IN THE SUPREME
COURT OF OHIO

ALEX J. GARCIA, et al.,
Plaintiffs-Appellants,

vs .

SIFFRIN RESIDENTIAL ASSOCIATION, et al.,
Defendants-Appellees.

APPEAL FROM THE COURT OF APPEALS OF STARK COUNTY FIFTH APPELLATE DISTRICT OF OHIO

CASE NO. 7 9-409

BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, INC. AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The National Center for Law and the Handicapped, Inc. is an organization dedicated to insuring the equal rights of handicapped persons through advocacy and educational services. It has been involved continuously in efforts to safeguard the rights of mentally retarded and developmentally disabled persons.

Through its expertise, the Center has provided information, authorities and argument in an attempt to assist the Court in deciding the important issues presented in the case at Bar. Amicus especially wishes to assist the Court by providing information on the historical treatment of mentally retarded persons, the current movement towards integration of mentally retarded persons into community life, and the key interrelationship between zoning and the ability to accomplish this goal of integration. Arnicus hopes that, by presenting this data, the Court can weigh the issues in their proper societal perspective.

The National Center for Law and the Handicapped is sponsored by the Family Law Section of the American Bar Association, the University of Notre Dame School of Law,

and the Council for the Retarded of St. Joseph County, Indiana. The Center assists attorneys, individuals and organizations, through direct participation in cases and through research and consultation. Assistance is often provided to courts by the filing of amicus curiae briefs.

The law firm of Dinsmore, Shohl, Coates & Deupree, co-counsel to amicus curiae, has had extensive experience within the state of Ohio on zoning problems. It currently is representing the Resident Home for the Mentally Retarded of Hamilton County, Inc. in the case of City of Cincinnati, ex rel Blair v. Guest, et al., pending before the Court of Common Pleas, Hamilton County, Ohio.

The Case at Bar raises basic and significant issues which, amicus believes, necessitate a full and comprehensive discussion. This brief is thus intended to supplement the Court's need and to provide assistance to the Court in consideration of this complex matter, the resolution of which will have significant ramifications for handicapped persons in their attempt to reenter the mainstream of community life.

STATEMENT OF THE CASE

On April 21, 1978, appellants, Garcias, filed a complaint seeking to enjoin the appellee, Siffrin Residential Association for the Developmentally Disabled of Stark County from establishing a family home in a R-2 district of Canton, Ohio, which permits several uses including single-family and two-family dwellings. In addition, appellants requested that Section 5123.18(D) of the Ohio Code be declared unconstitutional. The City of Canton joined the Garcias as a party and the Ohio Department of Mental Health and Mental Retardation and the Ohio Legal Rights Service joined Siffrin as parties.

The lower court enjoined the Department of Mental Health and Mental Retardation from issuing a license to Siffrin to operate its family home and declared Ohio Code Section 5123.18 to be unconstitutional. On appeal, the Court of Appeals of Stark County, Ohio, reversed the judgment of the Stark County Common Pleas Court, dissolved the injunctions which prevented Siffrin's operation of its family home and declared Ohio Code Section 5123.18 to be constitutional in its entirety. The Garcias and the City of Canton appealed the decision to the Ohio Supreme Court.

The Court of Appeals ruling rested upon its finding that the residents of the Siffrin home are a "family" because they will live as a "single housekeeping unit" and rejected the contention that such home was in the nature of a boarding home. In addition, the Court of Appeals upheld Ohio Code Section 5123.18 as a valid exercise of the State's power in an attempt to accomplish significant state interests.

The key issues before the Ohio Supreme Court on appeal are, thus, whether the Siffrin home constitutes a family for zoning purposes, and the validity of the State's attempt to foster the integration of mentally retarded and developmentally disabled individuals into community life by the enactment of legislation, evidencing an overriding state interest in the establishment of family and group homes throughout the state.

SUMMARY OF THE ARGUMENT

The case at Bar raises fundamental questions concerning the integral relation between zoning and the integration of developmentally disabled persons into society. Specifically, the case raises the issue of the integration of developmentally disabled persons into areas of Canton, Ohio, which have been zoned for two family residences.

In Part I, amicus presents an overview of institutionalization, arguing that the placement of mentally retarded persons in institutions is no longer justified on programmatic or habilitational grounds. Amicus traces the history of institutionalization and considers the varying justifications which have been used to support this drastic procedure during the past two centuries.

Institutionalization developed as a societal response to deviants, a class in which the mentally retarded were included. Amicus recognizes that an early purpose of institutionalization was to provide education and training to assist the individual in returning to society. However, by the late 19th century, the purposes of institutionalization had radically changed. Institutions began

to be used first as a means of protecting deviant persons from non-deviant society and then as a means to protect non-deviant society from deviant persons. The model became custodial; institutions grew larger and were more and more isolated from society. Little planning or even hope existed for the return of the mentally retarded to society.

This custodial institutional model has persisted for many years despite the repudiation of the views that mentally retarded persons are deviants who need to be removed from society for either their own or society's protection. The principles of normalization and the developmental model, which are widely, if not universally accepted, are proposed by amicus as the correct, controlling principles of care and treatment for the mentally retarded. These principles have been adopted by numerous courts which have held that habilitation is an essential ingredient of the states' obligiation to the mentally retarded.

Following the discussion of the non-legal principles mandating habilitation in normalized, community settings rather than institutions, the brief focuses on the emphasis in government policy and court actions over the past two decades to reintegrate developmentally disabled per-

sons into community life. This reintegration has been implemented by executive statements and orders, by federal legislation which has created a right to habilitation in the least restrictive setting, and by judicial rulings that there is a right to habilitation in the least restrictive setting. Amicus notes that the principle of normalization has been the underlying ideology of this reintegration. In the context of residential services, normalization implies the development of group living situations which provide developmentally disabled persons with an environment as close as possible to, if not identical with, that of an extended family.

Normalization is recognized to include a dispersal component as well as an integration component. Dispersal refers to the uniformity of distribution of residential facilities throughout the community. Amicus urges the court to take note of the fact that many communities try to prevent dispersal by means of exclusionary zoning. The exclusion generally takes the form of prohibiting family or group homes from single family residential zones. The result of this exclusion is that family or group homes are frequently located in inner cities in an environment which does not constitute the least restrictive setting.

In Part II of the brief, amicus argues that develop-mentally disabled persons have a decreased probability for

successful independent living in the community. Although some developmentally disabled persons do live independently, large numbers of developmentally disabled persons are incapable of total independent living. For the latter class of persons, living in the least restrictive setting means living in a community residence with support services . Amicus maintains that it is clearly not the case that developmentally disabled persons are "free" to purchase homes and live anywhere in the community.

Amicus analyzes recent Supreme Court decisions dealing with the meaning of "family" in restrictive zoning ordinances. These holdings do not limit "family" to a nuclear family; rather, they clearly recognize "family" to include the concept of the extended family. Following a discussion of the nature of group living situations, amicus concludes that family and group homes are formed out of economic and emotional needs and function like an extended family.

Finally, amicus argues that an overwhelming number of courts have considered the status of family and group homes for the mentally retarded and have found these homes

to constitute a family for zoning purposes. The reasoning of these decisions turns on the belief that group living situations operate in the nature of extended families. Amicus concludes that family and group homes should be allowed in single and two family residential zones because realistically these homes embody the basic character of a family living situation for developmentally disabled individuals .

ARGUMENT

I. ZONING IS AN INTEGRAL COMPONENT OF THE SOCIETAL RECOGNITION AND IMPLEMENTATION OF THE RIGHT OF EACH MENTALLY RETARDED PERSON TO BECOME INTEGRATED INTO THE COMMUNITY RATHER THAN TO BE ISOLATED AND SEGREGATED IN INSTITUTIONS

In order to understand the importance of the movement aimed at integrating mentally retarded persons into the community, it is important to understand how the mentally retarded have been separated from society in the past. This brief will summarize the rationales for institutionalization and, then, the developing philosophies which have spurred the development of community services. This discussion will show how zoning is an essential component of the deinstitutionalization movement and how restrictive zoning can negate numerous other "fundamental constitutional rights.

A. Institutions For The Mentally Retarded Were Created As A Societal Response- To The Mentally Retarded As Deviants

The development of society's understanding of mental retardation reveals at least seven perceptions of the

mentally retarded person: "sick person," "sub-human organism," "menace," "object of pity," "burden of charity," "holy innocent," and "developing person." In all but the final category, mentally retarded persons are viewed as deviant. Models based upon deviance are generally considered to be archaic.[2] The history of civil commitment of mentally retarded persons, however, has unfolded in relation to society's reaction to deviance.[3]

Initially, institutions were established in order to make deviant persons less deviant. By providing education and training to mentally retarded persons, it was believed that the person could then be integrated into society.[4]

Wolfensberger, The Orgin and Nature of Our Institutional Models, reprinted from President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded 6-23 (Kugel" & Wolfensberger, eds. 1969)

2 Roos, Basic Facts About Mental Retardation, 1 Legal Rights of the Mentally Handicapped 17, 21-22 (Ermis & Friedman, eds. 1973).

3 Wolfensberger, supra note 1, at 5.'

4 See Seguin, The Moral Treatment, Hygiene, and Education of Idiots and Other Backward Children (1846). See also Menolascino, Challenges in Mental Retardation 46 (1977)

Thus, from the mid-nineteenth century, institutions for "deviant" persons were founded so that "expert and intensive attention could be concentrated on them."

A marked attitudinal change led to a shift in purpose so that institutions became places to protect deviant persons from non-deviant persons. The original institutional purpose of minimizing deviancy was interpreted to have failed for the following reasons: individuals did not readily return to community life; in some cases, there was regression upon community placement; and frequently, there was no place for the person to go in the community. These events were incompatible with society's high expectations of quick and complete cure. The solution was then seen as neither education nor treatment, but, rather, as custodial care—sheltering and protecting mentally retarded persons from society.

Throughout the late nineteenth and early twentieth centuries, the momentum in growth of these custodial in-

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Wolfensberger, supra note 1, at 31. [6]Id. at 37-38. 'Menolascino, supra note 4, at 46-47.

stitutions could not be halted. Factors of isolation, agricultural needs, size, and economics contributed as perpetuating factors.

Supporting this isolation was a further societal shift in viewing the mentally retarded. At the turn of the century, mental retardation began to be viewed as a "social menace," necessitating the protection of non-deviant persons from deviant persons. Institutionalization served to protect society from the "dangerous" mentally retarded as well as restrict the ability of mentally retarded persons to marry and procreate. Though the "social menace" view had waned by 1920, the harm had been significant. The most far-reaching harm

> lay in the philosophical rationale underlying the pattern of services and its acceptance by society as a whole. -It contributed to the social devaluation of the retarded as human beings, and to their psychological and physical alienation from society, and singled them out on a funda-

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Wolfensberger, supra note 1, at 40-44.

[9] Id. at 45.

Wolfensberger, supra note 1, at 54-55 and Menolascino, supra note 4, at 49, discussing how legislation restricting marriage and requiring sterilization were part of this societal reaction.

> mentally negative basis in a way that no other group has experienced since the quarantining of lepers in the middle ages.

Throughout the twentieth century, institutions continued to grow, based upon these perceptions, as well as society's failure to provide community alternatives.

B. The Principles Of Normalization And The Developmental Model, Which Are Widely Held Beliefs As To Appropriate Habilitation Of The Mentally Retarded, Clearly Refute The Earlier Beliefs Which Constituted The Justification For Institutions

Professionals in the field of mental retardation have rejected the view of mentally retarded persons as deviant. It is recognized that mental retardation occurs in a variety of forms and degrees, develops at a variety of times, and results from a variety of factors. Retarded indi-

Adams, Mental Retardation and Its Social Dimensions 32 (1971),

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Wolfensberger, supra note 1/ at 77-78.

Smith, An Introduction to Mental Retardation 5
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viduals exhibit a wide range of capabilities and characteristics. Hence, a characterization of mental retardation must be applicable to a mildly retarded person living and working in the community as well as to an individual requiring complete nursing care in a residential facility.

The variance in characteristics of mentally retarded persons and the variance in degrees of severity of impairment make it difficult to arrive at a general characterization of mental retardation. [4] However, there is a commonly accepted definition of mental retardation developed by the American Association on Mental Deficiency (A.A.M.D.)

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.-'-"

Kirk, Educating Exceptional Children 5 (1972) .

Baumeister & Muma, On Defining Mental Retardation, 9 J. of Special Ed. 293 (1975); Tarjan & Eisenberg, Some Thoughts on the Classification of Mental Retardation in the U.S.A., 128 Am. J. Psychiat. 14 (Supp. 1972).

Manual on Terminology and Classification in Mental Retardation 11 (Grossman, ed. 1973) (published by the American Association on Mental Deficiency).

The A.A.M.D. definition emphasizes the current functional behavior of the individual. This emphasis is important because a child who is labeled retarded during his school years may no longer merit this label if he becomes a functioning adult in the community.

The component of "adaptive behavior" in the A.A.M.D. definition of mental retardation merits special attention. It has been defined as the "effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group. In general, adaptive behavior has been viewed as the degree to which an individual can cope with the natural and social demands of the particular environment in which he lives. The expectations of infancy and early childhood center on sensory-motor skills, communication skills, self-help skills and socialization skills. During childhood and early adolescence,the demands involve academic skills, social skills, and skills

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[17] Id.

Leland, Mental Retardation and Adaptive Behavior, 6 J. of Special Ed. 71 (1972) . See also Leland, The Relationship Between "Intelligence" and Mental Retardation, 7 3 Am. J. Ment. Defic. 533 (1969) .

in understanding and mastering the environment. The emphasis in late adolescence and adulthood is on vocational and social [19]

According to the A.A.M.D. definition, a person must exhibit three characteristics if he is to be labeled mentally retarded: (1) significantly subaverage general intellectual functioning, (2) deficit in adaptive behavior and (3) appearance of these characteristics during the developmental period. The characterization of a mentally retarded person as "deviant" cannot consistently be maintained in conjunction with this definition; the characterization of a mentally retarded person necessarily becomes a "developing person."

Hence, current trends in the field of mental retardation embrace a view close to that of the early period in which institutions were founded for the education and training of the mentally retarded. Once again it is believed that, provided with the proper services, all re-

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[19] Scheerenberger, Deinstitutionalization and Institutional Reform 7 (1976) .

tarded persons are capable of growth, learning and development. The principal difference between the early view and the present view is that it is now believed that institutions are inherently incapable of providing the services needed to improve functional ability. Current attitudes toward mental retardation are expressed in the concepts of normalization, habilitation, and the developmental model.

1. The Normalization Principle Mandates the Integration of Mentally Retarded Persons Into Society to the Maximum Extent Appropriate For Each Individual. The concept of normalization was developed in the Scandinavian countries during the 1950's and 1960's. "Normalization" was first defined by the head of the Danish Mental Retardation Service as "letting the mentally retarded obtain an existence as close to the normal as possible." In 1969, the Director of the Swedish Association for Retarded Children reformulated it as "making available to the men-

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Roos, Mentally Retarded Citizens: Challenge for the 1970's, 23 Syracuse L. Rev. 1059, 1065 (1972).

je, The normalization^principle and Its Management implications, in President's Committee tal Retardation, changing Patterns in Residential Services for the Mentally Retarded 17 9 (Kugel & Wolfensberger, eds. 19G9).

tally retarded patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society."

In 1972, Wolf Wolfensberger, the American psychologist, defined normalization as " [u]tilization of means which are as culturally normative as possible, in order to establish and/or maintain personal behaviors and characteristics which are as culturally normative as possible. From this definition, it is apparent that normalization is both a process and a goal. In as many aspects of a person's functioning as possible, characteristics of behavior and appearance should be developed to be as close to "normal" as individual potential permits.

The basic rule of normalization is that services to the disabled should be provided in such a way as to maxi -mize the normative. The principle is culture-specific,

and is empirical, not moral. "Normative" means "typical" or "conventional," and therefore disabled persons should be permitted and encouraged to be as much as possible like other persons in the same culture who share such

Id.

23 Wolfensberger, The Principle of Normalization in Human Services 28 (1972) .

characteristics as age and sex. For example, it is normative for a ten year old boy in our culture to get up in the morning, get dressed, go to a public school, and play football or go to a movie with friends in leisure hours. It is also normative for him to enjoy a conventional family relationship with parents and siblings, to have his own clothes, to have privacy in the bathroom, to go to the doctor's office, to interact with the opposite sex, and to encounter a certain amount of social, psychological and physical risk.

To the extent that the provision of services unnecessarily deprives the disabled person of the opportunity to live and develop in a normative fashion, the normalization principle is violated. Institutionalization generally represents the antithesis of normalization.[25] In addition to a general lack of habilitative 'programming, the institution is large, with populations into the thousands; it segregates its residents from the rest of society; it provides all services—food, board, medicine, therapy, work, education and recreation-'-within a single

[24] Id.

[25] Id. at 80-81.

organizational and geographic setting; it employs a medical model for the provision of all services (residents are "patients" who live in "wards" where they receive "treatment"); and it fosters a general lack of respect for the dignity and privacy of the individual.

The principle of normalization has found a legal sanction in the emerging requirement that a court, when asked to commit an individual to an institution, must determine that the ordered placement is the least restrictive alternative appropriate to the individual's needs. In order to be consistent with the concept of normalization and the developmental model of disability, "least restrictive alternative" must mean the alternative which is least restrictive of the individual's liberty consistent with his or her need for treatment, and not merely the least restrictive alternative actually "existing within the service system at a particular point in time.

[26]Coval, Gilhool & Laski, Rules and Tactics in Institutionalization Proceedings for Mentally Retarded Persons: The Role of the Courts in Assuring Access to Services in the Community, reprinted from Council for Exceptional Children, Education and Training for the Mentally Retarded, Journal of the Division on Mental Retardation (April 1977}.

The principle of least restrictive alternative "is hollow if there are, in fact, no alternatives to institutionalization. Normalization requires not only the recognition of the legal right to the least restrictive alternative, but also the actual creation of community-based services which foster integration of the handicapped into the mainstream of society.

2. The Developmental Model Recognizes the Potential for Positive Change in Each Individual. The developmental model of behavior was advanced as an alternative to the "medical" model. According to the medical model, culturally deviant behavior is to be attributed

> to a 'disease[1] process which has somehow 'invaded' the organism. This process is responsible for the observable anomalies ... of the disorder. Remediation is understood in terms of 'treating' the 'disease' and 'cure' occurs when the individual is 'freed' of the disease. On the

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Morales v. Turman, 383 F. Supp. 53, 125 (E.D. Tex. 1974), vacated and remanded on procedural grounds, 535 F.2d 864 (5th Cir. 1976), rev'd and remanded, 430 U.S. 322 (1977). See also New York State Association for Retarded Children v. Rockefeller (Carey), 357 F. Supp. 752 (E.D.N.Y. 1973) and 393 F. Supp. 715 (E.D.N.Y. 1975), and Memorandum and Order, 72-C-356 (March 10, 1976).

> basis of this model, behavior can be dichotomized into 'normal[1] and pathological[1] 23 —the latter being the product of 'disease.

The medical model has been found to be deficient in several ways. First, the patient is thought to be, and thinks of himself as: helpless, passive, and dependent; the "healer" is thought to be, and thinks of himself as: all-powerful and all-wise. Second, there is a radical distinction between normal and deviant behavior. Two different sets of principles must be applied to the two kinds of behavior, and the explanatory principles of normal behavior are inapplicable to deviant behavior. Third, the degree of expertise required in "curing" a patient tends to give mental health professionals a monopoly on "curing" and to exclude the aid of persons outside the profession (including the patient's family). Fourth, the medical model removes responsibility from the patient for his own behavior, thereby increasing his helplessness, passivity and dependence.[29]

28 **Roos, Reconciling Behavior Modification Procedures with the Normalization Principle, in The Principle of Normalization in Human Services 137, 139 (Wolfensberger, ed.** 1972).

[29]Id.

The developmental model rejects the premise of the static nature of "deviant" behavior and, in so doing, avoids the difficulties enumerated above. In the developmental model, the paradigm for all behavior is change. All persons have potential for change, and the rate of direction of change is capable of modeification by the environment. Any behavior, therefore, can be modified.

In the developmental model, mentally retarded persons are recognized as having capacity for growth and learning. In particular, the behavior of mentally retarded persons is not a simple product of retardation; rather, it is a product of the interaction between the individual and the environment. In brief, experience is important to the development of mentally retarded persons; it is possible to alter development through experience. The specific developmental goals are: "(1) increasing the complexity of behavior, (2) improving capacity to cope with the environment, and (3) enhancing human qualities (as culturally defined)."[31]

The developmental model and the principle of normalization are correlative concepts. The former provides

;, supra note 20, at 10 65

a framework in which all behavior is viewed as capable of change and development. The latter views this development as occurring by means which are as "normal" as possible and as culminating in a product which is as "normal" as possible. According to the principle of normalization, development can only occur by the "maximal integration of the perceived or potential deviant person into the societal mainstream.[32]

> Programmatically, segregation is particularly self-defeating in any context that is claimed to be habilitational.... If we are serious about working for the goal of preparing a person toward independence and normative functioning, then we must prepare him to function in the context of the ordinary societal contacts which he is expected to have and to handle adapt-ively in the future.

Integration means the physical integration of educational, vocational and residential facilities in the community and the social integration of retarded and non-retarded

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[32] Wolfensberger, supra note 23, at 45,

[33] Id.

[34] Id. at 48.

individuals within each kind of facility.[35] Taken together, the developmental model and the principle of normalization imply that mentally retarded persons may approach some degree of cultural normality by having typical experiences in typical situations.

C. The Normalization Principle Has Been The Ideology Of The Emerging National Policy Of Deinstitutionalization

The past two decades have been witness to a change in "the structure of service delivery in mental retardation and other disability areas from institution-dominated systems to systems based on community services." This change in the mode of delivery of services has resulted from three inter-related processes termed "deinstitutionalization." The processes are: (1) the prevention of institutional admission by the discovery and development of community based care and treatment facilities, (2) the return to the community of residents who have been habili-

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[35] Id. at 49.

[6] Braddock, A National Deinstitutionalization Studv. 50 State Government 220, 224 (1977).

tated to a degree making it possible for them to function adequately in the community, and (3) the improvement of institutional conditions for individuals in need of resi dential care and treatment.

The deinstitutionalization process is based upon the principles of normalization and least restrictive alternative :

> This approach is based on the principle that mentally disabled persons are entitled to live in the least restrictive environment necessary and lead their lives as normally and independently as they can.[38]

The deinstitutionalization process has been augmented by Presidential statements and executive orders, federal legislation, and litigation in federal and state courts.

Comptroller General of the United States, Report to the Congress—Returning the Mentally Disabled to the Community: Government Needs to Do More 1 (1977) (hereinafter cited as Comptroller General Report). As of 1973, approximately 200,000 mentally retarded persons were institutionalized. Seventy-nine percent were residents of facilities with a population of 500 or more individuals; sixty percent residents of facilities with a population of 1000 or more, twenty-seven percent residents of facilities of 2000 or more. Data cited in Braddock, Opening Closed Doors: The Deinstitutionalization of Disabled Individuals 8 (1977).

Comptroller General Report, supra note 37, at 1.

1. Executive Statements and Orders Have Implemented the Process of Deinstitutionalization. In 1961, the late President Kennedy made a public statement condemming the policy of segregating mentally retarded persons from society.[39] In the following year, he accepted the report of his President's Panel on Mental Retardation which recommended community based services for the mentally retarded.[40] This report recognized a specific social responsibility to mentally retarded persons, viz., "[t]o permit and actually foster the development of their maximum capacity and thus bring them as close to the mainstream of independence and normalcy as possible." In 1963 Kennedy introduced legislation authorizing federal grants to states for the construction of community facilities for the mentally retarded.[42] The proposed legislation was passed under the title of the Mental Retardation Facilities Construction Act of 1963.

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[39] Kennedy, Statement Regarding the Need for a National Plan in Mental Retardation (October 11, 1961), cited in Braddock, supra note 37, at 11.

[40] Braddock, supra note 37, at 11.

President's Panel on Mental Retardation, National Action to Combat Mental Retardation 13 (1962).

Braddock, supra note 37, at 11.

[43] 42 U.S.C. §2689.

In 1966, the late President Johnson established the President's Committee on *Mental* Retardation (P.C.M.R.) by Executive Order.[44] The Executive Order set forth the following mandate:

> The Committee shall provide such advice and assistance in the area of mental retardation as the President may from time to time request ....[45]

Since its inception, PCMR "has been deeply involved in promoting community living for retarded persons."[46]" PCMR has promoted the development of community based residences and services for the mentally retarded by radio, television and printed messages, meetings, publications, and commissioned studies.

The deinstitutionalization movement was further augmented by former President Nixon's formal statement of November 16, 1971, which called for the return to the community of one-third of the mentally retarded persons in

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[44] Executive Order 11,280, 31 Fed. Reg. 7167 (1966).

President's Committee on Mental Retardation, Mental Retardation: Past & Present 127 (Gray, ed. 1976).

[46] **Id.** at 130-

public institutions. This national goal was again supported by a statement issued by former President Ford in October 1974.[49]

President Carter has, similarly, supported efforts in the mental health field. The President's Commission on Mental Health, created by the President in 1977 and chaired by Rosalynn Carter, issued a final report on April 27, 1978. The principal recommendation of the panel was a "[n]ew federal grant program for community mental health services to encourage the creation of necessary services where they are inadequate and increase the flexibility of communities in planning a comprehensive network of services."[50]

2. Federal Legislation Has Promoted Deinstitutionalization by Creating a Right to Habilitation in the Least Restrictive Setting for Mentally Retarded Persons.

[48] Comptroller General Report, supra note 37, at 3-4; Menolascino, supra note 4, at 94.

[49] Comptroller General Report, supra note 37, at 4.

[50] Health Systems Report: 1978 Almanac on Federal Health Issues, Proposals, Administrative Actions, Legisla-tion, Public Laws 49 (1978) .

Several federal statutes grant specific rights to mentally retarded persons. One of the most important of these statutes is Section 504 of the Rehabilitation Act of 1973, which guarantees a right to habilitation in the least restrictive setting. Section 504 states:

> No otherwise qualified handicapped individual in the United States .. . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

"Handicapped individual" clearly includes mentally retarded persons. 52

The regulations to Section 504 provide that, to be equal, services

> must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

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[51]29 U.S.C. §794.

[52]29 U.S.C. §706(6); 42 Fed. Reg. 22,676, 22,678 22,685 (1977) .

[53]45 C.F.R. 84.4 (b) (2) .

It is clear from the legislative history of Section **504** that the purpose of the Act was to extend the provisions of the Civil Rights Act of 1964 to the handicapped in such a way as to integrate the handicapped into the community. The sponsors of the bill in which Section **504** originated have expressly stated this to be the purpose. Section 504 was patterned after and the language is parallel to Title VI of the Civil Rights Act of 1964 (to end racial discrimination) and Title IX of the Education Amendments of 1972 (to end discrimination in education on the basis of sex)." Hence, Section 504 is to be construed within the framework of a broad policy of nondiscrimination.

This interpretation has been affirmed by HEW:

> [S]ection 504 was intended to forbid discrimination against all handicapped individuals . . . Section 504 ... represents the first Federal civil rights law protecting the rights of handicapped persons

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See statements by: Senator Humphrey, 118 Cong. Rec. 525 (January 20, 1972), 118 Cong. Rec. 9495 (March 22, 1972), and 118 Cong. Rec. 32,310 (September 26, 1972); Mr. Cook, 117 Cong. Rec. 42,293-94 (November 19, 1971); Senator Percy, 118 Cong. Rec. 526 (January 20, 1972); Congressman Vanik, 117 Cong. Rec. 45,974-75 (December 9, 1971) .

[55] 4 U.S. Code Cong. & Admin. News 6373, 6391 (1974

> and reflects a national commitment to end discrimination on the basis of handicap -.. It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life.

In brief, the administrative construction of Section 504 prohibits services which are unnecessarily separate and, at the same time, recognizes an affirmative duty to pro vide meaningful services.

In considering the right to habilitation of institutionalized mentally retarded persons, the court in Halderman v. Pennhurst State School and Hospital held that Section 504 gave a "federal statutory right to habilitation in a non-discriminatory manner."[A] The court found that a large isolated institution such as Pennhurst was incapable of providing "minimally adequate" habilitation, ordered the removal of mentally retarded persons to community facilities where such habilitation could be provided, and enjoined the state from committing mentally retarded persons to Pennhurst in the future.

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[56] **42 Fed. Reg. 22,676 (1977).**

Halderman v. Pennhurst State School and Hospital, **446** F. Supp. 1295, 1323 (E.D. Pa. 1977) .

[58] **Id. at 1325-27.**

Another statute which grants a right to habilitation in the least restrictive setting is the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (D.D. Act). The D.D. Act provides that developmentally disabled persons "have a right to appropriate treatment services, and habilitation for such disabilities." The D.D. Act defines developmental disability in such a way as to include mental retardation. In addition the D.D. Act describes "appropriate treatment, services, and habilitation."

> The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.[62]

In addition to Section 504 and the D.D. Act, several other federal statutes appear to give the mentally re-

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[59] 42 U.S.C. §6001 et seq. (1975)

[60] 42 U.S.C. §6010(1) .

[61] 42 U.S.C. §6001 (7) (A) (i) .

[62] 42 U.S.C. §6010 (2) .

tarded a right to habilitation in the least restrictive setting. The chief of these are Title XIX of the Social Security Act,[63] and Title XX of the Social Security Act.

3. Numerous Courts Have Augmented Deinstitutionalization by Finding a Right to Habilitation in the Least Restrictive Environment. Mental retardation has been characterized as a developmental disability occurring during the early stages of life. (I.B., supra). A mentally retarded person is "habilitated" to relieve the developmental incapacity.

The definition of "habilitation" varies, but there is a common core of meaning which is generally recognized. The first court which found habilitation to be a constitutional right defined it as

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[63] **42 U.S.C. §1396 et seq.**

[64] **42 U.S.C. §1397 et seq.**

Mason & Menolascino, The Right To Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface, 10 Creighton L. Rev. 124, 147 n. 72 (1976).

> the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency.

Professionals in the field of mental retardation have given a more detailed definition which does not refer to institutionalization:

> **[H]**abilitation basically encompasses (a) a detailed developmental assessment of a retarded individual's ability to cope with personal-social expectations at the differing developmental stages of life (e.g., infancy, childhood, adolescence, young adulthood, etc.), encompassing a. survey of the physical, motor, language, social, and intellectual components of an individual's overall functioning; and (b) the provision of the specific services needed (e.g., educational, medical, physical therapy, etc.) to effectively alter the deficits identified by the developmental assessment.... [T]he overall thrust of modern habilitation is the remediation of the delayed learning process so as to develop the maximum growth potential by the acquisition of self-help, language, personal, social, educational, vocational, and recreational skills.

Wyatt v. Stickney, 344 F. Supp. 387, 395 (M.D. Ala, **1972)**, aff'd sub nom., Wvatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) .

Mason & Menolascino, supra note 65, at 139-40.

Many lower federal courts have found a constitutional right to treatment or habilitation for involuntarily confined persons, and some have specifically found such a retarded persons. In addition, most[69] right for mentally courts recognize that when habilitation is required, the services and facilities needed to provide habilitation must be the least restrictive alternatives for the situation.

Most courts have implicitly accepted the developmental model and the principle of normalization in their discussions of habilitation. Some commentators have suggested that these concepts are incompatible with involuntary confinement in an institution.

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[68]E.g., Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated and remanded, 422 U.S. 563 (1975); Woe v. Mathews, 408 F. Supp. 419 (E.D.N.Y. 1976), remanded in part, dismissed in part sub nom., Woe v. Weinberger, 556 F.2d 563 (2d Cir. 1977); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Wyatt v. Stickney, supra note 66.

[69]Wuori v. Zitnay, Civ. No. 75-80-SD (D. Me. July 14, 1978); Evans v. Washington, 459 F. Supp.'483 (D.D.C. 1978); Halderman v. Pennhurst State School and Hospital, supra note 57; Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976); Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), aff'd in part, remanded in part, 550 F.2d 1122 (8th Cir. 1977); Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973) and No. 72-6-299 (D. Neb. 1975); Wyatt v. Stickney, supra note 66.

[70]Mason & Menolascino, supra note 65, at 156.

> The logic of normalization and the developmental model ... suggests full implementation of habilitation can only be achieved in a non-institutional setting. Institutions, by their very structure—a closed and segregated society founded on obsolete custodial models—can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation.

Developing philosophies in the field of mental retardation —normalization, developmental model and habilitation— have caused the very legitimacy of the institution to be called into question. These philosophies have been influential in some court orders favoring alternative placement in the community over the institution as the locus of all habilitation for mentally retarded persons.

4. Normalization Which is the Ideology of Deinstitutionalization Implies Service Models. One important feature of an ideology is its role in suggesting the delivery of services. For example, if mental retardation is un-

Halderman v\Pennhurst: State School and note 57; Horacek v. Exon, supra note *69*

Braddock, supra note 37, at 4*

derstood on "social menace" or "subhuman" models, these models suggest that services be provided in large imper sonalized institutions located far from centers of popu lation. On the other hand, if "developing person" and "normalized" are models for understanding mental retar- dation, services which are community based are implied.

> Translated into residential services, normalization prescribes the development of small-group homes which provide residents with as near a family environment as possible.
>
> This process of "normalization" has been achieved in part by the estab- lishment of family-style group homes in the community patterned upon normal living conditions in single-family locations.
>
> More recently ... there has been an increased emphasis upon placing men- tally handicapped persons in small community located living groups, com- monly called family care homes. The purpose of this local community care is to facilitate "normalization" ... The process of normalization can best

74 Id.

75 Chandler & Ross, Zoning Restrictions and the Right to Live in the Community, in The Mentally Retarded Citizen and the Law 305, 308 (Kindred, ed. 1976) .

Comment, Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single-Family Dwellings, 24 U. Kan, L. Rev. 677 (1976) .

> be achieved by allowing mentally handicapped persons to live in residential areas, particularly single-family dwelling zones.77

The overwhelming emphasis in professional thought, governmental policy, and court actions for the past two decades has been the need to reintegrate our mentally retarded citizens into community life. By applying the principle of normalization, societal goals have been clearly established. Ohio has been part of this movement, recognizing its responsibilities for and obligations toward the mentally retarded. Section 5123.18 of the Ohio Revised Code reflects not only Ohio's commitment to ensuring community services but also reflects the national commitment and constitutional requirements.

D. Exclusionary Zoning Is A Major Obstacle To The Implementation Of The Goal Of Normalization Because It Prevents The Establishment Of Family And Group Homes For The Mentally Retarded

The normalization principle has been analyzed as including four essential components: integration, dispersal,

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Hong, Exclusion of the Mentally Handicapped; Housing the Non-TraditIonal~'Family, *T* U. Cal. DavTsHLT Rev. 150 (1974)

specialization and continuity.[78] Integration refers to bringing the mentally retarded into the mainstream of community life. Dispersal refers to the uniformity of distribution of residential facilities throughout the community. Specialization refers to a limitation on the non-uniformity of residents served within a particular facility. Continuity refers to a continuum of services adapted to the individual's needs.79

The dispersal of mentally retarded persons throughout geographic areas is, then, essential to normalization. Many areas, however, try to prevent dispersal by means of exclusionary zoning. The exclusion generally takes the form of prohibiting family care and group homes from sin-gle family residential zones.

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78 Dybwad, Action Implications, USA Today, in President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded 383, 385-89 (Kugel & Wolfensberger, eds. 1969).

Chandler & Ross, supra note 75, at 308. See also Cupaiuolo, Community Residence and Zoning Ordinances, 28 Hosp. & Coitun. Psychiat. 206, 207 (1977) ; Friedman, Analysis of the Principal Issues and Strategies in Zoning Exclusion Cases, 2 Legal Rights of the Mentally Handicapped 1093 (Ennis & Friedman, eds. 1973); Menolascino, supra note 4, at 300; Comment, supra note 76, at 677; Hong, supra note 77, at.150.

Cases which have resulted in court ordered creation of community alternatives to institutional care are illustrative of the obstacles to deinstitutionalization generated by exclusionary zoning. The court in Dixon v. Weinberger ordered plans for the release of at least 43 per cent of the residents of St. Elizabeths Hospital to more appropriate community facilities.[81] Three years after the order, the special assistant appointed by the Secretary of the Department of Health, Education and Welfare to implement the Dixon decision reported that community resistance and zoning restrictions were "two major limiting factors" to establishing the required community facilities.[82] Zoning restrictions have not only impeded the deinstitutionalization process but also have prevented the dispersal required in normalization. Most of the community residences created are concentrated in the central city.

The court in Halderman v. Pennhurst State School and Hospital ordered the creation of a system of community

Dixon v. Weinberger, 405 F. Supp. -974 (D.D.C. 1975).

[82]Special Report, St. Elizabeths Hospital: Case Study of a Court Order, 30 Hosp. & Comra. Psychiat. 42, 44 (1979)

[83]Id.

services for the mentally retarded residents of Pennhurst. An administrator of mental health and mental retardation involved in the deinstitutionalization following the Pennhurst decision described his success and failure rate in attempting to open group homes as a "perfect average": "whenever he had to go to a zoning board hearing, he lost; when ever he bought a house and moved residents in quietly, he won."[85] Dispersal has also been a problem in the implementation of the Pennhurst order- Parents of Pennhurst residents who expressed concern over community facilities "spoke about less restrictive alternatives and wondered if it was less restrictive to walk out of an institution onto a protected area of green grass or to walk down four flights of stairs from an apartment onto an inner -city street."[86]

Professionals in the field of mental retardation have stressed that deinstitutionalized retarded persons should not undertake independent living until their individual

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Halderman v. Pennhurst State School and Hospital, supra note 57 .

Conference Report, Placing the Mentally Retarded: Where Shall They Live?, 29 Hosp. & Comm. Psychiat. 596, **597** (1978).

[86]Id. at **599.**

capacities, needs and aptitudes for independent living have been assessed. Small group homes have been described as a "necessary first step" in this assessment process.[87]

> [B]ecause of an involuntary, unalterable, nonculpable status, the mentally retarded are far less likely than the nonretarded to be able to achieve a traditional family living situation.

Thus, exclusionary zoning prevents dispersal of the mentally retarded throughout the community and thereby im pedes the important and expressed goal of normalization. The exclusion may, in addition, augment the institution-alization of mentally retarded persons requiring services in an environment less restrictive than a residential set ting but unable to "find a place within the increasingly congested multiple-dwelling zones.""

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87 Menolascino, supra note 4, at 313.

88 Chandler & Ross, supra note 75, at 332,

89 Hong, supra note 77, at 165.

II. THE REALITY OF THE NATURE OF GROUP LIVING SITUATIONS FOR THE MENTALLY RETARDED AND THE FLEXIBILITY OF THE TERM "FAMILY" MANDATE A FINDING THAT RESIDENTS OF A FAMILY OR GROUP HOME FOR THE MENTALLY RETARDED CONSTITUTE A "FAMILY"

A definition of "family" is crucial to the interpretation of zoning ordinances which seek to exclude family or group homes, yet there is little agreement as to the gen- eral meaning of this term. One commentator recently has stated: "The word 'family' is one of those words in the English language which has been used to define so many different relationships that it no longer possesses a character of its owm." " The legal meaning of "family" changes with the legal issue involved; there are differ- ent meanings when the legal issue is marriage, welfare, insurance, or zoning. Even within the scope of one le- gal issue there is great variation. "[T]he definition of

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90 Minetz, Zoning Ordinances Which Restrict the Definition of a Family and Constitutional Considerations, 62 Ill, B.J. 38 (1973) .

91 Comment, The Legal Family—A Definitional Analysis, 13 J. Fam. L. 781 (1973-1974).

the zoning family is as widely varied as the statutes."[92] In the context of zoning, "family" has been interpreted to include: 20 nurses,[93] 60 student members of a religious order, 3 priests and 2 lay brothers, a small group of novices and a Mother Superior,[97] the residents of a home for the elderly,[98] 4 unrelated men, and an unrelated elderly couple .[99]

K_ at 800.

93 Robertson v. Western Baptist Hospital, 267 S.W..2d. 395 (Ky. 1954).

Application of Laporte, 2 App. Div.2d 710, 152 N-Y.S.2d 916 (1956).

95 Missionaries of Our Lady of LaSalette v. Village of 'Whitefish Bay, 269 Wisc. 609, 66 N.W.2d 627 (1954).

96 Carroll v. City of Miami Beach, 198 So.2d 6 43 {Fla. Dist. Ct. App. 1967).

97 Women's Kansas City St. Andrew Society v. Kansas City> Mo., 58 F,2d 593 (8th cir. 1932).

98 City of *Des* Plaines *V.* Trottner, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966) *

99 Marino v. Mayor and. Council of Norwood, 77 N.J. Super-587, 187 A.2d 217 (1963)

A. The United States Supreme Court, In Consider-ing The Interpretation *Of.* The Term "Family," Has Recognized The Value And Importance Of The Generic Character Of The Living Situation

Recent Supreme Court decisions have dealt with the meaning of "family" in restrictive zoning ordinances. In Village of Belle Terre v. Boraas the Court upheld an ordinance limiting land use to one-family dwellings,100 The ordinance defined "family" as

> "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants, *h* number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a. family."

The Court held that the restriction of the number of unrelated persons occupying single-family dwellings to two was not directed to transients, did not involve procedural

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[100] Village of Belle Terre v. Boraas, 416 *U.S.* 1 (1974)•

101 Id. at 2.

disparity, and did not infringe upon constitutional rights. Thus, a group of unrelated college students did not constitute a "family" for zoning purposes.

In addition, the Court found the limitation to be a legitimate state objective for regulating the use of land.

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one ... The police power is not confined to elimination of filth, stench, and unhealthy places- It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Three years later, the Court considered the constitutionality of an ordinance which defined "family" in terms of categories of related individuals.[104] An extended family consisting of a woman, her son, and two grandsons was determined by the city to be in violation of the ordinance

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at 7-8.

at 9.

[104] Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 496 (1977).

because the relationship of the two grandsons, first cousins, did not fit any of the categories listed in the ordinance. The Court reiterated language from Belle Terre stressing the importance of promoting "family needs" and "family values,"[105] but specifically rejected the contention that the "constitutional right to live together as a family extends only to the nuclear family." The Court described the ordinance as "cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family,"[107]

Court clearly recognized "family" to include the concept of the extended family.

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family--Out of choice, necessity or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home ... Especially in times of adversity, such as the death of a spouse

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[105]Id. at 498,

[106]Id. at 500.

[107]Id. at 502.

> or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. 108

The characterization of the necessity which frequently underlies the formation of extended families as "economic" necessity and "emotional" necessity is repeated in the concurring opinion.

> The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship ... remains not merely still a. pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household, 109

Belle Terre and Moore are the first cases in which the Supreme Court has reviewed substantive provisions of zoning ordinances since 1928.[110] The decision in Belle

at 504-05 (emphasis added).

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Id. at 508 [Brennan, J., concurring).

For a discussion of Belle Terre and Moore, See Jensen , From Belle Terre to East Cleveland: Zoning, the Family, and the Right of Privacy, 13 Fam. L.Q. 1 (1979),

Terre, upholding an exclusionary ordinance, cannot be interpreted as a trend toward the approval of increased regulation of land use-by zoning- This is clear because in Moore the Court was not willing to apply such restrictions to the extended family. Further, the Court explicitly recognised economic need and emotional need as most significant bases for an extended family.

B, Mentally Retarded Individuals, Residing In A Group Living Situation, Function In Their Daily Living Similar To Other Extended Family Situations

The impairment of intellectual functioning and deficits in adaptive behavior, which are characteristic of mental retardation, decreases the probability of successful independent living for a mentally retarded person in the community. This is not to say that mentally retarded persons cannot live independently. In fact, many mentally retarded individuals live alone or marry and enter into a traditional nuclear family situation.

See generally, Katz, The Retarded Adult in the Community (1968}; Baroff, Mental Retardation: Nature, Cause and Management (1974) .

However, for the large numbers of mentally retarded persons whose skills have not developed to an extent which would support independent living, living in the least restrictive alternative means supervised living in a comm-nity residence with support services. A typical community residence is a family or group home providing room and board, personal care services, habilitation services and supervision in a family setting.112

A family or group home may consist of mentally retarded children and their "foster" or "surrogate" parents or of mentally retarded adults and their "house parents." In both situations, the mentally retarded person lives under the supervision of the "parent." The child or adult reports to the parent when he leaves the home for school, work or recreation. The child or adult is responsible to the "parent" for the maintenance of his room and person, for his conduct, and for his responsibilities in the functioning of the household- A family or group home is considered to be a relatively permanent arrangement, providing a stable environment in which a mentally retarded child or adult can live and develop.

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[112] See, e.g. Ohio Rev. Code Ann. §5123.18 (Page's Supp. 1978) .

Professionals in the field of mental retardation identified certain "universal human needs," [113] These include basic survival skills (shelter, food, physical main tenance) and "comfortable social interaction, a family, a , an education and

> If a person is incapable of complete self-sufficiency—as is true of many of us, retarded or not—someone must help him either to acquire survival skills or to meet these universal needs. At some time, most of us get help from friends and family in these areas of life; most of us get help, too, from public entities such as educational systems; and many of us get special help in areas that cause us difficulty throughout our lives, [115]

Mentally retarded individuals, by definition, have deficiencies in certain areas of functioning. While these deficiencies vary by individual and by severity of retardation, general descriptive categories of functioning abilities have been established by professional groups

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Cherington, Community Life and Individual Needs, in President's Committee on Mental Retardation, New Neighbors The Retarded Citizen in Quest of a Home 1 (Cherington & Dybwad, eds. 1974).

Id. at 1-2.

such as the A.A.M.D. 116 Studying these groupings illustrates how, due to their deficiencies, many mentally retarded parsons must live in extended family situations, i.e. group living situations, if they are ever to live normalized and integrated lives.

The A.A,.M,D. categories include such items as social, economic activity, occupation, and self-direction. For most mentally retarded persons, even those within the mild retardation range, some assistance or guidance is useful, if not a necessity, in each of these areas. Host mentally retarded persons cannot realistically decide to live alone and forego assistance and community support services; nor are many mentally retarded persons in the position to marry, readily establish themselves in a career, and buy a home. Because of the deficiencies in their functioning abilities, numerous mentally retarded persons find that it is the group living situation--in which they function akin to an extended family—that represents the closest and perhaps only chance for a decent life. Family life or home living in a community—not life among drifters, transients or roomers—is all that mentally retarded individuals are re-

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5ee Manual, supra note 16, at 23-33, for Tables of Illustrations of Adaptive Behavior Levels by Age.

questing an opportunity to achieve, especially when the only obstacle hinges upon technicalities and ignores the reality of the life situations. The reality is simply that family or group homes are formed out of economic and emotional needs and function strikingly like an extended family situation.

C, In Considering The Status Of Group Living Situations For The Mentally Retarded, An Overwhelming Number Of Courts Have Found That Such A Home Constitutes A Family For Zoning Purposes

There has been significant litigation in the courts oi" other jurisdictions concerning the status of group living situations for zoning purposes, A trend has developed in which courts have viewed the residents of group living situations as -the equivalent of an extended family- The growth of the law in New York is especially illustrative.

The leading New York case is *City of White Plains v. Ferraioli.* 117 The city sought to bar a group home consis-

N.Y.2d 300, 313 N,E,2d 756

ting of a couple, their *2* biological children and 10 foster children from a one-family residential district. The Court of Appeals rejected the contentions that a group home is "a temporary living arrangement" and that it is style of living, [118] Rather the court[118] akin to a communal found that the group home (1) approximates "a normal family environment,"[119] (2) "is structured as a single housekeeping unit,"[120] and (3) is "to all outward appearances, a relatively normal, stable, and permanent family unit.[1*][121]

The court in White Plains gave a test for determining whether or not the members of a group home constitute a family* A family is "a group headed by a householder ing for a reasonable number of children as one would be likely to find in a biologically unitary family,"

[118] 313 H,E.2d at 758.

at 757.

, at 758.

at 75 9.

The White Plains test was applied in Little Heck *Com*-munity Association v. Working Organization^[123] The group home in question consisted of houseparents and as many as 12 mentally retarded children. The property owners and the organisation seeking to enjoin the use of a one-family residence as a group home attempted to distinguish the situation from that in White Plains on the basis that the retarded.[124] The court rejected children were mentally the distinction and found the group home to constitute a family.

> It is our opinion that a group home for mentally retarded children constitutes a family for the purposes of a zoning ordinance- Our decision is based primarily upon the fact that a group home which is organised pursuant to the Social Services Law is specifically designed to emulate in appearance a reasonably sized biologically unitary family ... [W]e are not persuaded that the proposed -group home will, in and of itself , alter the quality of life or the character of the neighborhood which a single-family residential zone is specifically designed to protect and enhance .., Rather, it will provide retarded children with a stable environment in a setting in which they will have a real opportunity to develop to their full potential.125

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[123] 52 App, Div. 2d 90, 383 N.Y.S.2d 364 (1976).

[124] Id- at 366.

[125] Id. at 367.

The court in Incorporated Village of. Freeport v. Asso-

for the help of Retarded Children found that y mentally retarded adults living with houseparents met the White Plains test for et family.[126]

> The "community residence" concept . . . clearly intends the creation of a **family** unit, living as a single housekeeping unit . , . Such a "community residence" bears the generic character of a **family** Unit as a relatively stable and permanent household and is consonant with the lifestyle intended for a family oriented neighborhood, and thus conforms to the purpose of the village zoning ordinance,

in other jurisdictions the test of a "single housekeeping unit" has been applied to group homes to determine whether or not the members are a family. Courts *in* few Jersey[128], Colorado , and Connecticut 130 have held that group homes for the mentally retarded meet this test.

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[126]94 Misc. *2d* 1048, 406 N.**Y.S. 2**d 221 (1977). [127]Id. at 223.

[12G]Berger v. State, 71 N.J. 206, 364 A,2d 993 (1976) (8-12 multi-handicapped pre-school children and foster parents}■

[129]Hessling v. City of Droomfield, 563 P.2d 12 (Colo, 1977) [6 mentally retarded children and surrogate parents).

130 Oliver v. Boning Commission of the Town of Chester, 31 Conn. Sup. 197, 326 A,2d 841 (1974) (8 or 9 mentally' retarded adults and 2

In addition to the Court of Appeals below, two other Courts of Appeal in Ohio have analyzed the group home concept in light of zoning ordinances which define family as "single housekeeping unit." In both Driscoll v. Goldberg, Case No. 73 C.A.59 Mahoninq Co. Ct. App., 1974) and Adams v. Toledo City Plan Commission,[132] Case No. L-78-00S [Lucas *Co.* Ct. App., 1978), the courts were faced with such definitional language and with additional limitations, i.e, that the living arrangement not constitute a boarding bouse, lodging house, or hotel. For all, practical purposes, the ordinances in Driscoll and Adams defined family in the same way as the Canton ordinance defines it in the present controversy. Both courts held that the groups constituted a family for the purpose of the respective zoning ordinances. Driscoll involved houseparents and 11 mentally retarded children, while Adams involved a group home for supervising adults and 6 mentally retarded teenage girls.

In Michigan, courts have noted the great flexibility of the word "family" and have found the term sufficiently flexible to encompass a group home for mentally retarded persons.[133]

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full text, Appendix A, Brief of Ohio Legal Rights Service,

132 See full text, Appendix D, Brief of Ohio Legal Rights Service

Association for
of Romeo No. 7???? *???* ?? Cir. Ct. I9?7
and Bellaramine hills Association v. Residential Systems Co., 84 Mich. App. 554, 269 N.W. 2d. 673~*(1973)* and cases cited"" therein}.

In Be Harming Hills Association y. Residential Systems Co. , in analyzing a restrictive covenant requiring single-family residential uses, the Court of Appeals suggested a relational definition of "family":

> the word family denotes a concept, the application of which is dependent upon the basis of affiliation of the group being analyzed, juxtaposed with the public policies invoked by the particular circumstances of the case being reviewed.134

The court held that the public policies invoked by the group home were two-fold: (l) affording "treatment to the children in an atmosphere that enables them to retain the benefits of residing in a household, instead of an institution and *(2)* encouraging parents of mentally retarded children "to seek professional care for their children, knowing that they will reside in a homelike environment in lieu of being "institution-alized. "[136] The court concluded that the occupants constituted a family, stating that: "[T]he associational nexus of the group clearly occupies a favored position in our state's public policy

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[134] Bellarmine Hills Association v. Residential Systems Co$_w$ supra note 132, at 675.

Id. at 676.

In other states, courts have held that zoning ordinances cannot contravene state statutory policy. In State ex rel. Thelen v. City of Missoula, the court struck down an ordinance similar to that upheld in Belle Terre restricting the number of unrelated individuals living as a single housekeeping unit to two.[139] The court held that the ordinance could not be used to prevent the establishment of a home for the developmentally disabled because of a new policy adopted by the Montana legislature.

> Montana's legislature having determined that the constitutional rights of the developmentally disabled to live and develop within our community structure as a family unit, rather than that they be segregated in isolated institutions, is paramount to the zoning regulations of any city [sic.] it becomes our duty to recognise and implement such legislative action.140

Similarly, the Supreme Court of Colorado cited legislative policy in holding that mentally retarded children and their surrogate parents constituted a family "by right."

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[138]State ex rel. Thelen v. City of Missoula, 543 P,2d 17 3 , 1975).

[139]Id. at 175. 14[0]Id. at 177. 141 Hessling v. city of Broomfield, supra note 130[r] at 14,

> The general assembly hereby finds and declares that it is the policy of the state to assist developmentally disabled persons to live in normal residential surroundings. Further, the general assembly declares that the establishment of state-licensed group homes for the exclusive use of developmentally disabled persons is a matter of statewide concern and that a state-licensed group home for eight developmentally disabled persons is a residential use of property for zoning purposes .[142]

Thus, it is obvious that the courts have recognized the importance of overcoming the obstacles to community living for the mentally retarded while also recognising the true nature of these living situations. The importance is underscored by the years of neglect and abuse suffered by mentally retarded persons as society excluded them from their rightful place in the community. Yet these courts accurately note that righting those Past wrongs will not upset the traditional community structure; rather, these group and family homes will operate in the nature of extended families,

benefiting mentally retarded individuals as well as the general community*

Homes, _Inc, No- 746834 (4th Jud. Dist. Ct» Minn. July 26,

142

Id. See also Alexander v. Minnesota Jewish Group? 1978); Abbott House v* Village of Tarrytown, 3 4 App- Div. 2d 821, 312 N.Y.S.2d 841 (1970)

CONCLUSION

For the reasons discussed in this brief, amicus curiae, the Court is urged to affirm the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served **upon counsel** noted **below** the attached Brief of Amicus Curiae by depositing **a true** copy thereof in the United States mail, postage prepaid, and addressed as follows:

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