1987, the petitioner was placed into the custody of the Department of Corrections following his arrest on criminal charges. The petitioner was subsequently convicted of these charges and has remained in Vermont jails since that time. He is scheduled for release in April, 1989.

Since the petitioner's incarceration in June, 1987, the Department has refused and failed to provide protective services to the petitioner. The Department maintains that its legal duties under the statutes terminate until the petitioner is released from jail.

ORDER

The department's decision is reversed.

REASONS

The "policy" of the protective services statutes is set forth as follows in 33 V.S.A. § 3601:

It is the policy of the state of Vermont to assure that mentally retarded citizens who are not residents of state schools or hospitals receive such supervision, protection and assistance as is necessary to allow them to live safely within the communities of this state. In furtherance of this policy, this Vermont protective services for mentally retarded persons act is enacted to permit the supervision of these mentally retarded persons who are unable to fully provide for their own needs and to protect such persons from violation of their human and civil rights. It is the purpose of this chapter to limit the state's supervision of mentally retarded persons who are living in the community to the extent necessary to ensure their

safety and well-being.

33 V.S.A. § 3604 defines "persons eligible for protective supervision" as follows:

Protective supervision or guardianship of the person may be provided to any mentally retarded person who:

- (1) is at least 18 years of age,
- (2) is in need of supervision and protection for his own welfare or the public welfare, and
- (3) is not a resident of a state school or hospital or is to be discharged from a state school or hospital at such time as guardianship or protective supervision is ordered under this chapter or under chapter III of Title 14.

Under 33 V.S.A. § 3615, "a person receiving services under this chapter may appeal a decision of the commissioner in accordance with section 3091 of Title 3."

The issue in this matter can be simply stated: Does the petitioner's incarceration terminate or suspend the Department's duty to provide him with protective services? The parties appear to agree that the resolution of the issue involves a rather straightforward question of statutory interpretation. The Department interprets the above statutes as limiting its duties to assisting only those retarded persons who are "living in the community". It points primarily to the last sentence of § 3601 (supra) which states that the "purpose" of protective services is "to limit the state's supervision of mentally retarded persons who are living in the community to the extent necessary to ensure their safety and well-being" (emphasis

added). Thus, the Department argues, since the petitioner is in jail and is not "living in the community", the department owes him no "duties" under the statutes. The petitioner maintains that his status of incarceration does not interrupt or terminate the Department's statutory duties.¹

A general guide to interpreting "remedial" statutes was set forth as follows by the Vermont Supreme Court in Grenafefe v D.E.S., 134 VT. 288, 290 (1976):

Certain principles, in general have been held to apply to statutory construction. . . We have recognized that where the meaning of words is clear and not ambiguous, we must construe them in their ordinary sense. We also consider that the statute here in question, as remedial legislation, is to be construed liberally in favor of the claimant. And, while we give weight to administrative construction, only the legislative intent as expressed in the language of the statute is binding upon us. (Citations omitted.)

Applying the above principles to the instant matter it is clear that the "eligibility" sections of the statutes, 33 V.S.A. § 3604 (supra), do not specifically exempt "residents" of correctional facilities from qualifying for protective services. The Department concedes, as it must, that a correctional facility is not a "state school or hospital". See § 3604 (3) (supra). The question, then, is whether the legislature "intended" to also exempt incarcerated individuals from the protective services program. The board concludes that there is not a legally-sufficient basis to infer such an intent.

As noted above, the Department relies heavily on the last sentence of the "purposes" section of the statutes--33 V. S. A. § 3601. The board concludes, however, that the Department's reading of this section is overly-selective and inconsistent with the overall context of this section and of the chapter in which it appears. The Department has made no claim that the petitioner's incarceration prevents the commissioner from performing any of the "duties" set forth in § 3613(b) (supra) and specified by the District Court in its protective services order (supra). Neither does the Department maintain that the petitioner's incarceration precludes it from being able to carry out the "policy" set forth in § 3601 of providing "such supervision, protection and assistance as is necessary to allow (mentally retarded individuals) to live safely within the communities of this state". Contrary to the Department's assertion that it would be "illogical" to read the statute as allowing protective services for incarcerated individuals, it can just as reasonably be argued that incarcerated individuals are more in need of supervision and protection, and are more accessible to be provided with many if not most, of the "services" specified in § 3613(b).

Clearly, the goal of protective services is to enhance the ability of mentally retarded persons to live as independently as possible. However, a plain reading of the statutes does not support the Department's position that a

mentally retarded person must, at all times, be "living in the community" as a precondition of having those services provided. The board finds nothing at all "illogical" or "irrational" in concluding that an individual, though temporarily incarcerated, remains eligible for protective services. See Grenafege, id at p. 291. To the contrary, the Department's position, that protective services terminate solely and simply because the petitioner is in jail, strikes the board as a singularly wooden and arbitrary policy--one that could be seriously detrimental to the highly vulnerable individuals the statutes are designed to protect.²

For these reasons it must be concluded that the "plain meaning" of the statutes is controlling. Inasmuch as those statutes do not clearly and specifically exempt incarcerated individuals from eligibility for protective services, and inasmuch as an irrational or absurd result would not result from the Department's providing protective services to those individuals, the petitioner must be found eligible for those services, despite his incarceration in a state correctional facility. The Department's decision is, therefore, reversed.³

FOOTNOTES

¹The parties have stipulated that the level of duties, if any, owed by the Department to the petitioner is not at issue at this time.

²For purposes of this decision, however, the hearing officer did not consider or weigh any of the allegations

made by the parties regarding whether or not the petitioner was in fact "harmed" by the Department's decision.

³Since the petitioner is now in jail again, it unnecessary for the board to consider the mootness issue addressed in the hearing officer's recommendation.

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