Sixty-Sixth General Assembly

Code Revisions

SUBMITTED BY:

Iowa State Developmental Disabilities Council

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STATE OF IOWA

Office for Planning and Programming

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ROBERT D. RAY
Governor

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Director

December 31, 1975

Honorable Members, 66th General Assembly

On October 25, 1975, the Iowa Planning Council for Developmental Disabilities approved the following legislative proposals for transmittal to the Governor.

These proposals are the product of more than a year of detailed study by the Developmental Disabilities Council, assisted by members of the College of Law at Drake University. The purpose of this study was to consider the special impact of Iowa law upon the hundreds of thousands of our citizens who are developmentally disabled and their families.

Consideration of this subject is of some importance and urgency. Recent court decisions are rapidly making some existing statutory laws in many states obsolete. Laws that seemed progressive and humane as little as a decade ago, now are recognized as defective and damaging - and often unconstitutional as well.

Just four years ago, in October of 1971, a Federal court handed down the first decision in a class action suit that involved the constitutional rights of the mentally retarded. Since then, some 95 cases have been filed in this and related areas. Several have been upheld by courts of appeal, and at least one upheld by the United States Supreme Court.

In brief, it is the finding of the Iowa Developmental Disabilities Council, that certain Iowa statutes do not adequately protect our developmentally disabled citizens from possible injustices. These laws may unreasonably discriminate against them, or interfere unnecessarily with their efforts to become as independent and self-sufficient as possible.

It should be emphasized that the purpose of these proposals is not to pursue some special advantage for those who are handicapped. Rather, they recognize the impact of recent court decisions and new developments in habilitative services. The purpose is to assure the same basic constitutional rights for those who are developmentally disabled that others enjoy as a matter of course.

This is a specialized and rapidly changing area. We have sought to play a supporting and clarifying role for the administration and for the legislature.

These recommended changes will, we believe, confirm Iowa's position of leadership in the provision of equal opportunity to our dependent citizens.

It is in this spirit that the Iowa Developmental Disabilities Council is sponsoring a conference for Iowa Legislators on February 4, 1976. Mr. Greig Siedor, an associate lawyer from the National Center on Law and the Handicapped, will address this conference and discuss these proposed revisions from the perspective of recent court decisions.

We stand ready to work with the Legislature to assist in the consideration of these proposals and in any way that will be helpful.

Sincerely,

Margaret G. Westerhof

Margaret G. Westerhof, Chairperson
Developmental Disabilities Council

MGW/bm/fjc

PROPOSED CHANGES IN THE IOWA PROVISIONS FOR GUARDIANS AND CONSERVATORS

Guardianship and conservatorship involve deprivations of an individual's personal freedom and property rights. The Constitution demands that such a serious loss of rights occur only when justified to protect the health and welfare of the individual. Under the present system in Iowa, guardians and conservators are appointed with few procedural safeguards to protect the individual from unwarranted infringement of his constitutional rights.

In addition, the present statute has no provision allowing the court to tailor the arrangement to the specific needs and capabilities of the proposed ward. Such a system fails to take into account the wide variation among those needing assistance. As the capabilities and characteristics of the individual vary, so do the kinds of services required and the method by which they can best be provided.

Thus, the proposed revision of Chapter 633 attempts to remedy any possible constitutional problems in the present statute and render the system more responsive to the proposed ward.

633.556 Procedure for appointment of a guardian.

1. Upon the filing of the petition for the appointment of a guardian because of minority, the court shall set a date for hearing on the matter. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it must appoint a guardian ad litem to represent the minor.

2. Upon the filing of the petition for the appointment of a guardian because of incapacity, the court shall appoint a guardian ad litem to represent the proposed ward unless he has counsel of his own choice. The person alleged to be incapacitated shall be examined by a physician or psychologist appointed by the court who shall submit his evaluation in writing to the court.

3. A visitor sent by the court shall interview the proposed ward and the person seeking appointment as guardian. He shall also visit the present place of abode of the proposed ward and the proposed ward and the place it is proposed that he will reside if the requested appointment is made. The visitor shall submit his evaluation in writing to the court.

4. No provider of direct services, whether public or private, shall serve as a guardian.

5. If the petition is based on incapacity, the proposed ward is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. All proposed wards are entitled to be present by counsel, to present evidence and to cross-examine witnesses, including the court-appointed physician and visitor.

6. If the allegations of the petition as to the status of the proposed ward and the necessity for the appointment of a guardian are proved, the court may appoint a guardian.

Comments

Guardianship requires a determination that the proposed ward is incapable of caring for his own person. Upon appointment, the duty of caring for the needs of the ward is thereby given to the guardian. Such a duty and its performance necessarily involve some degree of control over the ward and resulting restraints on his personal freedom. Furthermore, guardianship may result in the loss of other rights such as the right to marry.

Because the appointment of a guardian may result in the deprivation of liberty and other important rights, procedural safeguards are necessary to assure that a guardianship is imposed only where a less restrictive arrangement, such as a conservatorship, would not suffice. This problem is especially significant as it applies to the mentally retarded. Within the category "mentally retarded", there exists a wide range of individual abilities. Thus, although a person may be mentally retarded, he may have sufficient ability to attend to himself and his affairs. For such an individual guardianship is too restrictive.

The Iowa system of guardianships has few safeguards to ensure that only those actually in need of such assistance are given a guardian. The Iowa statute merely provides for notice, hearing and a jury trial, if requested. Adequate notice, a hearing or even a jury trial will not protect the mentally retarded person's rights if the attorneys and judges are not informed and aware of the needs and abilities of the proposed ward.

The proposed revised section 633.556 requires more than a mere determination that the proposed ward is incapable of caring for his person and that a guardian is necessary. It also requires that certain measures be taken so that such a decision is reached on the basis of accurate information about the proposed ward and not on the basis of the stereotyped mentally retarded person. Thus, the court must appoint a guardian ad litem who will not be emotionally involved, who can critically evaluate the situation and who can look after the best interests of the proposed ward.

Secondly, where a guardianship is sought on the basis of incapacity, an examination by a physician or psychologist is required. This will provide the court with a professional opinion on the physical condition of the individual so that the order can be based on his actual needs and abilities. A second opinion by a visitor is required under subsection (3) as to the overall situation. The visitor must interview the proposed ward and the proposed guardian and must also visit the present and proposed residences of the ward. With the ward's personal freedom at stake, it seems reasonable that such steps be taken to ascertain whether the suggested guardianship would be in the ward's best interest. Finally, the proposed

ward is given the right to be present at the hearing, be represented by counsel, present evidence and cross-examine witnesses.

Subsection (4) reinforces subsection 135C.24(1) as amended, 1975, and extends that section's coverage to include public facilities.

These protections all serve the ultimate purpose of insuring that the best interests of the proposed ward remain paramount and that he is not unjustifiably deprived of his liberty and rights.

633.560 Appointment of guardian on a standby basis.

A petition for the appointment of a guardian on a standby basis may be filed by any person under the same procedure and requirements as provided in sections 633.591 through 633.598, both inclusive, for appointment of standby conservator, insofar as applicable.

Comments

The number was changed from 633.597 to 633.598 to take into account the additional provision for a standby conservator which is recommended below.

Chapter 633 is amended by adding the following new section, Visitor Defined

A visitor is a person who is trained in law, nursing or social work or has other qualifications that make him suitable to perform the function and is an officer, employee or special appointee of the court with no personal interest in the proceedings.

Comments

This new section sets out those persons who may act as a visitor under sections 633.556 and 633.570. It requires that the visitor have professional training or the equivalent and that he have no personal interest in the

outcome of the proceedings. These requirements ensure that his opinion will be of real value to the court as contemplated by sections 633.556 and 633.570.

633.570 Procedure for appointment of a conservator

1. Upon filing of a petition for appointment of a conservator because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it must appoint a guardian ad litem to represent the minor.

2. Upon filing of a petition for appointment of a conservator because of incapacity, the court shall appoint a guardian ad litem to represent the proposed ward unless he has counsel of his own choice. The person alleged to be incapacitated shall be examined by a physician or psychologist appointed by the court who shall submit his evaluation in writing to the court.

3. The court may send a visitor to interview the person to be protected and/or the proposed conservator. He shall submit his evaluation in writing to the court.

4. If the petition for appointment of a conservator is based on incapacity, the proposed ward is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. All proposed wards are entitled to be present by counsel, to present evidence and to cross-examine witnesses, including the court-appointed physician and visitor.

5. No provider of direct services, whether public or private, shall serve as a conservator.

6. If the allegations of the petition as to the status of the proposed ward and the necessity for the ~~appointment-of-a-conservator~~ proposed arrangement are proved, the court may appoint a conservator or make other protective order for cause as provided in section 633.575.

Comments

The existing Iowa provisions for appointment of a conservator are identical to those for guardianship except that a conservator is appointed where the proposed ward cannot manage his property. Safeguards are just as necessary in this process as in the guardianship procedure since the ward under conservatorship loses all control of his property. This drastic

arrangement is not warranted for every mentally retarded person. Some mentally retarded individuals are capable of managing their person property and routine financial affairs and only need help with any large sums of money they may have.

Thus, the proposed new section amendment which follows would provide alternatives to the all or nothing arrangement of conservatorship. However, before these alternatives can be effectively used, there must be a procedure that will allow the court to make an intelligent decision which will result in the least restrictive arrangement for the ward. For this reason, representation by a guardian ad litem and examination by a physician or psychologist are required. In addition, the court may send a visitor to interview the proposed ward and conservator, if it deems this necessary. As in the procedures for guardianships, the proposed ward may be present at the hearing in person or by counsel, may present evidence and may cross-examine witnesses.

Subsection 5 reinforces subsection 135C.24(1) as amended, 1975, and extends that section's coverage to include public facilities.

These changes are recommended for the purpose of determining the least restrictive arrangement suitable for the proposed ward's needs and abilities, if any assistance is, in fact, needed.

Chapter 633 is amended by adding the following new section, Protective Arrangements and Single Transactions Authorized:

If it is established in a proper proceeding conducted in accordance with sections 633.567 through 633.570, inclusive, that a basis exists for affecting the property and affairs of a person, the court may make a protective order for cause as follows:

1. The court, without appointing a conservator, may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person.

2. The court, without appointing a conservator, may authorize, direct, or ratify any individualized protective arrangement which is warranted by the estate and affairs of the protected person.

3. The court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.

Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

Comments

Present Iowa law provides for the appointment of a conservator where the proposed ward is incapable of managing his property. Upon such a determination, the conservator is given complete control over all of the real and personal property of the ward. This sole provision does not take into account the wide variation among the mentally retarded. As the capabilities and characteristics of the individual vary, so do the kinds of services required and the method by which they can be best provided. For example, a mildly or moderately retarded individual can often care for himself physically and function adequately in many ways but may need help with financial matters. A conservatorship under present Iowa law would unnecessarily deprive such a person of control over his personal property and any wages which he earns.

The provisions in the proposed new section would allow the court to tailor the protective arrangement to the needs of the individual, thereby avoiding an unwarranted denial of the individual's constitutionally guaranteed property rights. Thus, the court would appoint an advisor or special conservator to assist a mildly or moderately retarded individual in his financial affairs without depriving the protected person of control over his property. The advisor would have the powers and duties given him by the court and would report as ordered by the court.

In addition, this section provides for the approval of single transactions without the necessity of establishing a full conservatorship. This alternative is necessary to prevent an unconstitutional deprivation of the individual's property rights where his capacity does not justify such interference.

These protective arrangements supplement the provisions for appointment of a conservator which have been retained for use in appropriate cases. The traditional conservatorship is still necessary for the severely or profoundly retarded individual who will need continuing supervision and assistance, as well as those individuals who are completely incapacitated for other reasons.

Chapter 633 is amended by adding the following new section, Standby Conservator:

Upon application of a conservator, a standby conservator may be appointed by the court. Such standby conservator shall, without further proceedings, be empowered to assume the duties of his office immediately upon death or adjudication of incompetency of the prior conservator, subject

only to confirmation of his appointment by the court within sixty days following assumption of his duties of such office. If not done at the time of his appointment, the court, before confirming the appointment of the standby conservator, shall follow the procedure for appointment of a conservator, section 633.570.

Comments

At the present time, the Iowa Code has provisions for a standby conservatorship which allow a person of full age and sound mind to petition for the appointment of a conservator upon the occurrence of a specified event. The petition is not acted upon until the occurrence of the event, at which time the conservator is automatically appointed with or without a hearing. Thus, a presently competent person can file a petition on a standby basis to be brought before the court only upon a specified condition, usually the person's incompetency.

The proposed section expands the concept of a standby conservator for use with an existing conservatorship. It permits the present appointment of a standby conservator who will serve upon the death of the present conservator. In this way, the ward can have continuous supervision and is not left unassisted during the time it would usually take to appoint a new conservator. Such an arrangement would be particularly useful where the present conservator is elderly and the ward is in need of constant supervision and/or assistance.

In addition, this section provides for a hearing prior to confirmation, either when the standby conservator is appointed or within sixty days after he assumes the duties of conservator. Thus, the ward is assured of the

benefit of the procedural safeguards available in section 633.570. Such safeguards are completely lacking in the existing Iowa provisions for standby conservatorships since they contemplate a voluntary petition. The need for and appointment of a standby conservator can easily be accomplished at the same time the regular conservator is appointed. However, such a determination is not limited to that hearing and a hearing may be conducted within sixty days of the standby conservator assuming the duties of his office.

633.627 Combining petitions.

The petitions for the appointment of a guardian and a conservator may be combined and the cause tried in the same manner as a petition for the appointment of a ~~conservator~~ guardian.

Comments

Formerly, combined petitions were tried in the same manner as a petition for the appointment of a conservator. However, it is recommended that they be tried in the same manner as for the appointment of a guardian so that the proposed ward will have the benefit of the procedural safeguards of that proceeding such as the required interviews by the visitor.

633.635 Combination of voluntary and standby petitions with involuntary petition for hearing.

If prior to the time of hearing on a petition for the appointment of a guardian or conservator, a petition is filed under the provisions of sections 633.557, 633.572, 633.591 or the new proposed section, Standby Conservator, the court shall combine the hearing on such petitions and determine who shall be appointed guardian or conservator, and such petition shall be triable to the court in accordance with section 633.556 or section 633.570, whichever is applicable.

Comments

The first change includes the new provisions for standby conservatorships and guardianships in those petitions that may be combined. The second change ensures that the procedures recommended for appointment of guardians and conservators will be followed when different petitions are combined.

633.637.1 New Section Powers of Protected Person

A person under a protective arrangement in accordance with the new proposed section on Protective Arrangements and Single Transactions Authorized, shall be limited in control over his property and financial affairs only as expressly ordered by the court.

Comments

This section ensures that a person under protective arrangement is not automatically deprived of his property rights except as ordered by the court. It prevents application to a protected person of the sections limiting the rights of a ward under conservatorship. Application of these sections to a protected person would defeat the purpose of a protective arrangement which is to allow the individual as much freedom to manage his affairs as he can handle.

Chapter 633 is amended by adding the new section, Wager of Ward:

Unless otherwise ordered by the court, if the ward shall at any time during the continuance of the conservatorship be employed, his wages and salary for employment shall not be a part of the conservatorship estate and the wages and salaries shall be paid to the ward and shall be subject to this control to the same extent as if the conservatorship did not exist. The conservator shall not be accountable for such wages or salary.

Comments

This section provides protection to those persons placed under a full conservatorship. Even though the continuing arrangement of a regular conservatorship may be necessary, the ward may still be able to manage any wages he may earn. In fact, the underlying presumption is that if the ward is capable of earning the wages, he is capable of managing them. Thus, under this section the ward is given the right to his earnings unless otherwise ordered by the court.

Chapter 633 is amended by adding the new section, General Powers and Duties of Guardian

1. A guardian has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

a. To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this state.

b. If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

c. A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

d. If no conservator for the estate of the ward has been appointed, he may:

(1) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(2) receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

e. A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control as required by section 633.669.

f. If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this Code, and the guardian must account to the conservator for funds expended.

2. Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

Comments

The Iowa Code does not define the powers or duties of a guardian. Thus, this section is suggested so that a guardian will know what his responsibilities are and will have the necessary powers to carry them out. By establishing the basic duties of a guardian and by providing for periodic review of his performance through regular reports, the guardian can be held accountable for his performance. Furthermore, a general enumeration of the guardian's duties will provide a definite standard with which to judge the condition of the guardianship. The end result should be a more satisfactory and beneficial arrangement for the ward.

633.669 Guardian's report.

Immediately after the appointment of the guardian, he shall make a report to the court advising the court as to the physical condition and whereabouts of the ward. Thereafter, the guardian shall present to the court and file in the guardianship proceedings a written, verified report of the condition of the ward and of the guardian's exercise of authority and performance of his duties. This report shall be made annually within sixty days following the anniversary date of the guardian's appointment.

Comments

The Iowa Code presently lacks any procedure for regular supervision of a guardianship. Although a conservator must report to the court at least annually, a guardian need only report at the discretion of the court. This system leaves the ward indefinitely in the custody of the guardian with no assurances that his needs are being met. Surely his physical needs are as important as his financial needs and warrant as much protection.

Based on this reasoning, revised section 633.669 requires that an annual, verified report be filed with the court. This report will document the guardian's performance and can also provide an opportunity to review whether the guardian is performing in accordance with section 633.641.1.

633.679 Petition to terminate or remove.

1. At any time not less than six months after the appointment of a guardian or conservator, the ~~person-under-guardianship-or-conservatorship~~ ward or any person interested in his welfare may apply to the court by petition~~,-alleging-that-he-is-no-longer-a-proper-subject-thereof,-and asking-that-the-guardianship-or-conservatorship-be-terminated.~~ to terminate the guardianship or conservatorship, or to remove the guardian or conservator and appoint a successor of in the best interests of the ward.

2. Before removing a guardian or conservator or ordering that the guardianship or conservatorship be terminated, the court shall follow the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian or conservator.

Comments

Present Iowa section 633.679 provides for termination of conservatorships and guardianships but does not deal with removal of a guardian or a conservator and appointment of a successor where this would better serve the interests of the ward. Furthermore, there are no procedural safeguards available to the ward during the termination proceedings that protect him from the possible continuation of an unnecessary arrangement. Proposed revised section 633.679 seeks to remedy this situation.

Subsection (1) allows the ward or any other person interested in his welfare to petition for removal of a guardian or conservator as well as a complete termination of the arrangement. Thus, an unsatisfactory guardian or conservator can be removed and a successor appointed where such a change is in the best interests of the ward.

Subsection (2) makes available the same procedures for removal and termination as were available for appointment. These procedures are just as necessary to avoid prolonging an unnecessary arrangement as they are to prevent an unwarranted guardianship or conservatorship in the first place.

633.680 Limit on application to terminate or remove.

If any petition to terminate the guardianship or conservatorship or to remove the guardian or conservator shall be denied, no other

petition shall be filed therefor until at least six months shall have elapsed since the denial of the former one.

Comments

The underlined words in this section are simply additions so that it will conform to the revision of section 633.679. This change will make the limitation on filing petitions applicable to those for removal of a guardian or conservator as well as for termination.

Chapter 222 Mentally Retarded Persons

Existing provisions in Chapter 222 allow the appointment of a guardian at a commitment proceeding. A continuance of this arrangement would result in an inequitable treatment of those who are mentally retarded. Thus, the following changes delete the guardianship provisions from Chapter 222, so that the mentally retarded will not be denied the safeguards and flexible provisions of revised Chapter 633.

222.18 County attorney to appear.

The county attorney shall, if requested, appear on behalf of any petitioner for the ~~appointment of a guardian or~~ commitment of a person alleged to be mentally retarded under this chapter, and on behalf of all public officials and superintendents in all matters pertaining to the duties imposed upon them by this chapter.

Section 222.31, unnumbered paragraph (1) and subsection (1) shall be amended as follows:

222.31 ~~Guardianship or~~ commitment.

If, in the opinion of the court, or of a commission as authorized in section 222.28, the person is mentally retarded within the meaning of this chapter and the court determines that it will be conducive to the welfare of such person and of the community ~~to place the person under guardianship, or~~ to commit the person to some proper institution for treatment, training, instruction, care, habilitation, and support, the court shall by proper order:

1.--Appoint-a-guardian-of-the-person-of-such-person,-provided-no-such guardian-has-already-been-appointed.

222.33 Power of guardian.

A-guardian-appointed-under-this-chapter-shall-have-the-same-power over-the-person-as-possessed-by-a-parent-over-a-minor-child.--The-guardian shall-be-subordinate-to-any-duly-appointed-guardian-of-the-property-of such-person.

222.34 Guardianship under jurisdiction of court.

Guardianship-proceedings-shall-remain-under-the-jurisdiction-of-the court.--The-court-may-at-any-time-on-application-of-any-reputable-person terminate-such-guardianship,-remove-the-guardian-and-appoint-a-new-guardian, or-order-that-such-mentally-retarded-person-be-removed-from-the-custody-of the-guardian-and-committed-to-an-institution-or-hospital-school-as-permitted in-section-222.31.

PROPOSED CHANGES IN THE CODE OF IOWA TO ENCOURAGE
THE EMPLOYMENT OF THOSE WHO ARE HANDICAPPED

It is the policy of this state to encourage the employment of workers who are handicapped, as evidenced by the existing provisions of the Iowa Code. However, there are flaws in these provisions that reduce the effectiveness of this policy. The following changes are suggested in an effort to remove these flaws and thereby further encourage the employment of those who are handicapped.

Chapter 85 Workmen's Compensation

85.64 Limitation of benefits.

If an employee ~~who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ~~, who has any form of pre-existing handicap which would be likely to make the employee more than usually susceptible to extensive disability in the event of a subsequent injury, receives a compensable injury which results in disability that is substantially greater by reason of the combined effects of the pre-existing handicap and the subsequent injury than the disability which would have resulted from the subsequent injury alone, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing ~~disability~~ handicap. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder any compensable value of the ~~previously lost member or organ~~ pre-existing handicap.

Any benefits received by any such employee, or to which he may be entitled by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforesaid.

Comments

Second Injury Acts, of which this section is an important part, were enacted to combat the effect of workmen's compensation acts which discouraged employers from hiring a disabled workman. Under workmen's compensation acts an employer must compensate the injured employee for his total disability. As applied to previously disabled workmen, the employer would pay not only for the additional disability caused by the injury but for the workmen's total cumulative disability which would include any pre-existing condition. As a result, employers risked higher compensation costs if they hired a handicapped worker since his total cumulative disability will be greater than the disability of a non-handicapped employee with the same injury.

To protect against this result, second injury acts require the employer to pay only for the immediate effects of the work injury, while the state pays for the difference between the damage caused by the accident and the cumulative disability arising out of the injury. For example, if the workman had previously lost one eye and the injury caused loss of the second eye, the employer would pay for the loss of one eye and the state would pay the difference between the schedule payments for loss of one eye and the loss of two eyes. This should have the effect of eliminating any employer prejudice arising out of the workmen's compensation acts.

The problem with Iowa's second injury act is that it covers only a few pre-existing disabilities. The state will underwrite compensation only

for those who have lost an extremity or an eye and who subsequently lose another extremity or eye. If it is the policy of the state to encourage the employment of all types of handicapped workers, the workmen's compensation laws ought to remove these second injury limitations which favor only certain categories of the handicapped.

This proposed revised section 85.64 broadens the conditions covered by the second injury act to cover any pre-existing handicap. The purpose of this change is to encourage the hiring of persons with any type of handicap by lessening the financial burden on employers whose handicapped employees are injured. More specifically, the proposed statute is designed to put all handicapped workers on an equal footing with non-handicapped workers.

Chapter 601A Civil Rights Commission

601A.2 Definitions

11. "Disability" means the physical or mental condition of a person which constitutes a ~~substantial~~ handicap. In reference to employment, under this chapter, "disability" also means the physical or mental condition of a person which constitutes a ~~substantial~~ handicap, but is unrelated to such person's ability to engage in a particular occupation.

Comments

Section 601A.2(11) now refers to a "substantial handicap" in defining disability. "Substantial" has been deleted under the proposed change for the following reason.

Paragraph 601A.7(1)(a) defines an unfair employment practice as refusing to hire or to otherwise discriminate against an applicant because of the

applicant's disability. Disability is then defined in paragraph 601A.2(11) as "the physical or mental condition of a person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation." The problem is that the Code does not define substantial handicap. The Iowa Civil Rights Commission's proposed rules, which will be used by the ICRC to guide their in-house decision making, attempt to clarify the definition of substantial handicap by relying on the standards of the Vocational Rehabilitation Division, Department of Public Instruction, for certification of a substantial handicap. The Vocational Rehabilitation standards, in turn, define a substantial handicap as one which adversely affects the individual's ability to perform the job.

Thus, if the person has a substantial handicap as just defined, the ICRC cannot help him under Chapter 601A as it is not discriminatory to refuse to hire when the handicap would adversely affect job performance. On the other hand, the ICRC has no jurisdiction over a claim where the person does not have a substantial handicap as Chapter 601A now reads.

It is the purpose of the proposed revision in paragraph 601A.2(11) that this definitional trap be eliminated. Few, if any, employers will discriminate against an individual who has no real handicap, so the language of the present statute serves no real purpose. Moreover, if an individual with a minor handicap were to be the target of discrimination, there is no reason why his rights should not be protected. Therefore, it is recommended that the word "substantial" be removed from paragraph 601A.2(11).

Chapter 601A is amended to include new section, Unfair Employment Practices

3. An employer must attempt to make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the employer can demonstrate that such accommodation would impose an undue hardship on the conduct of the employer's business. In determining the extent of an employer's accommodation obligation, the following factors shall be included: (a) business necessity, and (b) financial cost and expenses.

Comments

Often the problem arises as to what extent the employer must go out of his way to employ the handicapped. Specifically, the issue becomes whether it is an unfair employment practice for the employer to refuse to make any changes in his physical plant or operational techniques to accommodate the worker who could not function properly without such modifications. Specific problem areas arise in the context of forced removal of physical barriers, employer-run rehabilitation programs, fringe benefit expenses and modification of the tasks assigned to certain employees.

The statutory language designed to deal with these problems is rather vague. Paragraph 601A.7(1)(a) provides that "if a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be a basis for exception to the unfair or discriminatory practices prohibited." By implication paragraph 601A.9(12) also goes to this problem by allowing the ICRC to exercise broad remedial powers upon a finding of discrimination. These remedial powers have been interpreted to include forced removal of barriers, a remedy which could not be implied if the act was not meant to force the

employer to make some accommodations. Finally, paragraph 601A.11 says that the Act is to be "broadly construed to effectuate its purposes".

Taken together, these statutory provisions can reasonably be read to prohibit discrimination on the basis that the employer might have to make certain financial or organizational changes. However, such a result is by no means mandated by the statutory language. Thus, it is recommended that the above subsection be added to section 601A.7 to ensure that the handicapped will not be denied employment where reasonable accommodations would allow him to adequately handle the job.

Chapter 400 Civil Services

400.8 Original entrance examination - appointments.

The commission shall, during the month of April of each year, and at such other times as shall be found necessary under such rules, including minimum and maximum age limits, as shall be prescribed and published in advance by the commission and posted in the city hall, hold examinations for the purpose of determining the qualifications of applicants for positions other than promotions, which examinations shall be practical in character and shall relate to such matters as will fairly test the mental and physical ability of the applicant to discharge the duties of the position to which he seeks appointment. Provided, however, that such physical examination of applicants for appointment to the positions of policeman, policewoman, police matron or fireman shall be held under the direction of and as specified by the boards of trustees of the fire or police retirement system established by section 411.5.

However, no applicant shall be disqualified for the reason that he or she has a physical or mental handicap unless it is shown that such handicap would materially impair the applicant's ability to perform the duties of the position to which he seeks appointment.

All appointments to such positions shall be conditional upon a probation period of not to exceed six months, and in the case of police patrolmen in cities operating a police academy, a probation period not to exceed twelve months, during which time the appointee may be removed or discharged from such position by the appointing person or body without the right of appeal to the commission. Continuance in the position after the expiration of such probationary period shall constitute a permanent appointment.

400.9 Promotional examinations - promotions.

The commission shall, during the month of April of each second year, and at such other times as shall be found necessary, under such rules as shall be prescribed and published in advance by the commission, and posted in the city hall, hold competitive promotional examinations for the purpose of determining the qualifications of applicants for promotion to a higher grade under civil service, which examinations shall be practical in character, and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which he seeks promotion.

Hereafter, all vacancies in the civil service grades above the lowest in each shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights therein. If, however, no current employee passes a promotional examination and otherwise qualifies for the position, and entrance examination for such position may be used to fill such vacancy within one year after such promotional examination.

No applicant who is otherwise qualified shall be denied a promotion for the reason that he or she has a physical or mental handicap unless it is shown that such handicap would materially impair the applicant's ability to perform the duties of the position to which he seeks appointment.

400.16 Qualifications.

All appointive officers and employees of cities shall be selected with reference to their qualifications and fitness and for the good of the public service, and without reference to their political faith or party allegiance. A person shall not be disqualified for the reason that he or she has a physical or mental handicap unless it is shown that such handicap would materially impair the applicant's ability to perform the duties of the position to which he seeks appointment.

Chapter 19A State Merit System of Personnel Administration

19A.9 Rules Adopted.

3. For open competitive examinations to test the relative fitness of new applicants for the respective positions. Such examinations shall be practical in character and shall relate to such matters as will fairly test the ability of the applicant to discharge the duties of the position to which appointment is sought.

However, no applicant shall be disqualified for the reason that he or she has a physical or mental handicap unless it is shown that such handicap would materially impair the applicant's ability to perform the duties of the position to which he seeks appointment.

Where the Code of Iowa establishes certification, registration and licensing provisions, such documents shall be considered prima facie evidence of basic skills accomplishment and such persons shall be exempt from further basic skills testing.

Examinations need not be held until after the rules have been adopted, the service classified, and a pay plan established, but shall be held no later than one year after September 1, 1967. Such examinations shall be announced publicly at least fifteen days in advance of the date fixed for the filing of applications therefor, and shall be advertised through the communications media. The director may, however, in his discretion, continue to receive applications and examine candidates for a period adequate to assure a sufficient number of eligibles to meet the needs of the system, and may add the names of successful candidates to existing eligible lists in accordance with their respective ratings.

Chapter 80 Department of Public Safety

The following unnumbered paragraph is added to section 80.15:

80.15 Examination - oath - probation - dismissal.

However, no applicant shall be disqualified for the reason that he or she has a physical or mental handicap unless it is shown that such handicap would materially impair the applicant's ability to perform the duties of the position to which he or she seeks appointment.

Comments

The above underlined additions to Chapters 400, 19A and 80 should make clear the government's duty to lead the way in eliminating disability discrimination. It also conforms these chapters to the anti-discriminatory policy of the state as evidenced by Chapter 601A.

Chapter 735 Infringement of Civil Rights

Section 735.6, subsections (1) and (2) should be amended as follows:

735.6 Fair employment practices.

1. Every person in this state is entitled to the opportunity for employment on equal terms with every other person. It shall be unlawful for any person or employer to discriminate in the employment of individuals because of race, religion, color, national origin ~~or~~ , ancestry~~.~~ or handicap, unless based on the nature of the employment. ~~However, as to employment such individual must be qualified to perform the services or work required.~~

2. It shall be unlawful for any labor union or organization or an officer thereof to discriminate against any person as to membership therein because of race, religion, color, national origin, ~~or~~ ancestry or handicap.

Comments

The above changes are made to extend the application of this section to disability discrimination. In this way, the criminal law conforms with Chapter 601A and the disabled are given the additional protection of this section.

PROPOSED CHANGES IN ADOPTION PROCEDURE TO PROTECT THE INTERESTS OF PERSONS WHO ARE DEVELOPMENTALLY DISABLED

The following proposals focus upon those statutes and regulations which may place a burden particularly on a handicapped person desiring to adopt or to be adopted. The United States Constitution requires that persons under like circumstances be given equal protection in the enjoyment of personal rights and the prevention and redress of wrongs. Thus, statutes which create a presumption, or allow a presumption to be made, that persons who are handicapped cannot adopt may be unconstitutional.

They do not allow a determination of the individual's personal qualities and capabilities as would be the case with non-handicapped persons. The revisions which follow are designed to eliminate the use of such unconstitutional presumptions and to amend those provisions which unnecessarily burden those who are handicapped.

Chapter 600 Adoption

600.7 Annulment.

Repeal this section.

~~If within five years after the adoption, a child develops mental retardedness, epilepsy, mental illness, or venereal infection, or an otherwise permanent and serious disability as a result of conditions existing prior to the adoption, and of which the adopting parent had no knowledge or notice, a petition setting forth such facts may be filed with the district court of the county where the adoptive parents are residing. If upon hearing the facts alleged are proved, the court may annul the adoption and refer the child to the juvenile court or take such other action as the case may require. In every such proceeding it shall be the duty of the county attorney to represent the interest of the child. As amended Acts 1959 (58 G.A.) ch. 152, §192.~~

Comments

Section 600.7 allows the adoptive parents to petition for annulment of the adoption under certain circumstances. Where the child develops a condition such as a permanent and serious disability resulting from conditions existing prior to adoption and of which the adopting parent had no knowledge, the adoption may be annulled. This statute is rarely used and there appears to be a judicial hostility to its use. Furthermore, its use may have detrimental psychological effects on a child already once removed from his parents. Based on the dubious utility of this statute, it is recommended that it be repealed.

It may be noted that the proposed bill before the Iowa legislature, Senate File 41, would repeal this section if it becomes law. This proposal was made on the basis that a written consent to adopt can be revoked on equitable principles so the need for such a statute does not exist.

600. New Section - Placement investigations and reports.

1. A pre-placement investigation shall be directed to and a report of this investigation shall answer the following on forms provided by the department of social services:

a. Whether the home of the adoption petitioner is a suitable one for the placement of the minor person to be adopted.

b. Whether the conditions and antecedents of the minor person to be adopted make that person suitable for placement with the adoption petitioner.

c. How the adoption petitioner's emotional maturity, finances, health, relationships, and any other relevant factor may affect the petitioner's ability to accept, care, and provide the minor person to be adopted with an adequate environment as that person matures.

d. What is the complete family medical history of the person to be adopted, including any known genetic, metabolic or familial disorders.

e. What is the complete medical and developmental history of the person to be adopted.

2. A post-placement investigation and a report of this investigation shall:

a. Verify the allegations of the adoption petition and its attachments.

b. Evaluate the progress of the placement of the minor person to be adopted.

c. Determine whether adoption by the adoption petitioner may be in the best interests of the minor person to be adopted.

3. A pre-placement investigation and report of the investigation shall be completed and the placement approved by the investigator prior to any agency or independent placement of a minor person in a home in anticipation of an ensuing adoption. However, if the adoption petitioner is a stepparent or a relative within the fourth degree of consanguinity who has assumed custody of a minor person to be adopted, a pre-placement investigation of this petitioner and a report of the investigation may be completed at a time established by the court. Also, any investigation and report required under this subsection may be waived by the court if the adoption petitioner is a stepparent or a relative to the person to be adopted within the fourth degree of consanguinity.

4. The adoption of a minor person shall not be decreed until that person has lived with the adoption petitioner for a minimum residence period of one hundred eighty days. However, the court may waive this period if the adoption petitioner is a stepparent or related to the minor person within the fourth degree of consanguinity or may shorten this period upon good cause shown when the court is satisfied that the adoption petitioner and the person to be adopted are suited to each other.

The minimum residence period shall not begin running until the pre-placement investigation and its report are completed, approved, and filed with the clerk of the court.

5. If an investigator does not approve a placement under subsection (3), the persons having been investigated may appeal the disapproval to the court. The court shall order the investigator to show cause why the placement should not be made.

6. The agency making an agency placement shall conduct the pre-placement investigation and report required under subsection (3) of this section. The department shall conduct all other investigations and reports required under subsection (3) of this section and may charge a fee commensurate with the services rendered of up to two hundred dollars.

7. A post-placement investigation and report of the investigation shall be completed and the report filed with the clerk of the court prior to the holding of the adoption hearing. The court shall appoint any qualified person to conduct this investigation and report.

8. Any investigation or report required under this section shall not apply when the person to be adopted is an adult.

9. Any person designated to make an investigation and report under this section may request an agency or state agency, within or without this state, to conduct a portion of the investigation or the report, as may be appropriate, and to file a supplemental report of such investigation or report with the court.

10. The department may investigate, on its own initiative or on order of the court, any placement made or adoption petition filed under this chapter and may report its resulting recommendation to the court.

11. Any person who assists in or impedes the placement or adoption of a minor person in violation of the provisions of this section shall be, upon conviction, guilty of a misdemeanor.

Comments

The proposed section on placement investigations and reports is made up of sections (15) and (17) of Senate File 41, a bill now before the Iowa legislature. It is mainly a rewrite of the present Iowa statute, Section 600.2, /except for subsections (1), (2), (5), and (11)./

Subsections (1) and (2) are recommended to guard against an unconstitutional presumption that handicapped persons are unsuitable as adoptive parents or adoptive children. Undoubtedly this section would force an investigator to make an evaluation of any mental or physical handicap possessed by the petitioner or child with relation to the suitability of the adoption. While this may seem detrimental to the interests of those who are handicapped, such a handicap is probably already being evaluated expressly or as an unarticulated presumption. By requiring the caseworker to evaluate these factors in writing, it will allow a handicapped person to challenge any unjustified "rule of thumb" before a judicial body in order to determine whether such a rule is an unwarranted or even unconstitutional presumption. Subsection (5) provides the tool for such a challenge by allowing the person seeking to adopt to appeal any disapproval.

An additional protection is available in subsection (11) which sets up criminal penalties for violations of this section.

The adoption of this section is urged since it should be an aid to protect the interests of the developmentally disabled.

Section 600.2 Investigation - minimum residence.

This section is amended by repealing this section and enacting in lieu thereof the preceeding section.

~~The State Department of Social Welfare, or a qualified person or agency named by the court, after an order of the court, shall proceed to verify the allegations of the petition; to investigate the conditions and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption; and to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child. The investigation shall be completed and a report with recommendations made to the Court within sixty days from the date of the filing of the petition. No petition shall be granted until the investigation is completed. Nothing herein contained shall prevent the Court from conducting any other investigation which it may deem necessary or proper. No petition shall be granted until the child shall have lived for twelve months in the proposed home. Such period of residence may be shortened by the Court upon good cause shown when satisfied that the proposed home and the child are suited to each other. The State Department of Social Welfare may, and upon order of the Court shall, make a further investigation during the period of residence and a final report with recommendations to the Court. The investigation and period of residence may be waived by the Court where the petitioner or one of the petitioners is related to the child within the third degree of consanguinity or where the petitioner is married to a natural parent of the child. As amended Acts 1947 (52 G.A.) ch. 281, §2.~~

Chapter 600 is amended by adding the following new section, Appeal:

An appeal from any final order or decree rendered under this statute shall be taken in the same manner as an appeal is taken from a final judgment under the rules of civil procedure. However, a rule of civil procedure provision regarding a minimum amount of value in controversy shall not bar an adoption appeal as a matter of right. The supreme court shall review an adoption appeal de novo and shall base its decision on the consideration of how the interests of the person to be adopted will best be served.

Comments

This section is taken from the proposed bill before the Iowa legislature, Senate File 41. It specifically makes available the right to appeal any final

order or decree rendered under this chapter. Through the use of this section, a person who is handicapped may seek review of a ruling which he feels may have been discriminatory or based upon unconstitutional presumptions.

600.12 Determination of assistance.

Any adoptive parent desiring to avail himself of financial assistance shall state this fact in his petition for adoption, or application to the department of social services where the need for such assistance arises after adoption. The department of social services shall investigate the person ~~petitioning-for-adoption~~ seeking assistance and the child and shall file with the court a statement of whether the department will provide assistance as provided in sections 600.11 to 600.16, the estimated amount, extent, and duration of assistance, and any other information the court may order.

If the department of social services is unable to determine that an insurance policy will cover the costs of special services, it shall proceed as if no policy existed, for the purpose of determining eligibility to receive assistance. The department shall, to the amount of financial assistance given, be subrogated to the rights of the adoptive parent in the insurance contract.

Iowa Departmental Rules, Department of Social Services

83.6(600) New applications will be taken at any time and processed in the same manner as applications made prior to the filing of the petition to adopt.

Comments

Chapter 600 now provides that where the adoptive parent adopts a physically or mentally handicapped child, the state will pay for the costs of special services and maintenance of the child to the extent that such services are beyond the financial resources of the prospective parent. The state is contractually bound where the need for assistance is stated in the adoption petition. If the need for assistance is not stated in the petition, or if the need should arise after the granting of the adoption, the department of social services will provide funds only as long as they are available. In

this situation, the adoptive parent can 1) apply to the department of social services and hope for assistance on a yearly basis; 2) be forced to place the child in voluntary placement because of lack of funds in which case the state pays the majority of the expenses; 3) annul the adoption, or 4) keep the child and go continually bankrupt. Since the state or the public invariably pays the special services costs of any option available to the foster parents, it would be best for all parties concerned if the state bound itself contractually to the support of the child if and when the problem arises.

The changes in section 600.12 and Rule 83.6(600) would allow the department of social services to bind themselves to the support of a child for as long as needed regardless of when the handicap became apparent. Thus, the state would be expending approximately the same amount of funds, the adoptive parents could rely on the certainty of assistance and the child would still be allowed to remain with the foster parents.

PROPOSED REVISIONS IN QUALIFICATIONS
FOR DRIVERS' AND CHAUFFEURS' LICENSES

The United States Constitution requires that any classification made by the state cannot be arbitrary or unrelated to the goal to be served. Thus, when the state denies privileges to those persons classified as mentally or physically disabled, this classification must conform to constitutional standards.

In addition, if it is the policy of this state to prohibit discrimination on the basis of race, color, creed or national origin, the same considerations apply to discrimination based on mental or physical disability. Where there is no justification for differing treatment, disabled persons are entitled to be dealt with in the same manner as everyone else. The following changes are proposed with these considerations in mind.

Section 321.177, subsections (5) and (7) are amended as follows:

321.177 Persons not to be licensed.

5. To any person, as an operator or chauffeur, who ~~has previously been adjudged to be afflicted with or suffering from any mental disability or disease and who has not at the time of application been restored to competency by the methods provided by law~~ is currently suffering from a mental illness or handicap which renders such person either unable to comprehend or unlikely to obey the rules and statutes governing highway safety. ~~Provided, however, that the department may issue such license when said mentally ill person is placed on parole or convalescent leave, when advised in writing that the medical staff and superintendent of the institution in which the person has been hospitalized recommend the issuance of said license.~~

7. To any person ~~when the commissioner has good cause to believe that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways~~, as an operator or chauffeur, who has a physical handicap which renders that person unable to operate the controls of a motor vehicle equipped with the appropriate special mechanical control devices with a reasonable degree of safety.

Whenever the department refuses, for any reason, to issue a license, the department shall notify the applicant, in writing, of the reasons for such refusal and of the right to appeal such refusal provided in section 321.215. Delivery of the notification shall be deemed sufficient if it is handed to the applicant at the time of refusal.

Comments

The existing section 321.177(5) establishes a conclusive presumption that any person "who has previously been adjudged to be afflicted with or suffering from any mental disability or disease and who has not at the time of application been restored to competency by the methods provided by law" is not qualified to operate a motor vehicle. In applying this statute the Department of Public Safety refuses to license any person who has ever been an in-patient at any public or private mental health facility for any reason unless he has been discharged as cured.

While the state may classify people according to criteria bearing on their suitability to receive a driver's license, the United States Constitution requires that such classification cannot be arbitrary and unrelated to the goal to be served, in this case highway safety. Furthermore, the state may not conclusively presume the unfitness of a certain class where the presumption is not true for all members of the class. In this light, the conclusive presumption that former patients are unfit to drive is constitutionally questionable. It is simply not true that all mental patients are unable to safely operate a motor vehicle.

The proposed section 321.177(5) is designed to make the application turn upon the present abilities of the applicant rather than his past status as a mental patient. Further, the proposed revision recognizes that what is a mental handicap for one purpose may be no handicap at all for another purpose. Thus, the proposed statute would ignore mental handicaps which have no bearing on driving ability.

Existing subsection (7) allows the commissioner to refuse to license any person suffering from a mental or physical disability who cannot safely operate a motor vehicle. The suggested revision of this subsection removes mental disabilities from this subsection since they are fully dealt with in subsection (5). In addition, the statute explicitly allows issuance of a license to a physically handicapped person who can drive safely through the use of special equipment on the vehicle.

The final recommended change in section 321.177 provides for notice to the applicant who has been refused a license of the reasons for such refusal and of his right to appeal. Few individuals will take advantage of the right to review unless they are told of the right. This section is designed to eliminate this practical problem and thus provide for a more meaningful right to review.

PROPOSED REVISION OF THE BOARD OF EUGENICS TO PROTECT THE CONSTITUTIONAL RIGHTS OF THE DEVELOPMENTALLY DISABLED

Sterilization is presently regulated by Chapter 145 - State Board of Eugenics. This statute is outdated and unconstitutional in many respects. Of major importance is the fact that the United States Supreme Court has recognized a constitutional right to procreation. Therefore, governmental interference with this right must be carefully scrutinized. Thus, Chapter 145 has been evaluated and the following proposals made with a view toward protecting the constitutional rights of the developmentally disabled from unwarranted infringement by the state.

~~145.1--State board.~~

~~A state board of eugenics is hereby created. Said board shall consist of the medical director of the state psychopathic hospital connected with the college of medicine of the state university at Iowa City, of the commissioner of public health, and of the superintendents of the following state institutions, to wit:~~

~~1. Mental health institute, Cherokee, Iowa.~~
~~2. Mental health institute, Clarinda, Iowa.~~
~~3. Mental health institute, Independence, Iowa.~~
~~4. Mental health institute, Mount Pleasant, Iowa.~~
~~5. Glenwood state hospital school.~~
~~6. Woodward state hospital school.~~
~~7. The women's reformatory at Rockwell City.~~

145.1 Sterilization Review Board

A Sterilization Review Board is hereby created. The Board shall be appointed by the Governor of the State of Iowa and shall consist of the following members: the comissioner of the department of social services; the comissioner of the department of health; the medical director of the state psychopathic hospital connected with the college of medicine at the state university at Iowa City; the chairman of the Iowa Developmental Disabilities Council; the chairman of the Iowa Mental Health Association; two physicians and two attorneys.

Comments

This section renames the present Board of Eugenics and reconstitutes its membership.

~~145.2--Quarterly-reports-of-defective.~~

~~Each-member-of-said-board-and-the-warden-of-the-penitentiary-and the-warden-of-the-men's-reformatory,-shall,-annually,-on-the-first-day of-January,-April,-July,-and-October,-report-to-the-state-board-of eugenics-the-names-of-all-persons,-male-or-female,-living-in-this-state, of-whom-he-or-she-may-have-knowledge,-who-are-mentally-ill-or-retarded, syphilitic,-habitual-criminals,-moral-degenerates,-or-sexual-perverts and-who-are-a-menace-to-society.~~

145.2 New Section

(a) The Sterilization Review Board shall make judgments on petitions for sterilization, whether denominated voluntary or involuntary, of inmate patients of any penal or therapeutic institution, and on petitions for sterilization of any person on the application of another person.

(b) Nothing in this section shall be interpreted to require the consent of the Sterilization Review Board for any sterilization of any person legally capable of consenting to medical care other than sterilizations listed in subsection (a).

Comments

This new section grants to the Board a more limited role than the State Board of Eugenics has had. It takes away any power to initiate sterilization proceedings from board members, and makes the board's sole function that of making decisions under standards articulated later in the chapter.

Subsection (b) iterates that the state had no interest in private, voluntary sterilizations done for therapeutic or contraceptive purposes by competent individuals. Those decisions have no basis in state regulation. However, since some institutionalized patients may prefer sterilization, the board is empowered to act on their requests.

Comments - Chapter 145

The proposed Chapter 145 will apply only to the sterilization of the mentally retarded or mentally ill. Persons who are "syphilitic,

habitual criminals, moral degenerates or sexual perverts or who are a menace to society" have been removed from the purview of this statute for constitutional reasons.

The United States Supreme Court has held that the right of procreation is protected from unwarranted governmental interference. Thus, the state must have a compelling interest to justify sterilization of certain classes of people. Two theories are advanced for such sterilization. Eugenics, or the prevention of "inferior" persons bearing more "inferior" persons, is one justification. It is based on the theory that undesirable characteristics are hereditary. The second philosophy is environmental: sterilization is warranted where the person would produce children likely to become a "ward of the state" or a "social menace".

The first theory, eugenics, will not support the inclusion of persons who are "syphilitic, habitual criminals, moral degenerates, or sexual perverts". The scientific community has rejected the thoery that the undesirable traits of such persons are hereditary. Since eugenics has been discredited, there is no compelling state interest to justify the sterilization of such individuals. Thus, they have been excluded from the proposed statute. Because Board of Eugenics is an unnecessary euphemism, the name has been changed to the Sterilization Review Board.

Persons who are a "menace to society" have also been excluded on constitutional grounds. The due process clause requires that a statute give fair warning of the conduct prescribed and have discernable standards restricting the discretion of governmental authorities or

courts in enforcing the law. Where a statute does not meet these requirements, it is void. The category, "persons who are a menace to society", would appear to be void under these criteria. The Code is completely silent as to the standards to be followed in defining this class of individuals. For this reason, they have not been included in the scope of the proposed Chapter 145.

Chapter 145 is expanded to allow persons other than members of the board to request the sterilization of mentally ill or mentally retarded persons. This is to prevent the present situation where only those persons who are institutionalized come to the attention of the board. Such persons in the community are also entitled to the protections afforded by this statute.

145.3 Notice.

Any person reported to the Sterilization Review Board, under the provisions of section 145.2, must be served with a notice in writing of such report and fixing a time and place not less than ten days subsequent to such ~~report~~ notice for the ~~time-and-place-of-examination~~ and hearing before said board. ~~Said-notice-shall-be-served-as-provided-in-section-145.11.~~ The notice shall be served upon the person reported upon and his guardian or next of kin. Such notice shall state in clear and concise language the reason why it appears that such person should be sterilized and the type of sterilization recommended.

Comments

Revised section 145.3 incorporates section 145.11 which provides for the manner of service. Proposed section 145.3 also requires that the notice inform the individual of the reason for his recommended sterilization.

145.4 Hearing.

Any person reported to the Sterilization Review Board, as provided in section 145.2, and who has been notified thereof, shall have the right to appear personally before said board and to be represented by counsel at such hearing. Unless such person has counsel of his own choice, the board shall appoint an attorney to represent him in the proceeding and such attorney shall be compensated by the state, upon order of the board. He shall have the right to see and hear all evidence, to have witnesses subpoenaed ~~and to introduce such evidence in regard to the matter at issue as the board shall deem relevant, material and proper.~~ , to present evidence and to cross-examine witnesses.

Comments

Chapter 145 presently allows the individual to be represented by counsel but it makes no provision that he be told of this right or that the state will pay for an attorney if the individual cannot. Proposed section 145.4 solves both of these problems. Provision of counsel is absolutely necessary to protect the individual's interests. The parent or guardian cannot fill this role because too often their interests may be inconsistent with those of the individual. Furthermore, the lawyer, as a disinterested party, may see alternatives that concerned parties did not see.

145.41 New Section - Examination.

The person alleged to be within the purview of this chapter shall be examined by a physician appointed by the court for the purpose of determining the mental and physical condition of such person. The physician shall submit his report in writing to the court.

Comments

Chapter 145 presently requires the board to consider the individual's physical and mental condition when determining whether to order sterilization. Such condition cannot be accurately known without expert testimony

on the subject. Thus, proposed section 145.41 requires an examination and report by a physician. As a result, a decision can be reached on the basis of this particular person's condition and not on the possibly stereotyped thinking of the board.

145.5 Examination and hearing.

It shall be the duty of said board at the time and place named in the notice to the person reported upon, with such reasonable continuances from time to time and from place to place as the board may determine, to proceed to hear and consider the evidence offered and to examine into the innate traits, the mental and physical conditions, the personal records and family traits and history of the person reported upon and notified as in this chapter provided, insofar as the same can be ascertained. If the person reported upon is an inmate of any institution, the said board shall see to it that the inmate shall have an opportunity and leave to attend the said examination and hearing in person, if desired by him or if requested by his guardian, ~~or person served with the notice as aforesaid.~~ next of kin or attorney.

145.9 Order for sterilization.

If in the judgment of a majority of said board ~~procreation by such persons would produce a child or children having an inherited tendency to mental retardedness, syphilis, mental illness, epilepsy, criminality or degeneracy, or who would probably become a social menace or ward of the state, and there is no probability that the condition of such person so investigated and examined will improve to such an extent as to avoid such consequences,~~ the person qualifies for sterilization under section 145.12, then it shall be the duty of such board to make an order embodying its conclusions with reference to such person in said respects and specifying such a type of sterilization as may be deemed by said board best suited to the condition of said person and most likely to produce the beneficial results in the respects specified in this ~~section~~ chapter, but nothing contained in this chapter shall be construed to authorize castration nor removal of sound organs from the body.

Comments

The revision of section 145.9 was made in accordance with the proposed changes in section 145.2 and for the same reasons.

145.11 Service of order.

If an operation is deemed necessary by said board for such person so investigated, then a copy of the order of said board recommending such operation shall be served forthwith on said person and his guardian or next of kin. ~~or, in the case of a mentally ill or retarded person, upon his legal guardian, and if such person has no legal guardian, then upon his nearest known kin, or personal friend, within the state, and if such person has no known kin or personal friend within the state, then the board shall cause application to be made to the district court of the county in which such person resided or may be found for the appointment of some suitable person to act as guardian of the person reported upon during and for the purposes of the proceedings under this chapter, to defend the rights and interests of the said person, and the court shall, by proper order, appoint some suitable person to act as guardian for said purposes who shall be paid from any funds in the state treasury not otherwise appropriated, a fee, but not exceeding twenty five dollars, as may be determined by the judge of said court, for his services under said appointment. Such guardian may be removed or discharged at any time by said court, or the judge thereof in vacation, and a new guardian appointed and substituted in his place.~~

Comments

The portion of section 145.11 dealing with the appointment of a temporary guardian for the purpose of receiving the order and giving consent for the operation under section 145.14 has been deleted. Since the proposed section 145.4 provides for the appointment of counsel and since the consent provision has been done away with in these proposals, there is no need for the court-appointed temporary guardian.

145.12 New Section - Sterilization ordered.

An order for sterilization may be issued under section 145.9 only upon a finding

1. that:
   a. the person would be likely to produce children;
   b. the person is unlikely to be able to perform properly the functions of parenthood;
   c. there is no probability that the condition of the person will improve to such an extent as to avoid the consequences of subsection (1)(b);

d. the welfare of the person will be promoted by sterilization; and
e. sterilization may be performed without detriment to the person's general health; or

2. that the individual
a. has comprehension of the facts involved;
b. is able to arrive at a reasoned decision;
c. can signify assent or dissent; and
d. has made an uncoerced decision to be sterilized.

Sterilization of a mentally retarded or mentally ill person may be performed only upon the issuance of a court order upon one of the above findings.

Comments

This section sets up the standards to be used in determining who qualifies for sterilization. Such standards are lacking in the present system. The suggested standards keep in mind that the individual's fundamental right of procreation is at issue. Thus, the individual's interests are paramount, not the convenience of the institution or the family.

Subsection (1) provides for sterilization where the individual would produce children and is not capable, now or in the future, of properly performing the functions of parenthood. Such an individual has a right to be free from the burden of procreation and this statute gives the board the power to make such a decision where it is in the individual's best interests.

Subsection (2) provides for those cases where the individual does not qualify under subsection (1) for sterilization but has the capacity to decide for himself that he wants sterilization. In such cases, sterilization may be ordered so long as the requirements of subsection (2) are met.

145.13 Consent to operation.

~~If any person whose condition has been examined and reported upon by said board, as hereinbefore provided, shall consent in writing to have the operation specified in the order of said board performed~~ If an order for sterilization has been made by the board and approved by the court as provided in section 145.18, such operation shall thereupon be performed upon said person by or under the direction of the superintendent of the institution in which he is confined, if such person be an inmate of any of the state institutions herein mentioned, or if he is not an inmate of any of said institutions, such operation shall be performed by or under the direction of the Sterilization Review Board. All such operations shall be performed with due regard for the physical condition of the person upon whom it is performed and in a safe and humane manner.

Comments

This section has been revised to conform to the removal of the consent provision from this recommended statute.

145.14 "Consent" defined.

Delete this section.

~~In case the person to be operated upon is mentally ill or retarded, the consent hereinbefore mentioned in section 145.13 shall be construed to mean the written consent of such person's legal guardian, or if such person has no legal guardian, then the written consent of such person's nearest known kin or personal friend within the state of Iowa, or if such person is mentally ill or retarded, and has neither legal guardian nor known kin or personal friend within the state of Iowa, then the written consent of the guardian appointed by the court for such person as provided in this chapter.~~

Comments

Under the existing system a mentally ill or mentally retarded person's sterilization may be consented to by his legal guardian, next of kin or even by a personal friend. If such consent is given and the board has recommended sterilization, the operation is performed. There is no opportunity for court review because the action is deemed voluntary by virtue

of the consent given. The fatal flaw in this system is that the consent given is not that of the individual to be sterilized. When a fundamental right is at stake it cannot be denied to a person on someone else's assent. Only the person to be sterilized can give such consent and waive his constitutional rights. Therefore, section 145.14 is deleted. If the person involved actually wants to be sterilized and is capable of making such a decision, sterilization will be ordered under section 145.12(2).

145.15 ~~Absence of consent.~~ Recommendation reviewed.
~~If any such person shall not consent, within twenty five days from the service of such order upon him, to the performance of such operation,~~ If an operation is deemed necessary by the board for the person so investigated, said Sterilization Review Board, through its secretary, or other officer having charge of its records and files, within fifteen days thereafter, or such further time as the court or judge thereof may allow, shall file a transcript of its proceedings and of its said findings, conclusions and order with reference to said person with the clerk of the district court of the county in which such person resides or may be found.

Comments

Revised section 145.15 provides for automatic review of all orders wherein sterilization is ordered. With a fundamental right at stake, the individual is entitled to all the procedural safeguards of a truly adversary system. Furthermore, under the present system there is no effective means of review because consent is given in every case. This is evidenced by the fact that no such case has ever been heard in court. Under the proposed system, court review would be provided for all individuals without regard to the questionable acquiescence of the individual involved.

145.151 New Section - Operation denied.

If an operation is not deemed necessary by the board for the person so investigated, such decision may be reviewed by the district court in the same manner as provided in sections 145.15, 145.16 and 145.17 upon application of the person who filed the report or the person proceeded against.

Comments

This section provides for court review of a decision wherein sterilization was not recommended upon application of either party. Such a provision is necessary for the person who does not qualify under subsection (1) of section 145.12 but who seeks sterilization under subsection (2) of section 145.12. Such a case may arise where a mentally ill or mentally retarded individual requests his own sterilization but the board finds that he does not have the capacity to make such a decision. The board's decision would be reviewable upon request under proposed section 145.151.

145.16 Appearance

Upon the filing of such findings, conclusions and order, the clerk of the district court shall issue a summons directed to such person and deliver the same to the sheriff, together with a copy of such order prepared and certified by him and it shall be the duty of said sheriff to forthwith serve said summons and copy of order upon said person therein named, who shall be required, within twenty days after such service upon him, to enter his appearance in writing with the clerk of the district court in such case or by appearing in person in such proceeding. ~~If he is a mentally ill or retarded person such~~ Such appearance may be made by his guardian, if he has one; if not, then by his nearest of kin or near friend. If he is confined in an institution, facility shall be furnished him for making such appearance.

Comments

The only change in section 145.16 was the deletion of the special reference to mentally retarded and mentally ill persons. Such separate provision is unnecessary since the chapter only deals with these individuals.

145.17 Court procedure.

The issue thereby raised shall be whether the findings and conclusions of said board shall be affirmed by the court, and shall be tried in the district court of such county, as a special proceeding, in the same manner as a civil action at law in which the state shall be the plaintiff and the person so summoned shall be the defendant. Each party shall have the same rights as to production of evidence and the case shall be tried in the same manner as any other civil action. In all such cases the county attorney of the county where such proceedings are tried shall appear and prosecute such action on behalf of the state. ~~If the defendant has no attorney and he is unable to secure one, the court shall appoint an attorney from the membership of the bar of said county to conduct his defense, and appeal, if any be taken as hereinafter provided, and such attorney shall be compensated by the state, upon order of the court.~~ Upon the request of either party to such proceeding all questions of fact shall be tried by a jury and the court in every instance shall have the testimony fully reported at the expense of the state.

Comments

Section 145.17 remains the same except that the reference to the appointment of counsel for the person proceeded against has been deleted. Under the proposed changes, counsel would be provided from the very beginning under section 145.4, so this provision is unnecessary.

PROPOSED CHANGES IN CHAPTER 595 - MARRIAGE - TO PROTECT THE CONSTITUTIONAL RIGHTS OF THE DEVELOPMENTALLY DISABLED

The United State Supreme Court has recognized in a series of cases that a constitutional right to marraige exists. This right extends to all persons, including the developmentally disabled. However, Iowa presently denies to all persons who are mentally ill or mentally retarded the right to obtain a marriage license. The following changes are proposed to remedy the constitutional infirmities of such a restriction.

595.3 License

Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court. Such license must not be granted in any case:

1. Where either party is under the age necessary to render the marriage valid.
2. Where either party is under nineteen years of age, unless a certificate of the consent of the parents is filed. If one of the parents is dead such certificate may be executed by the survivor. If either parent is incompetent or his presence is unknown, the judge of the district court having jurisdiction in the county may, after hearing, upon proper cause shown, execute such certificate. If both parents are dead the guardian of such minor may execute such certificate but if such minor has no guardian then the judge of the district court having jurisdiction in the county may, after hearing, upon proper cause shown, execute such certificate. If the parents are divorced, the parent having legal custody may execute such certificate.
3. Where either party is disqualified from making any civil contract.
4. Where the parties are within the degrees of consanguinity or affinity in which marriages are prohibited by law.
~~5.--Where either party is mentally ill or retarded, a mental retardate, or under guardianship as an incompetent.~~

Comments

The United States Supreme Court has recognized in a series of cases that a constitutional right to marriage exists. Although the state does have the power to regulate, it must demonstrate a compelling state interest in order

to deprive the individual of the right. Furthermore, if such a compelling interest does exist, the statute must be narrowly tailored to meet the state's specific needs.

Presumably, the legislative policy in forbidding the marriage of the mentally deficient is based on the assumption that there will be a genetic flaw in the offspring. However, as early as 1930 Karl Menninger demonstrated that the incidence of inherited mental deficiencies is not as great as presumed. Thus, the state cannot justify the deprivation of this right on the remote chance that the couple would produce mentally ill or mentally retarded children. In addition, the statute is not narrowly tailored to restrict the marriage of only those who will produce such children. In fact, such a narrowly tailored statute is impossible since one cannot predict who will produce children with mental handicaps.

It might also be asserted that the statutory provision is designed to protect the individual from being exploited. However, the present restrictions on the marriage of any mentally ill or mentally retarded person is much too broad. The restrictions are not limited to those persons they are designed to protect, namely, the exploited. Furthermore, there is no need to prohibit the marriage of all to protect a few. The dissolution statutes should adequately provide relief to an exploited party.

Even if there were legitimate and compelling state interests, the present system of marriage in Iowa does not achieve the desired goals. Since Iowa recognizes the common law marriage, the ceremony and necessity for a license may be mere formality. Furthermore, the United States Supreme

Court's explicit protection of the "marital bedroom" would seem to prohibit any action by the state to prevent two mentally retarded individuals from co-habitating. Thus, the restrictions on obtaining a license do not accomplish the state's objectives. They simply prevent the performance of a valid religious ceremony. Surely the interests of individuals who wish to have the bonds of marriage consecrated by a church is greater than the asserted state interests. This is especially true in light of the fact that these interests are of doubtful legitimacy and are not even protected under the present system.

For all of these reasons, it is recommended that the restrictions on issuing a marriage license to mentally ill and mentally retarded persons be repealed.