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Prepared by Prof. John J. Regan, University of Maryland Law School, and Georgia Springer, staff attorney, Legal Research and Services for the Elderly, National Council of Senior Citizens.

PREFACE

Traditionally, State courts and private agencies have borne the major responsibility for the provision of protective services—help, sometimes with legal sanctions, needed by mentally and physically infirm elderly citizens.

That base for legal and social action should certainly continue. The following report offers model statutes for consideration by State legislators.

This timely and very welcome paper also makes the point that there is a growing Federal involvement, not only in the means of payment directly for such services in several nationwide programs, but also in the development of an overall service network intended to help prevent the need for such intervention in the first place, or—if infirmity has already occurred—providing assistance which may help prevent institutionalization.

Protective services take many forms: Guardianship, conservatorship, commitment, emergency services, clinical services, community social services, and others. Family members, practitioners, and the courts are called upon to make difficult, complex and, at times, controversial decisions in determining when these services are necessary.

To a very large degree, these decisions involve personal questions for the individuals affected and their family members. But fundamental Federal issues are also raised, and they merit concern by the Senate Committee on Aging and other congressional units:

- First, the institutional treatment of the infirm aged—perhaps more so than anything else—symbolizes our Nation's neglect of the elderly. This great failing in public policy takes its tragic toll in many ways: Economically, psychologically, and socially. As things now stand, the institutionalized infirm elderly patient usually does not return to the mainstream of community life. Even more disturbing, institutionalization can produce destructive results for those warehoused in nursing homes, foster homes, mental institutions, or other custodial arrangements.
- Second, protective services probably have a more profound impact upon older Americans than any other age group. Perhaps 2 to 3 million elderly persons may now need some form of protective care or assistance. This need is likely to intensify in the years ahead, as our population becomes older.
- Third, incompetency proceedings raise important constitutional questions. A determination of incompetency can have far-reaching as well as potentially devastating effects. An individual loses important rights, the most fundamental of which is the loss of liberty. Routine activities that most Americans take for granted—such as voting, charging a purchase at a local store, or conducting

their personal affairs—are typically beyond the capacity of the incompetent. It is essential, therefore, that the legal proceedings have built-in safeguards to insure equity and justice for all concerned. However, fundamental notions of fair play may be largely ignored or subverted. Incompetency proceedings are frequently conducted with a casual concern for the rights of those whose liberty is at stake. Notice is vague and sometimes nonexistent. The alleged incompetent is usually not represented by counsel and is ordinarily not given an opportunity to present evidence or cross examine adverse witnesses. The net impact is that hearings are typically one-sided.

- Fourth, issues related to protective services reinforce a longstanding concern of the Committee on Aging: The need to develop more effective alternatives to institutionalization. Most elderly persons would prefer to remain in their own homes if at all possible. Many can if appropriate care and assistance are available. In the long run, this can produce savings for our Nation because institutionalization is the most expensive form of care.
- Fifth, the committee wants to insure that effective and comprehensive services are included within the social services network now under development. Unfortunately, these services are traditionally outside the social services delivery system for older and younger persons in the community. Often there is little coordination among service providers.

The committee wishes to thank Prof. John Regan of the University of Maryland Law School, and Ms. Georgia Springer, a staff attorney for the National Council of Senior Citizens' Legal Research and Services for the Elderly project, for preparing this timely working paper on the status of protective services in the United States today. They have provided a powerful document, meriting the attention of the courts, policymakers, practitioners, and public. Their summary of the major issues is concise, scholarly, and readable. They have also developed several recommendations to modernize and humanize the treatment of the infirm. Their emphasis upon the least restrictive alternative in interfering with a person's liberty or civil rights deserves thoughtful and careful consideration. Quite clearly, improving and reforming protective services for the mentally and physically infirm presents one of the most formidable challenges for the Federal Government as well as State governments.

Finally, the committee pays special thanks to Mr. David Marlin, director, Legal Research and Services for the Elderly, for coordinating the preparation of this working paper. The committee has called upon Mr. Marlin on many occasions to draw upon his legal expertise on issues of direct concern to aged and aging Americans. He has freely given of his time and talent. This working paper is another example of his excellent contributions.

FRANK CHURCH, *Chairman,*
Special Committee on Aging.

LETTER OF TRANSMITTAL

MARCH 11, 1977.

HON. FRANK CHURCH,
Chairman, Special Committee on Aging,
U.S. Senate, Washington, D.C.

DEAR SENATOR CHURCH: From the beginning of the Legal Research and Services for the Elderly project, created by the National Council of Senior Citizens in 1968, the protective services problem has been a dominant legal issue.

First of all, there has been the need to clarify the language. For many social workers and related professionals who assist older persons, the phrase "protective services" connotes homemaking, home health care, nutritional, and other social services. Lawyers, on the other hand, envision guardianship, conservatorship, power-of-attorney—even commitment—and refer to social services as supportive services. The legal definition holds sway here.

Second, social workers and other professionals have been most persuasive in convincing us that the present system of legal protection available to them and their clients is inadequate. They have coped too long with laws and procedures that deprive persons of due process of law, that expose persons to unnecessary risks, and that sometimes do not work at all. We accept the opportunity to provide pragmatic solutions.

One illustration is the failure of the legal system to provide equality of treatment to those persons who require protective services but who have small incomes and net worth as contrasted to those whose estates are more substantial. The latter often are handled by the "conservatorship bar," frequently court appointed, and whose lawyers are compensated for their services from the estate. The amount of compensation is often established by State law. The estates can also finance the services of social workers, who provide supportive services and work conjunctively with attorneys.

Poorer persons, however, present little attraction to the bar. Although lawyers sometimes do assist pro bono, social workers customarily act as providers of both supportive and protective services. But they are uneasy at this dual responsibility, and well they should be. For the operation is usually ultra vires—and unnecessarily so. Perhaps more important, there are thousands of low-income persons who receive no help. Our public guardian concept suggests one solution to this dilemma.

A further illustration of the need for new legal approaches is the rarity of social service organizations acting with legal sanction in a surrogate capacity as an institution. By law or custom, if the family or close friends are not named as guardians or conservators, only lawyers or trust officers—all individuals—perform that function. That

stylistic requirement has been applied to social workers who are attached to charitable and social service organizations. But it would be far more efficient, productive, and protective if the organization itself could act as guardian or conservator, with the social workers carrying out the agency's policies. The practical problems are minimal and soluble. We have provided a legal remedy in our model statutes.

Finally, the legal issue of personal liberty versus intervention has beclouded the field of protective services. There are those who believe no intervention is justified in any circumstance. The other extreme is to permit intervention when it appears necessary to protect the person or others from danger but in such a way that individual rights are not respected. We consciously trod the middle and explain why.

I wish to thank Prof. John Regan and my colleague Georgia Springer for their dedication, perseverance, scholarship, and willingness to tackle one of the most prevalent problems in the field of aging. We are indebted to Marcus Rosenblum, now of Sarasota, Fla., who applied his editorial talents to produce a report intended for interested readers, whatever their background. And we are grateful to the members and staff of the U.S. Senate Committee on Aging for encouraging and supporting our efforts.

DAVID H. MARLIN, *Director,*
Legal Research and Services for the Elderly,
National Council of Senior Citizens.

SUMMARY OF MAJOR ISSUES

One challenge facing government today—Federal and State—is to reform the procedures for the protection of mentally and physically infirm elderly persons. Traditional approaches to caring for the helpless or dependent, including family arrangements, community social services and charities, institutionalization and legal protection, have not been adequate for all those in need. The present number of aged persons who require support or protection exceeds 2 million. More than twice this number would need assistance if they lost the support of relatives, friends, or social service agencies.

Treatment of the elderly often contrasts strikingly with the concern shown for others who are helpless or dependent, such as children, the mentally and physically handicapped, the ill, the indigent, the alcoholic, or the psychotic. Neglect or abuse of older persons, though it receives little publicity, occurs frequently.

Some elderly, infirm and with no one to look after them and nowhere to go, are seen wandering at-large, unkempt, rummaging through dumps or garbage cans for a piece of paper, something to wear, or something to eat. More keep to themselves, often afraid to step outside. In self-imposed solitary confinement, some decline until they become unable to make simple decisions, such as turning off the tap water. Others are confined in mental hospitals or nursing homes under conditions that would sicken the public conscience.

Most older persons who need assistance in daily living activities accept it eagerly. Friends, relatives, and social welfare agencies support them in finding a place to live, a suitable diet, a few friends, social and recreational opportunities, perhaps part-time employment, and trustworthy legal or business advice. When a client is agreeable, social workers themselves may provide much of the support needed.

This assistance is frequently termed "protective services" and is meant to refer to services offered a physically or mentally infirm older person in order to assist that person in carrying out activities of normal living. They could be health or social services, psychiatric, medical, or legal services.

When the provision of services is accepted voluntarily, and the intervention is slight, "protective services" may be only supportive in nature and are frequently called "supportive services." When the intervention is significant or resisted, there may be a need for legal intervention to authorize the necessary services.

It is in situations where legal sanction is involved that the assistance offered is truly "protective services." Whether or when the assistance is offered, and what form it should take, are the subjects of this report.

The law in most States has authorized intervention in one of several ways: civil commitment to an institution; guardianship of the person

which transfers control over personal decisionmaking; guardianship (conservatorship) of the property which transfers control over one's property and financial affairs; or finally, under newer "protective services laws," authorizing temporary intervention and protective placements.

Yet these legal alternatives have often been destructive to the individual, involving loss of control over one's life, and, usually, in the case of institutionalization, a loss of pride, self-esteem, confidence and competence—even the quickening of death. These approaches, then, are also an imperfect answer for social workers and family—a double-edged sword. From the legal practitioner's point of view, frequently the law has been an inflexible, inadequate tool for dealing with the many situations presented in working with disabled older people.

The legal and social work professions have not worked well together to develop a solution, or even a methodology, for dealing with disabled older persons. Social workers proceed to deliver services at times against a client's wishes, without an understanding of potential violations of legal and constitutional rights of the clients or their own vulnerability. They do not invoke legal sanctions or use legal processes because the former are often inadequate, the latter often unavailable.

Lawyers are often unavailable and/or incapable of working in a situation with unfamiliar psychiatric, social service, and medical complexities. Laws relating to intervention are unclear and rigid, providing an all or nothing approach, so fashioned that disabled persons may lose all their civil rights when civil commitment or guardianship is imposed. A lesser, simpler degree of intervention to place a person in a protective setting or to intervene on an emergency basis is frequently unavailable.

This report will attempt to bridge the gap between the practice relating to "protective services" and the law. Chapter 1 will examine the social problem and the social cost of the "protective services problem," attempting to explain the complexity of this social phenomenon and the need for better laws. Chapter 2 will examine the social work approach to delivering protective services. It will attempt to show what has been learned from several experimental projects and how the results relate to our proposed law reforms. Chapter 3 will examine traditional legal criteria for protective arrangements and recommend reforms. Finally, the appendixes offer five model statutes designed to guide States in reforming laws relating to mentally and physically disabled elderly. These statutes cover civil commitment, guardianship of the person and property, "emergency intervention" and protective placement and public guardianship.

Protective services involve vital questions of personal liberty for older persons and professional ethics for social workers. How much control should there be of the individual by society? What are the basic policy issues for the Federal Government?

It is our hope that this report and model statutes will encourage discussion about all these issues and lead to desirable changes to benefit the entire community and, in particular, the aged, who need a helping hand.

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PROTECTIVE SERVICES FOR THE ELDERLY

(By Prof. John J. Regan and Georgia Springer)*

Chapter 1

PROTECTIVE SERVICES: THE NEED AND THEIR NATURE

A COMPLEX CASE

No client in the project demonstrated more facets of protective service issues and intensive treatment than Miss B., 75 years of age. The first elderly person to be referred to the project, living under physical conditions of the most abhorrent nature, an "involuntary" client of the most pronounced kind, the object of striking concern and despair of neighbors, sanitation and health officials and community agency personnel. Miss B.'s mode of living for herself, her 14 dogs, and a cat was destructive, and obnoxious to all but herself. Diabetic, with ulcerated legs and sore feet, filthy, Miss B. resisted medical care, and ate improperly. She kept her animals incarcerated and starving in her 10-room house, begged food from neighbors, and stalwartly and regressively maintained herself in her Augean menage against an increasingly intolerant world which unsuccessfully tried to get her to change. * * *

A woman of better than average intelligence, Miss B. retained her mental abilities to an unusual degree, yet with striking pathology which was manifested by the incredible accumulation of filth in her home, gross neglect of her starving dogs and herself, and denial of the existence of this state of affairs. * * *

The last survivor of a large family (barring an older brother dying in a nursing home), the caretaker during final illnesses of her mother, a brother, and a sister, then living alone for almost a quarter of a century in the old increasingly neglected house where she had lived most of her life, an independent woman of demonstrated ability as a secretary employed until age 68, Miss B. had succumbed to a variety of

*Professor Regan teaches at the University of Maryland Law School and Ms. Springer is a staff attorney, Legal Research and Services for the Elderly, National Council of Senior Citizens. Editorial assistance was provided by Marcus Rosenblum, Sarasota, Fla.

circumstances in the last few years. Reports about her, confirmed by an interested niece who became overwhelmed by the magnitude of Miss B.'s problems, indicated that her serious social deterioration was of several years standing. Grave financial limitations undoubtedly played into Miss B.'s neglect of herself, her home, and her animals. The ownership of her home and her fierce tenacity about possessing it complicated her eligibility for public assistance. A \$40 monthly pension from social security and a small garage rental might have been her only regular income between the ages of 68 and 74, after which an aid for aged grant of \$50 increased her income to \$98 monthly. Highly manipulative of others, intensely self-willed and self-directing, Miss B. had outmaneuvered those in her environment so as to preserve her decaying way of life. As a "fighter," these traits augured well for Miss B.'s survival through the necessary steps that were to be taken toward guardianship, temporary commitment to a mental hospital and then placement in a nursing home. * * *¹

DIMENSIONS OF THE NEED FOR PROTECTIVE SERVICES

Lonely though she may be, Miss B. is not alone. She is but one of several million in need of protective care. Most of these fragile survivors of an earlier time live in mental and social isolation, an isolation that compounds the infirmities that grow more common with age. Another pattern is exemplified by Charles Perkins (see below). His mild infirmities need only limited support. It is a rare family that does not know of one or more elderly friends, neighbors, or relatives, in a similar condition. Though many prefer to live alone and even may resist any form of help, patronage, or charity, their needs are no less serious. Their individual histories tell the degree of emotional need and suggest the kind of assistance they require.

The social need can be expressed only in cold numbers, impersonal statistics projected from random samples. Today the number aged 60 or more exceeds 32 million. Some degree of mental infirmity perhaps afflicts 15 to 20 percent of this number.² The frequency of mental infirmity, as might be expected, may run to three-fourths of the elderly in nursing homes, foster homes, and other custodial situations.³

Charles E. Perkins, 89, is a biochemist, learned and intelligent, with many friends, but he tends to wander. Although he has enough income, he neglects to pay his rent. He doesn't have his clothes laundered or his rooms cleaned. Sometimes he forgets to eat.

For these reasons, a Fairfax County, Va. court, following a 15-minute medical examination, on the initiative of a social

¹ Wasser, "Protective Service Casework With Older People," 97 (1974).

² Blenkner, Bloom, Nielsen, and Weber, "Final Report: Protective Services for Older People: Findings From the Benjamin Rose Institute," 2-4 (1974) [hereinafter cited as Blenkner]; See also Eisenberg, Gottesman, and Ishizaki, "Protective Services for Adults: A Policy for Pennsylvania" 5 (1975) [hereinafter cited as Eisenberg]; Horowitz and Estes, "Protective Services for the Aged" 13 (1971) [hereinafter cited as Horowitz]; Butler, "Why Survive? Being Old in America," 227 (1975).

³ Joint Hearing Before the Subcommittee on Health of the Elderly and the Subcommittee on Long-Term Care of the Senate Special Committee on Aging, 94th Cong. 1st sess., 35, 138 (1975) [hereinafter cited as Hearing]. Butler estimated that well over 51 percent * * * have evidence of some psychiatric symptomology and mental impairment." supra No. 2, at 227, while Patricia Wald of the Mental Health Law Project estimated the figure at 75 percent. Hearing, at 35.

worker ordered Perkins confined to the Western State Hospital for the Mentally Ill. Subsequently, Perkins demanded a jury trial, where he testified, "I was in a room with babbling lunatics."

This happened to a man who, except for forgetfulness, was in full possession of unusual mental faculties. He won his freedom but, by that time, he had no home. His possessions were stored by the landlord for rent past due. While his lawyer telephoned in a vain attempt to place him in a charity shelter, Perkins waited in a chair in the courthouse, without a cent in his pocket and no identification other than the strap placed on his wrist by the hospital. No charity shelter would take him. Either they had no room or would not take responsibility for a man known to be a wanderer.

Before the attorney left the telephone, Perkins left the court house. That night he was found about 10 miles away by a policeman in the District of Columbia who took him to a shelter, which he promptly deserted. At 2 in the morning, he was back across the Potomac River in Arlington, where police found a volunteer to put him up for a night. The next day he was in Fairfax County Hospital, waiting for another hearing. This time, the court's decision was deferred while attempts were made to place Perkins in an apartment of his own near his friends. There are no supervised hotels for the elderly in Fairfax County, one of the richest in the United States.

—Summarized from a report by Thomas Grubisich, *Washington Post*, September 5, 1976.

We estimate that 10 to 15 percent, or 3 to 4 million elderly persons, currently need some form of protective care or assistance.⁴ Another 3 to 4 million may be potentially in need of protective services should existing forms of support, such as spouse, friend, relative, or special services, no longer be available.⁵

WHAT ARE PROTECTIVE SERVICES?

In her noted report on practice at the Benjamin Rose Institute, Edna Wasser states:

Protective service for the aged has come to represent society's way of caring for those of its aging members who have become limited in caring for themselves and who no longer have or never had others to care for them. The service can also be construed as society's efforts to deal with what it might conceive as deviant behavior. It usually refers to elderly who are living within the community.⁶

As used freely here, protective services include first, the supportive services provided to those in need with their consent and second, the

⁴ Blenkner, *supra* No. 2, at 2-4; Eisenberg, *supra* No. 2, at 5; Horowitz, *supra* No. 2, at 13; Butler, *supra* No. 2, at 227. See also Subcommittee on Long-Term Care of the Senate Special Committee on Aging, "Nursing Home Care in the United States: Failure in Public Policy, Introductory Report," 93d Cong., 2d sess. 15 (1974) [hereinafter cited as Report].

⁵ Blenkner, *supra* No. 2, at 2-4; Eisenberg, *supra* No. 2, at 5; Horowitz, *supra* No. 2, at 13; Butler, *supra* No. 2, at 227.

⁶ Wasser, *supra* No. 1, at 3.

legally enforced supervision or guardianship which, temporarily depriving the client of certain rights, enables an agency or individual to assist the person without his consent. The legally enforced protection may be custodial—in effect a form of confinement—without freedom to come and go; or it may be supervisory, a protection which denies a client the right to perform certain acts freely.

The core of protective services consists of visits by a social worker supplemented by various community services such as visiting nurses, homemakers, clinical services, special transportation, hot prepared meals delivered to the residence, and periodic callers or telephone checks.⁷ What distinguishes these “protective services” from other social services is the potential for legal intervention understood as part of any protective services program. Forms of legal intervention, as noted, include guardianship, commitment, emergency services, and protective placement.

WHAT HAPPENS TO THE AGED?

Most often protective care is needed for deep-rooted and complicated reasons: the need is as much the effect of historical processes as of public policy, a product of social change no less than simple physical changes in the individual.⁸ Although the length of life expected today at age 20 is only 2 or 3 years more than it was 50 years ago, older people compose a growing portion of the population because of the declining birth rate. The average age of the population has been rising.

With age, the numerical chances of being alone and infirm increase, an automatic addition to the need for protective care.⁹ Families which formerly lived together, taking care of their own, today are likely to be separated so widely that they cannot meet frequently to share the care of parents or other elderly relatives.¹⁰ The elderly also find it hard to keep up with a rapidly changing, swiftly paced world of motorcars and other complex machinery. More than younger people, they are confused by business and legal processes and terrified by threats to their property or person.

Traditional aid from churches or charities has not been able to meet the swelling demand for services to the aged. Social services by public agencies have been insufficient and inadequate. Community mental

⁷ For an extensive discussion of the delivery of protective services, see ch. 2 of this report and works cited therein.

⁸ There is much literature on the subject of mental health of the elderly, much of the best of which is by Dr. Robert Butler, psychiatrist and recently appointed director of the new National Institute on Aging. For a short summary of the area, see Butler, *supra* No. 2, at 225-259.

⁹ See ch. 2 of this report, discussion of “Who Are the Clients?”

¹⁰ This is true although there seems to be little support for the theory that families “dump” elderly relatives in nursing homes. See Report, *supra* No. 4, at 18.

health centers,¹¹ legal service agencies,¹² and other community agencies¹³ have served the aged weakly or not well.

Prejudice against employment of the aged, including enforced retirement, exiles many elderly from the paths of production and leaves them without a sense of purpose or belonging. Unemployment, aggravated by progressive price increases that shrink pensions and savings, forces the elderly to deprive themselves of food and shelter, to resort to eating pet food or to pawn prized heirlooms. Social security regulations further discourage them from productive and rewarding work by obliging those who earn extra money to give up part of their small retirement benefit. For many, the mental distress is worse than the enforced decline in their living conditions.¹⁴ Those who may be confused, slow, and weak also are the favored prey of thugs, robbers, and swindlers.

Capping all these troubles and anxieties, many elderly suffer from cumulative effects of a host of chronic ills, congested blood vessels, muscular wasting, progressive deafness, loss of vision, and loss of teeth.

WHAT IS DONE FOR THESE OLDER PEOPLE?

Though most of the infirm would probably prefer to spend their last days in a private home, a large percentage are likely to die in an institution of some kind. More than 1 million of the 23 million persons 65 or older reside in nursing homes.¹⁵ Of this number, about

¹¹ Butler, supra No. 2, at 228-229. Butler states " * * * only 2 to 5 percent of older persons are on the rolls of community mental health centers * * * and public and nonprofit clinics. Perhaps no more than 2 percent of the time of psychiatrists in private practice is spent with older patients." Hearing, supra No. 3, at 88. See Butler, supra No. 2, at 225-259, "They Are Only Senile," for an excellent general discussion of the relationship between the mental health profession and the elderly.

¹² Senate Special Committee on Aging, "Legal Problems Affecting Older Americans," 91st Cong., 2d sess. (Committee print 1970). 1971 White House Conference on Aging, "Report of Special Concerns Sections: Protective and Social Support, Legal Aid and the Urban Elderly (1971)." Hearing on Legal Problems Affecting Older Americans, before the Senate Special Committee on Aging, 91st Cong., 2d sess. (1970). Hearing on Legal Problems Affecting Older Americans, before the Senate Special Committee on Aging, 92d Cong., 1st sess. (1971). Joint Hearing on Improving Legal Representation for Older Americans, before the Senate Special Committee on Aging and the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 92d Cong., 2d sess. (1974). See also "The Elderly Get Some Clout," Business Week, 95 (Mar. 24, 1975); Klaidman, "Elderly Get Some Help Battling Bureaucracy," Washington Post (Dec. 12, 1974) in Potomac Magazine.

¹³ While community services have grown faster than psychiatric or legal services, they still have a long way to go. For a discussion of some of the problems, see Subcommittee on Federal, State, and Community Services of the Senate Special Committee on Aging, "The Rise and Threatened Fall of Service Programs for the Elderly," 92d Cong., 1st sess. (1973), and Senate Special Committee on Aging, "Developments and Trends in State Programs and Services for the Elderly," 93d Cong., 2d sess. (1974).

¹⁴ This position is supported in a statement of Caesar Gloloto, director of government relations of the American Psychiatric Association, to William Ortol, staff director, Senate Special Committee on Aging, in hearing, supra No. 3. It is impossible to go into all these conditions at length, but for an excellent overview of statistics and public policy issues concerning the elderly, see Senate Special Committee on Aging, "Developments in Aging: 1974 and January-April 1975" 94th Cong., 1st sess. (1975) [hereinafter cited as Developments], and Butler, supra No. 2.

¹⁵ Report, supra No. 4, at 15. Dr. Robert Kastenbaum of Wayne State University notes, "While 1 in 20 seniors is in a nursing home or related facility on any given day, 1 out of 5 seniors will spend some time in a nursing home during a lifetime." Id.

three out of four have some mental problems.¹⁶ Many of those in nursing homes have been released from institutions for the mentally ill (where they should not have been confined), because of the recent trend toward deinstitutionalization.¹⁷

Hans Kabel, 78, a machinist, came to the United States from Germany with his wife, Emma, in 1939. Although the neighborhood changed, the couple lived in retirement in an apartment they had occupied for many years in the Bronx. Within a few weeks, in the autumn of 1976, Hans was twice attacked and robbed by young thugs who forced their way through his door. In the second attack, they stabbed Emma in the face with a fork to force her to tell where Hans kept his \$275 pension money. The Kabels were childless. With \$23,000 in the bank, they could have afforded to move to a safer location. Instead, they laid out their burial clothes neatly on a bed. In separate rooms, they slashed their wrists and hung themselves from a doorknob. They left a note reading, "We don't want to live in fear any more."

—Digested from an Associated Press report, October 8, 1976.

In 1973, there remained 81,900 elderly in State mental hospitals.¹⁸ In many mental institutions, the elderly still compose a large percentage of those confined.¹⁹ At St. Elizabeths Hospital in Washington, D.C., 60 percent of the patients are more than 55 years old.²⁰ Other elderly, including many with mental illness, are cared for in private homes, foster homes, or boarding homes, which provide some degree of assistance with personal hygiene, food, and clothing.²¹

Other disabled elderly have the benefit of noninstitutional services. The most fortunate have families both willing and able to care for them. Community-based agencies also may assist elderly persons to continue to live in their homes with help of a homemaker, visiting nurse, and home-delivered meals. These services sometimes are delivered under the single direction of a protective services agency either with or without legal sanction under guardianship or protective services laws.²²

¹⁶ *Supra* No. 3.

¹⁷ The Senate Special Committee on Aging reports that the number of elderly in mental institutions dropped 56 percent in 5 years from 1969 to 1975. Today only 59,685 elderly remain in mental institutions. Senate Special Committee on Aging, "Nursing Home Care in the United States: Failure in Public Policy. Supporting paper No. 7: The Role of Nursing Homes in Caring for Discharged Mental Patients," 94th Cong., 2d sess. 718 (1976) [hereinafter cited as Supporting Paper No. 7]. The reasons therefore are: Humanitarian motives; recent court actions; economic reasons (\$400 to \$600 per month for nursing home care vs. \$800 per month for mental institutional care); the advent of SSI, paying \$146 per month (now \$167.80 per month) for custodial or boarding home care vs. \$800 per month for mental institutional care. *Id.* at 718.7. Developments, *supra* No. 14 at 35. (See also Butler, *supra* No. 2, at 240ff, and Redick, Kramer, and Taube, "Epidemiology of Mental Illness and Utilization of Psychiatric Facilities Among Older Persons," in "Mental Illness in Later Life." (Blisse and Pfeiffer eds. 1973) and Supporting Paper No. 7, *supra*.)

¹⁸ Report, *supra* No. 4, at 10. For complete statistics, see National Institute of Mental Health, Utilization of Mental Health Statistics (1971), Analytical and Special Study Reports, Mental Health Statistics, Series B, No. 5 (1971).

¹⁹ Twenty-eight percent of all public mental hospital beds are occupied by elderly, yet elderly receive only 2.3 percent of all psychiatric services. Statement of American Psychiatric Association in Hearing, *supra* No. 3, at 138.

²⁰ Hearing, *supra* No. 3, at 13.

²¹ Developments, *supra* No. 14, at 34-35.

²² See chapter 2 of this report for a full description of such programs.

THE SOCIAL COST OF NEGLECT

Although most communities have resources for helping the elderly with mental and physical infirmities, they have been slow to respond sufficiently to the needs. This tardiness has exacted a terrible price in human tragedy, not to mention the exorbitant economic loss to the individual and to society.

The human cost is seen in the appalling condition of the victims. Neglect of the aging person leads to withdrawal, increasing disorientation, mental disturbance, and physical deterioration. For those living in need of care, there is a constant threat of injury from fire, assault, or accident.²³

At the same time, the elderly who are beneficiaries of social services may be at even higher risk of injury or death. When the elderly receive that attention, this may mean that the social workers and courts will put the client in an institution where both the enjoyment and length of life are curtailed.²⁴ In addition to a shortened life, confinement in an institution usually means loss of self-esteem, of freedom, and of useful activity.²⁵

For families and spouses, especially those without much money, the burden of caring for a disabled older person can be exhausting emotionally, financially, and physically.²⁶ It is as painful to see a loved one decline as it is difficult to meet their needs, whether or not assisted by community resources. Yet the family often finds it even more heartbreaking to commit the patient to an institution.²⁷ In time, the stress of caring for the patient personally, or even of visiting frequently in an institution, drains a family's ability to continue with the task or to attend to other family, business, or community duties.

Present public policies of relying primarily on institutional care without providing other options are as damaging to society as to the individual involved.

The cost to society is evident in several respects. First, institutional care is too infrequently rehabilitative. Too seldom are patients restored to function at a level appropriate to the patient's needs. Rather, as noted earlier, institutional care often accelerates deterioration and death, usually by passive indifference and occasionally by deliberate intent.²⁸

Second, frequently the patient is confined to an institution involuntarily, either by court order following civil commitment proceedings or simply because the community offers no other means of care.²⁹

²³ Butler, supra No. 2, at 225-231.

²⁴ Report, supra No. 4, at 6, and Blenkner, supra No. 2, at 175-185.

²⁵ Butler, supra No. 2, at 260.

²⁶ Report, supra No. 4, at 18.

²⁷ Report supra No. 4, at 18; Butler, supra No. 2 at 261.

²⁸ Supra No. 24.

²⁹ "At St. Elizabeths Hospital nearly 45 percent of the present inpatient population does not, according to estimates of the hospital's own clinical staff, need to be retained in a 24-hour psychiatric facility. Yet they are warehoused nevertheless because there are no suitable alternatives to St. Elizabeths." (from statement of Benjamin Helneman, cocounsel on *Donaldson v. O'Connor*, 422 U.S. 563 (1975), 493 F. 2d 507 (5th Cir. 1974), and former attorney with the mental health law project). Hearing, supra No. 3, at 14, 22, 34. For a discussion of alternative arrangements, see Senate Special Committee on Aging, "Alternatives to Nursing Home Care: A Proposal" prepared by staff specialists of the Levinson Gerontological Policy Institute, Brandeis University, 92d Cong., 1st sess. (committee print, 1971).

The legality of such treatment has been challenged, notably by court decisions in *O'Connor v. Donaldson*³⁰ and *Lake v. Cameron*.³¹

In *Donaldson*, the U.S. Supreme Court held that it is unconstitutional for a State to confine in a mental institution an individual who is not dangerous and is capable of surviving alone or with the help of friends and family.^{31a} In *Lake*, the U.S. Court of Appeals for the District of Columbia, in a habeas corpus action, ordered a lower court to seek less restrictive alternatives for treatment for a nondangerous old woman confined in St. Elizabeths mental hospital. In these cases and others, the courts have decided that legal actions which, in the process of protective treatment, deprive infirm elders of personal freedom and freedom of choice are (a threat to the freedom of ordinary citizens, too) unconstitutional.

Third, and perhaps most cogent for those heavily burdened by taxes, is the point that, aside from being ineffective and potentially unconstitutional, the institutional care of the infirm elderly is extraordinarily costly. There are far more economical methods of providing protection.

GROWING FEDERAL INVOLVEMENT

During the past 10 years, State and Federal legislators have voted to let taxpayers, assume more and more of the financial burden of caring for the aged who are physically and mentally disabled. Two main arguments are advanced in support of this policy. First, it is in the public interest to insure that the disabled/elderly have access to health services which they could not otherwise afford. Second, it is in the public interest to provide financial aid and services to disabled elders who are unable to care for themselves and who are without means of obtaining assistance with their own funds or through friends or family. In effect, it is a responsibility of Government to pay expenses which cannot be met by individuals who are helpless and dependent.

The costs of such assistance have been high. Also, they have been increasing, along with the number of forms of assistance (described below). The Older Americans Act of 1965 established a national network of State and local agencies to assist the aged.³² In 1973, amendments to the act provided money to States to furnish social services (title III) and nutritional aid (title VII) for the aged. The typical social services provided were listed earlier in this chapter. All such services, legal services in particular, are important to protection of the aged.

In 1977, Federal appropriations for Older Americans Act totaled \$401.6 million.³³ In contrast, medicare and medicaid, voted by large majorities in Congress in 1965,³⁴ pay billions of dollars for health

³⁰ 422 U.S. 563 (1975).

³¹ 364 F. 2d 657 (D.C. Cir. 1966).

^{31a} See chapter 3 of this report, *infra*, text accompanying No. 42.

³² Older Americans Act of 1965, Public Law No. 89-73, 79 Stat. 219, 42 U.S.C. 3001 et seq. For a discussion of recent developments relating to the Older Americans Act, see *Development's*, supra No. 14, at 81-100.

³³ Public Law 94-439 became law on Sept. 30, 1976, when the House and Senate overrode President Ford's veto.

³⁴ The medicare program is found in title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq. Regulations are found at 20 CFR 404 et seq. Medicaid is title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. Regulations are found at 45 CFR 246-250. For a complete discussion of health issues affecting older persons, consult hearings on "Barriers to Health Care for Older Americans" before the Senate Special Committee on Aging, parts 1-16, 93d Cong., 1st sess., through present (1973-present).

services for the elderly, particularly for the mentally and physically disabled.³⁵

Medicare, the Federal health insurance for the disabled and those 65 years old and over, paid \$14.7 billion in 1975.³⁶ It pays for hospital care, physicians' services, nursing home care, home health services, and institutional psychiatric services. The three last items are especially important to elderly needing protective services. In 1973, medicare paid \$200 million for nursing home care alone and \$75 million for home health care.³⁷

Medicaid, funded jointly by State and Federal governments and administered by State governments, pays medical and hospital bills for those who cannot afford to pay with their own funds.³⁸ In 1974, medicaid payments exceeded \$12 billion.³⁹ Although the benefits depend on family income, not on age, a large part of medicaid money goes for services to aged patients who cannot meet costs not covered by medicare.⁴⁰ Medicaid also pays health bills for the aged after medicare benefits and personal resources have run out.⁴¹ Medicaid payments cover hospital care, physicians' services, and nursing homes as basic benefits in all States. For other services, including institutional psychiatric treatment and home health care, State governments must pay part of the bills in order to qualify for Federal funds. For this reason, their coverage varies from State to State.⁴² In fiscal year 1973, medicaid paid \$2.1 billion for nursing home care.⁴³

The supplemental security income program (SSI) has in the past few years become another major source of Federal support for the mentally and physically infirm in the aged population. In 1975, the SSI program provided \$6 billion in benefits, a sum that assisted the blind and disabled as well as the aged.^{43a} Many of the aged had been discharged recently from State mental institutions.^{43b} Others were transferred to boarding houses or other residences from skilled or intermediate nursing homes. The major economic incentive for supporting disabled elderly beneficiaries with SSI is that the Federal Government will pay \$167.80 a month SSI for custodial care of a person in a boarding home, far less expensive than nursing care or care in a hospital for the mentally ill.^{43c}

More Federal funds especially important to the infirm elderly are appropriations for mental health care under the National Institute of

³⁵ Developments, supra No. 14, at XVIII.

³⁶ See Social Security Bulletin, vol. 39, No. 1 at 1 (January 1976) for breakdown of various costs of medicare in all areas. See also, Butler, "An Advocate's Guide to the Medicare Program," 8 Clearinghouse Review 831 (1975).

³⁷ Report, supra No. 4, at 25, 60.

³⁸ See Butler, "The Medicaid Program: Current Statutory Requirements and Judiciary Interpretations," 8 Clearinghouse Review, 7 (1974).

³⁹ Social Security Bulletin, supra No. 36, at 1.

⁴⁰ "Older individuals are subject to more disabilities, see physicians 50 percent more often, and have about twice as many hospital stays that last twice as long as do younger persons." Developments, supra No. 14, at XVIII. Moreover, older persons have less than half the income of their younger counterparts. In 1973, half of the families headed by older persons had income of less than \$6,426; the median income of older persons living alone or with nonrelatives was \$2,723.

⁴¹ Developments, supra No. 14, at 31. Contrary to popular belief, at present medicare pays only 38 percent of the health bill of the average older person—and this at a time when health costs are rising at a rate significantly higher than the increase in the cost of living.

⁴² See Developments, supra No. 14, at 38. In 1972, for example, medicaid paid only \$24 million, or less than 1 percent of its total \$5 billion budget on home health care.

⁴³ Report, supra No. 4, at 25. For a discussion of other Federal assistance to nursing homes, see Id. at 25.

^{43a} Social Security Bulletin, supra No. 36, at 1.

^{43b} Supporting Paper No. 7, supra No. 17, at 718-727.

^{43c} Id.

Mental Health, the Developmental Disabilities Act,⁴⁴ the Community Mental Health Centers Act of 1963,⁴⁵ and amendments thereto.⁴⁶

Most significantly, the new title XX of the Social Security Act offers millions of dollars for State programs that provide protective services aimed at the potentially dependent elders.⁴⁷ The law does not define clearly what protective services should be, a shortcoming causing considerable confusion to the States. Yet, it breaks new ground by absolutely endorsing the responsibility of Federal and State Governments to provide protective services to adults. It is equally significant that protective services are one of two "universal" services to be provided without regard to the client's income.

In addition to supporting various services needed by disabled old people, Federal money has funded projects to demonstrate what protective services can do and how they operate. These demonstrations were approved and financed through the Social Security Administration,⁴⁸ the Social and Rehabilitative Service of the Department of Health, Education, and Welfare,⁴⁹ the Administration on Aging,⁵⁰ and the National Institute of Mental Health.⁵¹

State agencies have had the duty of carrying out some of these federally funded programs. In addition, States have voted their own funds to further these goals, either to qualify for Federal funds or to pay for State-run programs. Certain States, including Wisconsin, South Carolina, Nebraska, New York, and North Carolina, have been leaders in establishing State government based protective services.⁵² Most other States are developing governmental protective services to

⁴⁴ The Developmental Disabilities Services and Facilities Construction Act of 1970, Public Law No. 91-517, 42 U.S.C. 2670, 84 Stat. 1316. Developmental Disabilities Assistance and Bill of Rights Act of 1975, Public Law 94-103, 42 U.S.C. § 6001 et seq., 89 stat. 486.

⁴⁵ Community Mental Health Centers Act of 1963, Public Law 88-164, 42 U.S.C. 2681 et seq., 77 Stat. 290.

⁴⁶ The Community Mental Health Centers Amendments of 1975, Public Law 94-63, 42 U.S.C. 2689, 89 Stat. 308, § 201(b)(1)(C) state that to qualify as a provider of comprehensive mental health services a center must provide "a program of specialized services for the mental health of the elderly, including a full range of diagnosis, treatment, liaison, and followup services (as prescribed by the Secretary)."

⁴⁷ Social Service Amendments of 1974, Public Law 93-647, 42 U.S.C. 1397-1397F, 88 Stat. 2351, which became effective Oct. 1, 1975, removed title IV-A and VI of the Social Security Act, establishing a new title XX, "Grants for States for Services." It provides \$2.5 billion to States for social services with specific funding limitations for every State. Estimated funding for protective services for fiscal year 1975 was to be \$175.3 million (from *Technical Assistance Memorandum*, Administration on Aging, Department of Health, Education, and Welfare, April 24, 1975). It is especially significant that the goals of services under that program are: (1) To help people become or remain economically self-supporting; (2) To help people become or remain self-sufficient (able to take care of themselves); (3) To protect children and adults who cannot protect themselves from abuse, neglect, and exploitation and to help families stay together; (4) To prevent and reduce inappropriate institutional care as much as possible by making home and community services available; and (5) To arrange for appropriate placement and services in an institution when this is in an individual's best interest. See also, B. Melemed "Title XX of the Social Security Act: A Resource for Serving the Needs of Older Persons," (National Council on Aging: 1976); Social Services Amendments of 1974, report of the Committee on Ways and Means of the House of Representatives, 93d Cong., 2d sess. (1974); and Social Services Amendments of 1974, conference report of the House of Representatives, 93d Cong., 2d sess. (1974).

⁴⁸ See Wasser, supra No. 1, and Blenkner, supra No. 2.

⁴⁹ Social and Rehabilitation Services, Department of Health, Education, and Welfare, "Report of the National Protective Service Project for Older Adults," (1971).

⁵⁰ Horowitz, supra No. 2.

⁵¹ Hall and Mathiasen, "Guide to Protective Services for Older Persons," (1973).

⁵² Butler reports that "Federal legislation under the 1962 Public Welfare Amendments to the Social Security Act permits local welfare offices to set up protective services with 75 to 25 percent financial match; in November 1970 such services were mandated for inclusion in all State plans. Very few States, however, have actually established protective service programs." Supra No. 2, at 156. This does appear to be changing rapidly within the past year or two with passage of title XX of the Social Security Act.

qualify for Federal funds under title XX. Several also have enacted their own protective service laws.⁵³

THE NEED FOR PUBLIC PARTICIPATION

Public interest in protective services and care for mentally or physically infirm elderly has been stimulated by recognition of their numbers, their needs, the human and economic cost of obsolete policies, by political leadership, professional testimony, and by growing interest in rights of elderly citizens. It has been abetted by the growth of organizations of senior citizens and by public participation in programs such as those funded by the Older Americans Act and by title XX.⁵⁴

Particularly stimulating have been the contents of certain Federal reports on care of mentally and physically disabled elderly, notably the hearings on "Mental Health and the Elderly," published in 1976 by the Senate Special Committee on Aging, and 1975 recommendations to the President in the annual report of the Federal Council of the Aging. The Federal Council expressly recommended that (a) the "frail" elderly receive first priority for existing services, (b) special services be tailored for their needs, and (c) immediate attention be given to funding demonstration and evaluation projects to develop viable legislative and administrative alternatives for care of mentally and physically infirm elderly.⁵⁵

In the growing library of works dealing with public policy on care of the disabled elderly,⁵⁶ the present report is believed to be the only one to survey the field broadly with the aim of justifying a coordinated set of legislative recommendations. This report is unusual also in recommending broad reforms of State law in a field that is supported primarily by Federal funds.

An elderly woman active in the Gray Panthers recently asked a party of young men why they shoved older people aside. One answered frankly, "Because they are so slow." Her sharp retort was, "I wish for you only that you live to a ripe old age."

—Janet Neuman, personal report.

⁵³ The following protective services laws authorize State-run programs: Kentucky Revised Statutes, ch. 209; Montana Statutes title 71 § 1902-1919; Nebraska Statutes, title 28 § 1501-1508; North Carolina General Statutes, ch. 108 § 102-106.8; South Carolina Code, title 71 § 300.71-300.80; Tennessee Code, title 14, § 2301-2312; Virginia Code, ch. 63.1 § 55.1; Revised Code of Washington § 26.44; Wisconsin Code, chs. 55.001 et seq., 46.03, 880.07. Protective services programs operate under the following State regulations: California Welfare and Institutions Code, division 9, ch. 10001, Regulations of Health and Welfare Agency, § 30.050 (1969) (Department of Health); Department of Human Resources Manual Transmittal No. 40 under Georgia Code 49-604; Oregon Public Welfare Division Rule 11.000.

⁵⁴ See generally, Butler, *supra* No. 2.

⁵⁵ Federal Council on the Aging, 1975 Annual Report, 45-50 (1975). See also earlier reports of the President's Council on Aging, "Federal Payments to Older Persons in Need of Protection" (1965), and "The Report of the President's Task Force on the Aging" 33, 34 (1970).

⁵⁶ Besides those already mentioned, see Subcommittee on Health and Long-Term Care of the House Select Committee on Aging, "New Perspectives in Health Care for Older Americans," 94th Cong., 2d sess. (committee print, 1976); hearings on home health care before the House Select Committee on Aging, 94th Cong., 2d sess. (1976); Senate Special Committee on Aging, "Home Health Services in the United States: A Working Paper on Current Status," 93d Cong., 1st sess. (committee print, 1973); Senate Special Committee on Aging, "Home Health Services in the United States," 92d Cong., 2d sess. (committee print, 1972); Senate Special Committee on Aging, "Mental Health Care and the Elderly: Shortcomings in Public Policy," 92d Cong., 1st sess. (1971).

Considering that so many elderly need some type of daily assistance, we recommend strongly the continuing development of such social and protective services by public agencies. Yet beyond these public services, there remains the great need for popular discussion and understanding of protective service laws and of the many forms of care for disabled adults.

The issues are controversial because they are complicated. In their moral aspects, they require as much study as the issues of abortion, death with dignity, capital punishment, or sterilization of the mentally incompetent. For lack of acceptable, simple solutions, it is necessary to work out reasonable compromises among equally valuable principles, to reconcile conflicting paths toward a common objective. On one hand are the ideals of personal choice, individual freedom, and respect for individual differences. On the other are the principles that society has a duty to protect those unable to care for themselves and to protect itself from dangerous and destructive situations.

Moreover, the discussion involves complex questions of a medical, legal, and psychiatric nature. And, we must consider the hostile feelings of the often unwilling older person who disagrees with the court or the social worker's judgment that protective services are necessary and helpful.

Many will legitimately question whether the older candidates for protective services constitute a social challenge worthy of public attention. Margaret Blenkner, an acknowledged expert on protective services, felt that the older disabled person truly is a social responsibility, but in coming to that conclusion she posed several important questions.⁵⁷

First, given that most older "protectives" neither desire assistance nor define themselves as a group in need, in whose opinion are they termed a problem?

Second, given their resistance to assistance and by definition their lack of relatives or friends, is assistance given to relieve the older person's burden or more the psychological discomfort of the helping professional?

Third, is the real social problem the older person on whom attention is focused in crisis, or in fact are the real social problems the long-term underlying societal causes bringing a person to that crisis?

Fourth, isn't the societal solution, that is, institutionalization, frequently as destructive as the individual's situation?

Finally, a "problem" presumably suggests a resolution or at least possibility of improvement. Yet many older persons needing protective services could never improve to the point of normal functioning. Often "improvement" can be at best psychological adjustment and acceptance of supportive help in the most dependent environment possible. Thus, how can we consider these persons a "problem" when no "solution" will ever exist?

Blenkner's comments explain why, in the judgment of some, including many elderly people, the need for intervention in the lives of the infirm aged exists mainly in the minds of self-centered professionals

⁵⁷ See Blenkner, *supra* No. 2, 160-162, and see *Id.* 159-174 for an excellent discussion of these issues.

and well-meaning but misguided humanitarians. This question of the need for protective services needs searching popular discussion and clarification.

The fact that candidates for protective services are relatively inconspicuous keeps them from becoming a popular cause. They share this handicap with mental patients, nursing home patients, and the terminally ill. Few identify with them or think of being in their position. They have no powerful advocates. There are none to call their abusers to task or to criticize infringements of their liberties. Only the public at large is ultimately accountable for the treatment of protective service clients.

This report offers a framework for examining the issues. The debate and discussion will proceed in the mass media, in Congress, in academic circles, in legislatures, in forums for civil liberties, and among senior citizen leaders. Popular opinion will have its innings in hearings on title XX, on the Older Americans Act, and on State laws concerning civil commitment, protective services, and guardianship. The outcome of such discussions will affect both the standards for intervening in older people's lives and the practice of intervention, if it is to be allowed at all. Only after thorough discussion and study will legislators, administrators, and civil leaders be able to sort out and decide upon the complex and controversial issues.

RECOMMENDATIONS FOR STATE LAW REFORM

Out of such discussions, the least to be expected is broad improvement of community services. Above all, the debate should disclose the glaring need for reform of State laws concerning civil commitment, guardianship, and protective services.⁵⁸

Current civil commitment procedures give little consideration to conditions peculiar to older persons. Rarely does a psychiatrist or social worker evaluate the circumstances to ascertain the appropriate or available alternatives to commitment or guardianship. Still less frequently does any one seek out other options for the client. Judges aren't usually required to find that the treatment ordered is the least restrictive consistent with the elderly person's needs.

Guardianship proceedings are outdated and frequently of questionable constitutionality. No guardianship services are available for those with meager assets. State laws seldom provide for protective care short of guardianship. When they do, they fail, often, to provide that the arrangements respect the client's constitutional rights. Yet these laws provide the only alternatives available whenever legal intervention is sought to authorize care of an infirm elderly person.

ISSUES IN THE REFORM OF THE LAWS

The core issue in legal proceedings to order protective care is freedom of choice. The determination of this issue involving personal liberty belongs in the legal forum, although physicians, psychiatrists and social workers should contribute to the decision. But it is the court which must decide whether disabled older persons, particularly those who

⁵⁸ See chapter 3 for an in-depth discussion of the need for legal reforms.

have refused help, have the freedom to accept or reject protective services.

In the past, this decision usually has been a one-sided judgment by a friend or social worker, presumably acting in behalf of the client. Although each and every case warrants individual consideration, the decisions should be consistent with a set of principles established and administered under State laws, consistent with the civil liberties of those involved.

The court is the correct forum for such decisions for two reasons. First, the law provides the framework for defining the respective interests of society and the individual, such as protection of the individual, protection of the social worker or friend offering assistance, and protection of society from possible dangers posed by the client. In legal language, these interests are protected or represented by specific concepts; that is, the 5th and 14th amendments to the Constitution, *parens patriae*, and the State's police power.

The protection of individual liberty is bestowed under the 5th and 14th amendments and newer concepts of individual privacy. The protection of the individual's health and safety is embodied in the concept of *parens patriae*, allowing the State to intervene in the life of an individual when deemed in the best of interests of that person. Finally, the protection of the society from that which endangers its health, safety, or well-being is embodied in the police power authorizing the State to remove that which is dangerous, unhealthy or even unwholesome.

Second, the provision of protective services to the elderly in any given situation may require a balance or compromise of any or all of these interests, a traditional responsibility of all courts.

Regrettably, the legal profession has not undertaken a comprehensive study to restructure protective service laws relating to older people. Such a study is overdue. We hope this report will encourage the Congress, State legislatures, courts, the American Bar Association, law schools, and the legal profession in general to do three things: to identify the conflicting interests; to affirm the rights of infirm elderly people; and to develop a set of laws that will make protective services humane.

In expectation of such action, we recommend the following reforms of State law:

(1) Before ordering civil commitment, guardianship, or any lesser form of involuntary treatment of an elderly person, the presiding court should be required, except in emergency proceedings, to do two things: first, to order that the person be screened by a psychiatrist and a social worker in order to determine the most appropriate available mode of placement, treatment, or assistance; second, to issue in writing a finding that the placement or intervention ordered is the least restrictive alternative possible consistent with the person's needs.

(2) Guardianship laws concerning both person and property should provide complete due process including the right to counsel, to be present, to cross examine witnesses, to appeal, et cetera.

(3) State law should provide for establishment of (a) an adult protective services system, (b) proceedings guaranteeing due process of

law concerning limited intervention during temporary emergencies in lives of elderly persons and (c) proceedings guaranteeing due process of law concerning involuntary protective placements of any older person (whether emergency or not).

(4) State law should provide for establishment of public guardianship service for persons without financial resources to pay private guardians.

Chapter 2

SOCIAL WORK ASPECTS OF PROTECTIVE SERVICES FOR THE ELDERLY: CONTRIBUTIONS OF SOCIAL WORKERS TO PROTECTIVE SERVICES

Within the last 20 years, many social workers, some associated with the National Council on Aging (NCOA) and others with the Benjamin Rose Institute in Cleveland, have intensified professional concern with protective services for the elderly. Among them, Margaret Blenkner, Virginia Lehmann, Gertrude Hall, Geneva Mathiasen, Ruth Weber, and Sadelle Greenblatt have designed and operated programs and published reports which have provided both the practical experience and theoretical basis for the reforms proposed for protective services law.

Anyone considering these reforms must ask, how did these programs operate? What conclusion may be drawn from this research? Who needs protective services? What services have been provided? How has the law affected the availability, form, and delivery of protective services? How often do protective services require intervention into clients' lives against their will? How often do the courts authorize such intervention? How do professional findings bear upon the proposed reforms?

The answers must be viewed also through the eyes of the legal profession and the general public before the laws are changed.¹

THE PROJECTS

In 1958, a small group of concerned social workers assembled to form an "Ad Hoc Committee on Protective Services for the Elderly" under the sponsorship of the National Council on Aging. In their "Guide to Development of Protective Services for Older Persons" Gertrude Hall and Geneva Mathiasen recount the groundbreaking

¹ An interdisciplinary discussion of protective services is not new, although this report may be the broadest and lengthiest to date. For earlier references, see Alexander, *The Aged and the Need for Surrogate Management* (1972); Allen et al. *Mental Impairment and Legal Incompetency* (1968); Group for the Advancement of Psychiatry, *Laws Governing Hospitalization of the Mentally Ill*. (Rept. No. 61, 1966); Lehmann, *Guardianship and Protective Services for Older People*, 42 *Social Case Work* 5-6 (1961); Lehmann and Mathiasen, *Guardianship and Protective Services for Older People* (1963); Lehmann, *The Legal Aspects of Dependency and Guardianship of Adults* (1959); National Council on Aging, *The Law and the Impaired Older Person: Protection or Punishment?* (1966); Siegel, *The Legal Aspects of Protective Services*, in New York State Office for the Aging, *Proceedings of the Fourth Annual Governor's Conference* (1965); Research Department of United Community Services of Metropolitan Boston, *Protecting the Aged: A Layman's Handbook of Laws and Legal Procedures under Massachusetts Practice* (19—); Regan, *A Protective Services Program for Maryland* (unpublished report) (National Council of Senior Citizens, 1974); Springer, *Protective Services for Older Persons in Pennsylvania: Analysis of Existing Law and Recommendations* (unpublished report) (National Council of Senior Citizens, 1975).

nature of this meeting.² The focus of their concern was the growing number of mentally and physically disabled elderly who were no longer able to care for their daily needs and were prey to abuse, neglect, disease, accident, and exploitation because they did not have friends or family to assist them. Apparently few, if any, in the profession had ever investigated the subject in depth.

Over the years the numbers of concerned professionals grew.³ In 1963, NCOA hosted an interdisciplinary seminar on protective services for the elderly in Houston.⁴ Two other notable developments occurred in that year. First, the results of a Chicago study directed by Virginia Lehmann, an attorney-social worker, were published in "Guardianship and Protective Services for Older People."⁵ Second, Cleveland's Benjamin Rose Institute began a 5-year study, financed by the Social Security Administration, of protective services for severely impaired older adults. The unexpected results of this study challenged the very bases of the social work profession's assumptions that protective services were a good thing for older persons.⁶

In 1964, the National Council on Aging, with a 4-year grant from the National Institute of Mental Health, undertook to compare the findings of three model protective services programs for the elderly. One was conducted by a voluntary agency in Houston, called Sheltering Arms; one by the Community Welfare Council of San Diego in cooperation with the School of Social Work at San Diego State College; the third by the Department of Public Welfare of the city of Philadelphia.⁷

In 1967, two other model programs, both conducted by public welfare agencies, one in Washington, D.C., the other in three rural counties of Colorado,⁸ were established with funds from the Social and Rehabilitative Services division of the U.S. Department of Health, Education, and Welfare. Shortly afterward, the Council for Community Services in Metropolitan Chicago launched a similar program with funds from the Office of Economic Opportunity, title XVI of the Social Security Act, and the Model Cities program.⁹

Still, by 1968, 10 years after the formation of NCOA's ad hoc committee, fewer than 20 communities in the Nation could be identified as having "communitywide protective service programs for the aged."¹⁰ Meanwhile, the numbers of the elderly had increased, as had reports of their abuse and neglect, deviance, and "untended illness."

² Hall and Mathiasen, "Guide to Development of Protective Services for Older Persons," 6 (1973) [hereinafter cited as Hall].

³ For a good bibliography, including earlier works in the field of protective services, see Blenkner, Bloom, Nielsen, and Weber, "Final Report: Protective Services for Older People. Findings from the Benjamin Rose Institute Study" 186 (1974) [hereinafter cited as Blenkner].

⁴ "Seminar on Protective Services for Older People" (Eckstein and Lindey, eds. 1974).

⁵ See also, Lehmann, "Guardianship and Protective Services for Older People," 42 Social Casework 5-6 (1961) and Lehmann, "The Legal Aspects of Dependency and Guardianship of Adults" (1959).

⁶ Blenkner, supra No. 3.

⁷ Reports of these projects are found in Hall, supra No. 2; Horowitz and Estes, "Protective Services for the Aged" (1971) [hereinafter cited as Horowitz]; and Community Welfare Council of San Diego, "The Evolution of Protective Services for Older People" (1970).

⁸ See Social and Rehabilitation Service, U.S. Department of Health, Education, and Welfare, "Report of the National Protective Services Project for Older Adults" (1971) [hereinafter cited as Report].

⁹ See Council for Community Services in Metropolitan Chicago, "Protective Services for the Aged: Final Report on the Chicago Project" (1973) [hereinafter cited as Chicago].

¹⁰ Hall, supra No. 2, at 5.

Hall and Mathiasen attribute the slow pace of progress to the complexity of the problem and to "traditional attitudes which accept deviant behavior as normal for an older person."¹¹ In 1968, the National Council on Aging sponsored a conference in Houston aimed at "overcoming barriers to protective services for the aged,"¹² and attempted to analyze the reasons for the slow progress and to identify problems and future possibilities.

Since then, model projects, both large and small, have continued to experiment with protective services and to report their findings. These include: A geriatric screening project in San Francisco;¹³ various foster homes and other residential facilities to care for the aged;¹⁴ establishment of public guardians in Delaware, California, Portland, Oreg., and Chicago;¹⁵ the use of emergency care facilities; a special staff to serve the elderly in a family court in the State of Washington; a State-funded research project in Pennsylvania;¹⁶ and a geriatric evaluation project in Maryland.¹⁷ Legislatures in Wisconsin, the Carolinas, Tennessee, and elsewhere have voted State sponsorship of local protective services programs.¹⁸

Funds available through title III of the Older Americans Act have improved substantially the availability of the components of protective services. Further impetus has been provided by the title XX¹⁹ social services program.

Reports of these many projects²⁰ contain answers to a number of the questions posed above, but they raise other issues. All these questions bear importantly on proposed reforms in protective services law.

PROTECTIVE SERVICES DEFINED

The initial question is: What is a protective services program?²¹ Generally, a protective services program is an interdisciplinary program of assistance to persons with mental and physical disabilities, who can no longer take care of their basic needs, and who require community support. The underlying factor is the potential for legal intervention in the beneficiary's life. Such intervention, in principle, is invoked for a person who is not capable of making decisions in personal or business matters and is dangerous or is in danger. Some have interpreted this principle to mean that legal intervention may be

¹¹ *Id.*

¹² See Hall, supra No. 2, at 9-10 and "Overcoming Barriers to Protective Services for the Aged: Conference Proceedings" (Hall and Mathiasen, eds. 1968). NCOA had also held two workshops in 1965 at the National Conference on Social Welfare, the proceedings of which are reported in Lindner, "A Crucial Issue in Social Work Practice, Protective Services for Older People" (1965).

¹³ Senate Special Committee on Aging, "Mental Health Care and the Elderly: Shortcomings in Public Policy," 92d Cong., 1st sess. 70 (1971).

¹⁴ See Butler, "Why Survive? Being Old in America," 240-246 (1975); U.S. Department of Health, Education, and Welfare, *Foster Family Care for the Aged* (1965).

¹⁵ See McKeany and T. Taylor, *Public Guardians and Welfare Services in California* (University of California School of Social Welfare, 1970).

¹⁶ For a report, see Eisenberg, Gottesman and Ishizaki, *Protective Services for Adults: A Policy for Pennsylvania* (1975).

¹⁷ See Regan, supra No. 1.

¹⁸ See chapter 1 of this report, No. 52.

¹⁹ See chapter 1 of this report for a discussion of the Older Americans Act of 1965, and title XX.

²⁰ Hall, supra No. 2; Horowitz, supra No. 7; Blenkner, supra No. 3; Report, supra No. 8; Chicago, supra No. 9. For bibliographies of other works see Blenkner, supra No. 3 at 186, or Hall supra No. 2 at 117-119.

²¹ For a discussion of the definition of protective services, see Horowitz, supra No. 7 at 3-5, Eisenberg, Gottesman, and Ishizaki, supra No. 16, at 7-11.

invoked when a person refuses services deemed by others to be necessary to the safety of the beneficiary or the public.

SPONSORS OF PROTECTIVE PROGRAMS

The sponsors and operators of protective services programs include private voluntary organizations, a community welfare council, city welfare departments, State and local social service agencies, health departments, and a local interagency committee. In some States, such as Wisconsin and North Carolina, the projects, were authorized by State legislatures.²² Many programs, though, had to struggle in the early years for community recognition and acceptance.

As noted elsewhere, funds have come from the National Institute of Mental Health, Social Security Administration, the Administration on Aging, and the Social and Rehabilitative Service of the Department of Health, Education, and Welfare, State and local governments, private sources, and, most recently, title XX of the Social Security Act.

COMMON CHARACTERISTICS OF PROTECTIVE SERVICES

Despite their diversity, protective services projects through years of experience have several common denominators: the kinds of clients, certain principles of practice, and the need for interdisciplinary cooperation among law, social work, medicine, and psychiatry.

WHO ARE THE CLIENTS?

Although each client is unique, they share many similarities and a pattern has emerged of typical protective services beneficiaries. Originally, most agencies decided that a client had to be above a certain age (usually 60 years or more) to be eligible; live outside an institution; be mentally incapable of taking care of self or property to a degree that posed danger to the person or others; and without anyone able and willing to provide needed help.

Aside from these agency requirements, statistics gathered by the agencies brought out other descriptive information.²³ More clients were female than might be expected in the general population at that age; more were white. Most were alone, either never married, divorced, or surviving spouses. Most were 75 years old or older. Typical incomes ran from \$100 to \$250 a month, although some very serious cases involved the well-to-do. Not many had more than 8 to 12 years of school, although a few in severe circumstances were highly educated. The authors of the Benjamin Rose Institute study described their most exceptionally wretched clients as characterized by "anomie, alienation, and despair."²⁴

There is, however, a danger in typifying clients. Each is an individual: The woman with 50 cats, the lady with the stuffed shopping bag, the man who locked himself inside his farmhouse, the man who

²² See chapter 1 of this report, No. 52.

²³ For lengthy descriptions of various client populations see Blenkner, *supra* No. 3, at 33-57; Horowitz, *supra* No. 7, at 49-63; Chicago, *supra* No. 9, at 79-94; Hall, *supra* No. 2, at 62-69.

²⁴ Blenkner, *supra* No. 3, at 179.

stored old newspapers, and the lady with 15 starving pets. Such variety in itself suggests the complexity and frustrations of the social worker's task.²⁵

PRINCIPLES OF PRACTICE

Of the programs studied, certain basic operating principles were identified which, on paper at least, guide the social worker delivering protective services to an elderly client. Hall and Mathiasen identify them as: client participation in decisionmaking, insofar as possible; maintenance of the client in a noninstitutional setting, insofar as possible; assumption of surrogate role by the social worker only if a client is incapable of making a decision, lacks a friend or relative to do so, or refuses help to prevent danger to himself or others; and restoration of decisionmaking power as soon as possible.²⁶

Most protective services programs also have certain common procedures. They attempt to assist clients by providing or securing a range of services tailored to individual needs.²⁷ These services are usually classified as preventive, supportive, or surrogate (meaning use of a substitute or guardian).²⁸ They include medical evaluation, financial management and assistance, psychiatric evaluation and consultation, legal consultation and services, homemaker or household aid, nursing and other health aid in the home, social services (transportation, friendly visiting, shopping, escorts, and others), protective placement, and judiciary and guardianship services.²⁹

This range of services provides flexibility for a program to meet different needs. In theory, the client, as much as possible, is drawn into sharing decisions about these services.³⁰ A program director favors surrogate services only when a client is unable to participate (that is, guardianship, fiduciary services, protective placement).³¹ Legally, surrogate functions should be authorized by a court; in practice, a social worker may make the decision and assume responsibility.³²

INTERDISCIPLINARY APPROACH

The necessity for a constellation of services, including medical, psychiatric, social, and legal accounts for another basic similarity of

²⁵ Blenkner states: "Rarely located or interviewed in surveys, the protective is, for all practical purposes, a sociological unknown, about whom there are few epidemiological data, no well-developed theories, and little research. Yet, the concern such persons generate, collectively and singly, is enormous, and helping professionals are constantly called upon to make decisions that impinge on life and liberty of older protectives," supra No. 3, at 157.

²⁶ Hall, supra No. 2, at 12-13.

²⁷ Horowitz, supra No. 7, at 3, 12. It is important to remember that service delivery is the key to almost all protective service programs. This is the result of two basic assumptions of almost all programs: First, that there is a great need for protective services in the community, and second, that the effect of services on clients will be positive.

²⁸ This was agreed on very early at the 1963 NCOA conference and appears to remain unquestioned. Supra No. 4. See Horowitz, supra No. 7, at 3.

²⁹ For a lengthy discussion of various service components of protective service programs, see Wasser, "Protective Casework Practice with Older People," 54-83 (1974), Blenkner, supra No. 3, at 14; Chicago, supra No. 3, at 25-41, 79-115; Hall, supra No. 2, at 79-97. Because of the range of services, all programs stressed the vital importance of both good relationships with all existing community resources and an interdisciplinary approach to delivery of services.

³⁰ Horowitz, supra No. 7, at 64.

³¹ See infra text accompanying footnotes 37-66.

³² Hall, supra No. 2, at 48, 86, 87.

most protective programs.³³ While many specialists contribute to a program in a cooperative and complementary plan, primary responsibility for the client's welfare falls upon the social worker,³⁴ who must locate needed resources, see that they are provided in an economic, systematic, and timely order, and cultivate the support of many different agencies. Methods of encouraging a coordinated response by the various resources include the following: multidisciplinary advisory boards; use of consultants; a multidisciplinary advisory committee on legal intervention; a requirement for coordination under State law; and the use of a local social services director with responsibility for the entire program.³⁵ The task of coordinating diverse and sometimes jealous specialists can be difficult. But most project directors agree that a system of coordinated resources is essential to effective protective services.³⁶

USE OF LEGAL INTERVENTION

As noted above, legal intervention³⁷ may take the form of civil commitment, guardianship, conservatorship (guardianship of property), power of attorney, protective placement, or court-ordered services under newer protective service laws. An examination of the use of legal intervention by social work programs may explain the need for reform of protective service laws.

REASONS FOR LEGAL INTERVENTION

Why have protective services programs used legal intervention? Consider the frustration of trying to help someone who is incompetent but resistant. The client may have severe mental disabilities, but neither desires nor seeks assistance or actively resists it. This condition may lead ironically to a desperate need for the very help that had been refused.³⁸ A client may have become dangerous or endangered, in need of emergency action to prevent further suffering, or a crisis.³⁹ Moreover, many clients fear social workers: they feel "threatened by the approach of persons representing power and authority * * * power and authority that they suspect[ed] would be used to curtail what little freedom of action and choice they still had left."⁴⁰

To overcome these difficulties, the projects began to intervene timidly at first. Social workers gradually accepted the need to assume author-

³³ Blenkner reports: "Although the general practitioner, public health nurse, social worker, lawyer, juror, financial manager, and psychiatrist, among others, occasionally meet on the common ground of a protective situation, there is an immense fog concerning responsibility and cooperation among professions. Since the social problem of the older protective is most likely to be defined by experts from these disciplines, the lack of communication is all the more disturbing. The mere presence of a number of professions, each unsure of its responsibilities, increases the chances of the protective client suffering from the malintegration of this aspect of the social system." *Supra* No. 3, at 154. See also Horowitz, *supra* No. 7, at 8-12, and Chicago, *supra* No. 9, at 57.

³⁴ Blenkner, *supra* No. 3, at 5; Horowitz, *supra* No. 7, at 8-12.

³⁵ See Hall, *supra* No. 2, at 113.

³⁶ Chicago, *supra* No. 9, at 2-57.

³⁷ See Hall, *supra* No. 2, at 84.

³⁸ Blenkner, *supra* No. 3, at 64-71; Horowitz, *supra* No. 7, at 62.

³⁹ *Id.*

⁴⁰ Blenkner, *supra* No. 3, at 26.

ity in certain cases to deliver services or simply to gain entry to a home. Their reasoning is described in a report on the San Diego program.⁴¹ At first, the worker was guided by two premises: a belief in the importance of client self-determination and a belief in the ability of the social work profession to mobilize community resources to assist a client. Gradually, the worker realized that some endangered persons, who could not take care of themselves, were unable to, or refused to, consent to needed aid. Only intervention against the client's will would offset the danger. At this point, it was the worker's turn to come to a serious, difficult decision, often without concrete guidelines.

Hall and Mathiasen dwell on this issue in their "Guide to Development of Protective Services for Older People." Referring to "Some Ethical and Procedural Problems in Providing Protective Services: Preliminary Service Study," they say:

There are two sets of criteria to be considered: what is legally possible and what can be done without betraying the standards and ethics of the social work profession. Acute and constant awareness of the civil and personal rights of the individual and a dedication to preserving these must be the base from which to start. Nevertheless, if seriously impaired persons are to be given protection, some infringements of their rights of self-determination are unavoidable, and the social worker has to make peace with himself in doing what seems essential to prevent complete deterioration. It is a matter of careful judgment and not to be taken lightly to decide at what point authoritative intervention is necessary.⁴²

And from the Benjamin Rose Institute: "Final Report Protective Services for Older People":

In essence, guardianship * * * by an agency * * * represented the legal validation of many services that the client had been leaning on the agency to perform. With the involuntary client, guardianship was obtained to assure that a decision to which he was opposed could be acted upon in some crucial area of his life, usually having to do with where he was to live or be cared for.⁴³

In essence, guardianship was a device of the agency to achieve the same end sought earlier on a voluntary basis.⁴⁴ Regarded as a drastic step, a last resort,⁴⁵ guardianship was felt to be justified on the theory that it protected the welfare of the client or the community or both.

FREQUENCY OF INTERVENTION

Being a standard component of protective service, how much has legal intervention been used? Most programs report that legal intervention was necessary for from 8 to 15 percent of the clients.⁴⁶ Workers

⁴¹ Hall, *supra* No. 2, at 48-49.

⁴² Hall, *supra* No. 2, at 49.

⁴³ Hall, *supra* No. 2, at 76.

⁴⁴ Blenkner, *supra* No. 3, at 76.

⁴⁵ *Id.*

⁴⁶ See Hall, *supra* No. 2, at 84-89; Blenkner, *supra* No. 3, at 87; Chicago, *supra* No. 9, at 29.

with greater experience and skill were more willing to use intervention and to employ it early.⁴⁷ They considered legal help to be the service most urgently needed when intervention appeared necessary.⁴⁸ Almost without exception, project directors concluded that the need for legal intervention was directly tied to the severity of the client's disability: the more serious the condition, the more probable the prospect of intervention.⁴⁹ They also reported some relation between the need for intervention and the amount of the client's assets or property.

Significantly, in certain situations where legal intervention might have been appropriate, it was not used. Guardianship and legal services were often the least employed of all the services in a program.⁵⁰ Social workers were simply reluctant to invoke the law, or they were unfamiliar with its use.⁵¹ They felt conventional voluntary social work procedures were superior.⁵² Agencies were reluctant to submit guardianship petitions or act as guardians.⁵³ Legal services, guardians, and conservators were often hard to find.⁵⁴ Medical or psychiatric evaluations necessary for court petitions were not readily obtained.⁵⁵ Intervention often produced a negative reaction in the client and almost always a loss of social esteem.⁵⁶ Perhaps the best argument against intervention was that guardianship did nothing constructive except to establish control over the client's finances and allow consent for medical treatment.⁵⁷

EFFECTIVENESS OF INTERVENTION

When guardians were used, the action was intended often as a means to an end, presumably the client's well-being. But the projects report conflicting results at best.

A positive gain is that, with time and with the establishment of good relations with the social worker, many involuntary clients became willing participants in major decisions about their lives. Although intervention sometimes enabled a client near the end of life to secure certain necessities and greatly desired benefits, guardianship brought even greater benefits to others⁵⁸: The social worker was relieved of frustration and the guilt of leaving the client untended and in danger; the community, neighbors, and family were protected from expectation of injury and, perhaps unnecessarily, from the client's conduct, which might appear unpleasant or eccentric.

There is evidence that negative as well as positive results occur from intervention, and also from protective services. The presumed beneficiary was often resentful and further alienated.⁵⁹ The client suf-

⁴⁷ Hall, *supra* No. 2, at 85-86.

⁴⁸ Hall, *supra* No. 2, at 98; Wasser *supra* No. 29, at 70.

⁴⁹ Chicago, *supra* No. 9, at 29; Hall, *supra* No. 2, at 80-83. Hall notes that in the Houston project, 73 percent of those clients classified as "dangerously incompetent" needed legal intervention.

⁵⁰ Blenkner, *supra* No. 3, at 87; Wasser, *supra* No. 29, at 79; Chicago, *supra* No. 9, at 37, 82; Horowitz, *supra* No. 7, at 46.

⁵¹ Hall, *supra* No. 2, at 84; Chicago, *supra* No. 9, at 88, 82.

⁵² Hall, *supra* No. 2, at 84.

⁵³ Blenkner, *supra* No. 3, at 87; Chicago, *supra* No. 9, at 37.

⁵⁴ Horowitz, *supra* No. 7, at 47; Hall, *supra* No. 2, at 80-83; Chicago, *supra* No. 9, at 33, 37, 97.

⁵⁵ Chicago, *supra* No. 9, at 37.

⁵⁶ Blenkner, *supra* No. 3, at 87, 160-162.

⁵⁷ Blenkner, *supra* No. 3, at 87.

⁵⁸ Hall, *supra* No. 2, at 13.

⁵⁹ Wasser, *supra* No. 29, at 79.

ferred not only the stigma of becoming a ward of the court but also a loss of liberty, civil rights, and pride.⁶⁰ Most seriously, legal intervention frequently led to confinement in a mental or other institution,⁶¹ with resultant hastening of death.⁶² Quite often the costs of intervention far exceeded the benefits.⁶³

A. CONSENSUS

Project directors generally agreed on certain points in dealing with the law. First, almost all felt the option to pursue legal intervention was necessary at times. In that event, a clear understanding of the law was essential, as were good relations with the probate courts and the availability of legal counsel for the client.⁶⁴ Second, medical, psychiatric, legal, and social work consultations were necessary and desirable before legal intervention.⁶⁵ Third, statutory changes were urgently needed in practically every State.⁶⁶ Most State law was confusing and provided insufficient safeguards in protecting individual rights. The ease of establishing a guardianship was often alarming, the legal consequences drastic. The law was typically inflexible and provided little room for maneuvers.

SUMMARY OF FINDINGS OF PROGRAMS

Protective services for the elderly have been the social workers' response to a major challenge. The reports yield the following findings: Millions of mentally and physically disabled elderly wait in need of many different forms of assistance.

There is an increasing need for widespread, community-based services of good quality and specialized protective services.

The need should be met by a coordinated system of protective services supplied by medical, legal, psychiatric, and social work professionals and specialists.

Clients should be granted as much responsibility as possible for decisions about their lives. The social worker should make decisions only when the client is unable to do so.

Intervention in the lives of clients by a protective services program seems to be accepted when a suitable outcome is not possible under the client's self-direction. This intervention, to the extent practical, should be attempted only with the client's permission.

At times, the client is unwilling or, at best, noncommittal. If the client appears to present a danger to self or others, the social worker

⁶⁰ *Id.*

⁶¹ Horowitz, *supra* No. 7, at 55; Blenkner, *supra* No. 3, at 138, 181; Chicago, *supra* No. 9, at 143.

⁶² Blenkner, *supra* No. 3, at 138. For an opinion seeking to disprove Blenkner's findings, see Berger, Pillavin, "The Effectiveness of Casework: A Research Note," 21 *Social Work* No. 3, at 205-207 (1976).

⁶³ Blenkner offers two insights into this problem. First, she proffers a general conclusion "that the helper would do well to adhere to the principle of minimal intervention, introducing change slowly and only in the amount necessary to make the client more comfortable and acceptable to his neighbors," *supra* No. 3 at 184. Second, quoting from Trilling, " * * * we must beware of the dangers which lie in our most generous wishes. Some paradox of our nature leads us, when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion." *Id.* at 215.

⁶⁴ Hall, *supra* No. 2, at 39, 105, 113.

⁶⁵ Blenkner, *supra* No. 3, at 87.

⁶⁶ Hall, *supra* No. 2, at 54, 110.

should provide involuntary protection, preferably with a court order but without legal authority if necessary.

Whenever possible, placement of elderly clients in institutions should be avoided, although intervention often leads to commitment and a truncated future for the client.

Despite many difficulties, protective services for the elderly are usually beneficial or could be. For this reason, they are preferable to allowing an elderly person to deteriorate in isolation, to become alienated, and to die alone and unattended.

UNANSWERED QUESTIONS

Although the social work profession has done much to meet the needs of the mentally and physically disabled elderly, this report would be incomplete without a discussion of conflicts inherent in protective services law.

First, whom do protective services laws protect? Considering the effects of institutionalization and the death rates following involuntary intervention, do these laws truly protect the client? Is intervention more often intended to protect the sensibilities of a public offended by the sight, smell, or presence of the older person?⁶⁷ Is it done to accommodate the social worker who cannot bear to leave the older person alone?⁶⁸

Second, does intervention do more harm than good for the client? On the negative side is the tendency toward institutionalization and its consequences, including loss of liberty and self-esteem.⁶⁹ On the positive side of the ledger, the quality of the person's life can improve at least in the eyes of society if not in the eyes of the client.⁷⁰ The *parens patriae* concept has set a tradition of paternal care for the mentally incompetent.

Third, if legal intervention is to be permitted, at what point should it be considered? When the older person's best interests merit action? When the person is deemed dangerous to others? Or when the person is deemed to be dangerous to self? These questions are complicated and difficult.

Fourth, who should determine the criteria for intervention? The law? The social worker on the case? The family? The person in need? And at what point should legal intervention be invoked? At the first sign of incompetency? When the person refuses services? When force is needed in order to enter a person's home for investigation?

RELATIONSHIP OF SOCIAL WORK EXPERIENCE TO MODEL LAWS

The model laws appended to this report are meant to respond to the questions above, based as they are on social work experience. The relationship between these laws and this experience is substantial.

First, the laws provide a clearly defined framework of legal options desired as guidelines by social workers. To meet the need for flexibility, the laws admit various arrangements based on separate standards

⁶⁷ See *supra* No. 63.

⁶⁸ See *Bienkner, supra* No. 3, at 182.

⁶⁹ See *supra* No. 60, 61, 62.

⁷⁰ See *Hall, supra* No. 2, at 13.

for clients of varying degrees of disability. In addition, the court is given power to fashion temporary and short-term accommodations as well as to authorize one-time transactions or services less than full guardianship.

The emphasis on limited forms of intervention, while safeguarding a strict test of mental incompetency, is expected to diminish the frequency of inappropriate commitment and guardianship. A social worker who might otherwise have to petition for commitment of a client will have the option of placing the client protectively in a foster home or nursing home instead. Rather than appoint a guardian, the court may order a one-time 72-hour emergency intervention to prevent imminent damage to a mental incompetent without depriving the person totally and permanently of basic rights.

A second principle of law supported by social work experience is the requirement to seek the least restrictive alternative. This principle obliges the court, in ordering intervention, not only to choose the least restrictive alternative of available treatment but also to state specific reasons for rejecting options that are less restrictive than that ordered. This requirement rests legally on the constitutional right to personal freedom. Empirical findings by social workers reveal that the more restrictive forms of treatment, especially commitment, are frequently more destructive than beneficial.

A third recommendation related to social work experience is the provision for geriatric evaluation screening, a diagnostic process whereby an interdisciplinary team of professionals determines the client's condition and needs in all aspects. On this basis, the team recommends to the court the most appropriate treatment.

This legislative proposal is based upon well-documented findings that protective services need to be delivered by a combination of legal, medical, psychiatric and social work resources. The evaluation procedure also provides the occasion for seeking out the least restrictive alternatives appropriate for treatment.

A fourth concern is to offset the drastic effect of guardianship on the client's liberty. The proposed laws have attempted to lighten this blow to the client by providing for mild and temporary forms of intervention and the loss of only those civil rights specified in the court order.

Fifth and most important, the laws proposed are based firmly on a long-standing principle that the elderly have a right to self-determination.

The model laws provide that neither the social worker nor the court can make a decision for a mentally competent person, no matter how wretched the circumstances. The law provides a guaranty of due process to insure this self-determination. Moreover, the law specifies that a refusal to consent to services does not constitute a lack of capacity to consent or evidence of incompetency. For the person mentally incapable of consent, the law provides for the possibility of legal intervention, but only by due process through proceedings protecting individual rights and liberties. Maximal self-determination is reinforced by the requirement that intervention ordered by the court must be the least restrictive consistent with the client's needs.

Chapter 3

LEGAL ASPECTS OF PROTECTIVE SERVICES FOR THE ELDERLY

Mrs. D., 74, a former teacher, smiles and greets visitors graciously, but she isn't able to find her way about her own home or to follow the thread of a conversation. She depends on her husband, 82, to prepare her meals and do laundry. He worries about what will happen to her if, as likely, she survives him.

Mrs. K., 80, a widow, suffered so from arthritis and heart trouble that she had to leave her cherished home and garden to live in an apartment where she would have less housework and no need for a car. As her eyes are dim and her hearing blocked, she no longer enjoys reading or music. Few friends call. She is apathetic and depressed.

In the framing of protective service laws, it is conceivable that the legislators and judges have overlooked the needs of elderly people like these gentle old ladies. For both, the time may be near when families, neighbors, or friends will no longer be able or willing to help. Eventually, someone will call a social service agency. The next likely step will be legal protection. But under present law, protective services frequently do not protect.

Protective service law is a two-headed creature, part Santa Claus and part ogre. The Federal and State laws have provided public funding for a variety of services which ease the burden of age, but State laws in general also permit a designated caretaker to intervene in an elderly person's affairs without the client's consent. Both the Senate¹ and the House of Representatives² are studying ways to improve and expand services for the aged. State governments are working on plans to do a better job of putting together, in a single system, the variety of social and health services, so that a client may have to deal with no more than one representative of the law. To date, though, not enough attention has been given to changes in the law, changes needed to adjust supportive and managerial services suitable to the needs of the individual elderly person.

¹ See generally, "Developments in Aging," published annually by the Senate Special Committee on Aging, for summaries of the committee's findings in these areas and references to other committee publications on the same topics. Subcommittee hearings on "Trends in Long-Term Care" and "Barriers to Health Care for Older Americans" are also relevant.

The specific problems of the elderly with mental disabilities are discussed in joint hearings on "Mental Health and the Elderly" before the Subcommittee on Long-Term Care and the Subcommittee on Health of the Elderly of the Senate Special Committee on Aging," 94th Cong., 1st sess. (1975) [hereinafter cited as Hearings]. See also Senate Special Committee on Aging, *Mental Health Care and the Elderly: Shortcomings in Public Policy*, 92d Cong., 1st sess. (committee print 1971).

² Subcommittee on Health and Long-Term Care of the House Select Committee on Aging, *New Perspectives in Health Care for Older Americans*, 94th Cong., 2d sess. (committee print 1976).

To safeguard both the dependent person's rights and society's interests, the law generally requires that a caretaker obtain from the elderly person authorization to perform certain services. If a caretaker helps only with specific services, consent of the client is sufficient. Simple consent is not enough, however, if a helper, acting in behalf of the client, must do something that affects the client's legal rights or duties, such as selling a property or filing a tax return. In that event, the helper must seek delegation of authority from the elderly person according to standards and procedures established by law.

When an aged person personally desires a caretaker and willingly names some one to provide such help, the task of obtaining court approval of the authorization is easier but by no means simple. Legal machinery for approving a caretaker may be cumbersome and expensive. Also, the arrangement finally approved may be inappropriate.

If an elderly person is unable or unwilling to delegate legal authority to someone to help in business or legal affairs, the procedures for obtaining court authority may prove so complex that the prospective caretaker may not even seek it. In that event, the helper may decide either to act illegally or not at all.

The results of these legal hurdles are predictable. Clients suffer because proper help is not provided. The next stage likely is placement in a nursing home or mental hospital, with loss of freedom and hope. Death may follow quickly.

Many tragedies might not occur if legal processes were geared to the task of obtaining support and services for elderly clients before they are forced from their homes.

Various legal procedures available to provide care for the elderly are described and analyzed in this document. Then the working paper discusses proposals for new and revised methods to achieve this goal flexibly, economically, and justly.³

HISTORICAL PERSPECTIVE

Under common law, Government traditionally assumed the power to authorize someone to intervene in the lives of adults considered to be mentally disabled.

The principle, as expressed in English law roughly 700 years ago, was that the king, as father of the country (*parens patriae*) was responsible for protection and care of the person and property of the mentally incapacitated.⁴ The English king exercised this power through the chancellor, who was authorized, upon petition, to issue orders for a judge to inquire whether the subject was in fact mentally incompetent and also the owner of assets likely to be dissipated.

If, as a result of the inquiry, the person was found by a jury of peers to be incompetent, the chancellor would commit the ward to the care of a friend, who would receive an allowance from the assets to pay costs of services and care. Responsibility for managing the assets typically was assigned to another person, the ward's heir. The heir had to account to the court of chancery, to the incompetent (if

³ For a fuller discussion of these issues, see Regan, "Protective Services for the Elderly: Civil Commitment, Guardianship and Alternatives," 13 *Wm. & Mary, L. Rev.* 569 (1972).

⁴ The legal basis for this principle was the statute "De Praerogative Regis" 17 Edw. 2. c.9 (1324). See generally American Bar Foundation, "The Mentally Disabled and the Law" 1250 (rev. ed. 1971).

recovered), or to the incompetent's caretaker, according to a gradually evolving set of customs, rules, and standards.

This paternalistic practice was the parent of today's proceedings for appointing and holding to account a guardian or conservator.

It is noteworthy that the chancellor opened an inquiry only if the alleged incompetent had assets sufficient to bear the expense, since the purpose was only to insure prudent administration of the incompetent's affairs. The law made no provision for care or custody of the poor: they were left to their own resources or to the good will of others.

In colonial America, the same policy prevailed.⁵ Persons lacking both assets and family drifted at the mercy of fortune, singly or in company with others. Instead of providing for their needs, the ethic of the period, which equated labor with virtue, produced laws that compelled them to work. Those who could not work were obliged to beg.

The violent mentally ill were given more public attention than those who were merely helpless. People deemed too dangerous to be at large were confined by law, in what was to become the civil commitment process, for the duration of the dangerous condition.⁶ In the company of criminals and paupers, the insane were shut up in a public jail, workhouse, poor house, or a private cage, pen, or strong room. Such confinement increased during the second quarter of the 18th century as the population increased. Newly formed communities dealt more impersonally with the unfortunate than did rural areas.⁷

The scandalous treatment of the mentally disordered inspired a movement in the latter half of the 18th century that ultimately produced State mental hospitals.⁸ Procedures for committing a person to these institutions were frighteningly simple. A few words scribbled by a physician on a piece of paper, as "Jas Sproul is a proper person for the Pennsylvania Hospital," were all that were necessary.⁹ By contrast, to declare that same person incompetent to administer property required a petition to the court for a writ, adequate notice, jury trial, or appointment of a guardian.

As the number of State hospitals multiplied, so did the need for laws defining commitment procedures that were humane and just. The confinement of Josiah Oakes in particular excited public attention and led to widely followed guidelines for the detention of mental patients. Oakes, an elderly and ordinarily stable man, had become engaged to a young woman of unsavory character a few days after the death of his wife. His family had him committed to the Massachusetts asylum on the allegation that he suffered from hallucinations and displayed unsoundness of mind in conducting his business affairs. In ordering his release, the Massachusetts court declared:

The right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others. * * * And the necessity which

⁵ *Id.* at 4.

⁶ A. Deutsch, "*The Mentally Ill in America*," 419-20 (second edition 1949).

⁷ *Id.* at 51.

⁸ *Id.* at 59, 71.

⁹ Deutsch, *supra* No. 6, at 62.

creates the law, creates the limitation of the law. The question must then arise in each particular case whether a patient's own safety, or that of others, requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation.¹⁰

This decision signaled a subtle but significant expansion of the law's authority to intervene in the lives of the mentally disabled. No longer was the State intervening merely as *parens patriae* to protect the incompetent and their property. Instead the State was bringing to bear its police power to protect society from persons whose presence in the community was thought to be a danger to others.

The next major step in this legal evolution came late in the 19th century, when medical figures like Dr. Benjamin Rush and Dr. Isaac Ray, in combination with pioneers in social work like Mrs. E. W. P. Packard and Dorothea Dix, led a popular movement to aid the mentally disabled.¹¹ The stream of State legislation that followed still constitutes much of the basic legal pattern in effect today.

Under this legislation, two primary types of proceedings are civil commitment and guardianship actions.

CIVIL COMMITMENT AND THE STATE MENTAL HOSPITAL

Until recently, the State mental hospital has provided most of the institutional care for the mentally disabled. Although patients may apply for admission voluntarily, many elderly who enter a mental hospital do so unwillingly, admitted under pressure or through the process of civil commitment. In 1969, an estimated 30 percent of the patients in mental hospitals were aged.¹² By 1974, this figure had dropped to 25 percent as a result of a change in policy, discussed later. This discharge of so many aged mental patients tends to confirm the belief that many of the 25 percent still confined, approximately 60,000 persons over age 65, have been admitted to these institutions wrongfully. The villain is the civil commitment process as operated in many States. Its chief defects are that:

(a) statutory criteria used to determine that the elderly require confinement often are vague and inappropriate;

(b) procedures employed to reach this determination may not protect the constitutional rights of the patient sufficiently;

(c) treatment provided to the elderly in mental hospitals frequently is inadequate, absent, or even destructive.

The criteria for civil commitment typically provide that a person may be committed if he:

- * * * (1) is mentally ill, and (2) because of his illness is likely to injure himself or others if allowed to remain at liberty, or (3) is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight

¹⁰ Matter of Josiah Oakes, 3 Law Rep. 123 (1845-46).

¹¹ American Bar Foundation, *supra* No. 4, at 7.

¹² Hearings, *supra* No. 1, at 2.

or capacity to make responsible decisions with respect to his hospitalization.¹³

These criteria in theory require two findings: (1) that the patient has a mental disorder as diagnosed by a physician and (2) that the mental disorder is of a nature that makes the person either dangerous or in need of treatment or both.¹⁴

This requirement presents a tall order to the court. Although the court must find that the alleged mental illness or disorder is actual, mental illness cannot always be precisely defined or readily diagnosed. Many patients may behave erratically without any apparent physical cause.¹⁵ Moreover, the range of mental illness extends from "the massive functional inhibition characteristic of one form of catatonic schizophrenia to those seemingly slight aberrancies associated with an emotionally unstable personality, but which are so close to conduct in which we all engage as to define the entire continuum involved."¹⁶

Often the only symptom of mental illness that justifies a diagnosis is the patient's conduct. Inevitably, the clinician's personal judgments concerning the desirability of certain conduct are reflected in the diagnosis of mental illness.¹⁷

Accurate diagnosis of mental illness is especially difficult in elderly patients. The typical basis for committing the elderly has been a finding that the person suffers from "organic brain syndrome." (Syndrome means a set of typical symptoms. It does not refer to specific physical damage.) This condition is defined as the "basic mental condition resulting from diffuse impairment of brain tissue function from whatever cause."¹⁸ (Possibly brain damage which justifies this diagnosis may be revealed some day by a scanner or surgery, but it is not necessarily revealed by electronic instruments which chart brain waves.)

If the physician believes that the syndrome is temporary, it is called acute; the underlying brain damage, if any, is assumed to be reversible.¹⁹ If the physician believes that the syndrome is likely to persist, the patient's condition is called chronic and is believed irreversible. Both acute and chronic conditions may be present in one person to the degree that they can be diagnosed by such symptoms as loss of ability to identify surroundings, loss of memory, and weakened intellectual functions;²⁰ that is to say, the physician may regard some symptoms as temporary and others as chronic.

Although some forms of chronic brain damage can be diagnosed with confidence, it is unfortunate, from a legal point of view, that the diagnostician does not seem able to tell clearly the difference between the symptoms of chronic brain syndrome and signs of advanced age

¹³ National Institute of Mental Health, Draft Act for the Commitment of the Mentally Ill § 9(g) Public Health Service Pub. No. 51, (1951).

¹⁴ Wehofer, "The Definition of Mental Illness," 21 Ohio St. L. J. 1 (1960).

¹⁵ *Id.* at 4.

¹⁶ American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders" (2 ed. 1968).

¹⁷ Livermore, Malmquist & Meehl, "On the Justifications for Civil Commitment," 117 U. Pa. L. Rev. 75, 80 (1968); Leifer, "The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Skeptical Inquiry into the Courtroom Functions of Psychiatrists," 14 Syracuse L. Rev. 564, 570 (1963).

¹⁸ Wang, "Organic Brain Syndromes," in Behavior and Adaptation in Late Life 263 (Busse & Pfeifer eds. 1969).

¹⁹ *Id.* at 267.

²⁰ Group for the Advancement of Psychiatry, Report No. 59, "Psychiatry and the Aged: An Introductory Approach" 550 (1965).

that occur commonly in conduct and attitudes in the final years of the life span.²¹

Organic brain syndrome results in a progressive loss of abilities.²² Persons so affected tire easily as the mind and body wear. Their mental resources diminish, energy decreases, responsiveness declines, initiative and creative imagination wane. They may lose partial or complete control of excretory functions.

At the same time, such changes arouse feelings of frustration and helplessness, quite as deafness creates suspicion, and blindness, fear, and anxiety. The concurrent loss of friends and relatives and perhaps rejection by children generate loneliness. These reactions may in turn lead to hostility and to self-imposed isolation. The usual mild symptoms of old age may change gradually and almost imperceptibly to successively more serious conditions, until they reach the extreme of senile dementia.

There may be no clear-cut neurological signs of this process. The dividing line between old age and mental disease is often drawn by the diagnostician's judgment. This judgment may reflect the observed facts less than the diagnostician's own training, experience, and attitudes or even the subtle pressures on the physician who is asked by a petitioner to help in committing an elderly person.²³ Such influences may lead to a diagnosis of mental illness on the basis of behavior that is abnormal only in the eyes of those who favor commitment.

For this reason, the diagnostician's opinion, in theory, should be no more than evidence to be weighed by the court with other evidence in assessing the person's likely behavior and need for care and treatment.

In actual practice, the psychiatrist's clinical judgment is adopted almost automatically by the court as a conclusive finding that the person is mentally ill or incompetent and in need of hospitalization. The court rarely seeks to evaluate independently the psychiatrist's judgments about what is socially acceptable or normal behavior.²⁴ Judges and juries both abdicate to the psychiatrist their responsibility to decide what kinds of behavior are socially tolerable and consistent with individual freedom.

Other criteria for civil commitment also are open to challenge. The criterion, for example, that the person is dangerous to himself or others implies an ability to predict the person's future conduct, uncertain though it may be.²⁵ If the client's acts merely offend or disturb others, should these acts be ruled dangerous? On what basis are certain classes of mentally ill persons considered more likely to commit dangerous acts than others? What degree of probability is sufficient to label a person dangerous?

²¹ Department of Health, Education and Welfare, "Working with Older People," Vol. II—*"Biological, Psychological and Sociological Aspects of Aging,"* 2 (1970).

²² Noyes & Kolb, "Modern Clinical Psychiatry" 244 (sixth edition 1962).

²³ Wang, *supra* No. 18, at 270.

²⁴ Kaplan, Civil Commitment "As You Like It," 49 Boston U. L. Rev. 14 (1969); Leifer, *supra* No. 17, at 52; Swartz, "Mental Disease": The Groundwork for Legal Analysis and Legislative Action, 111 U. Pa. L. Rev. 389 (1963); Szasz, Civil Liberties and the Mentally Ill, 9 Clev.—Mar. L. Rev. 399 (1960); Ross, Commitment of the Mentally Ill: Problems of Law and Policy, 57 Mich. L. Rev. 945, 961-63 (1959).

²⁵ Dershowitz, The Law of Dangerousness: Some Fictions about Predictions, 23 J. Legal Ed. 24 (1970); Livermore, *supra* No. 17, at 81-82, 84.

It has been noted that the likelihood of crime within a group of individuals with any particular psychosis is no greater than that to be expected in a cross-section of a normal community.²⁶ It is ironic that a criminal, who by definition committed a prior criminal act, cannot be deprived of liberty on the basis of predictions about future conduct, yet a psychiatrist's prediction that a mentally ill person may commit a dangerous act is sufficient to justify the patient's indefinite confinement.²⁷ Realistically, to commit a person as a future danger is to operate a system of preventive detention.²⁸

The criterion that the client needs care or treatment is as dubious a reason for committing the elderly as the others. Many States which authorize commitment on this ground do not require that the court also find that the client is incapable of making his own treatment decisions.²⁹ The result is that courts substitute their own opinion as to the best course of action above that of the individual whose fate is at stake, despite his ability to decide for himself.

The error is compounded by the widespread confusion between "need for hospitalization" and "incompetent."³⁰ The former means simply that a person is mentally ill and requires institutional care.³¹ Incompetency has a more drastic ring, implying that a person is incapable of making significant personal or business decisions and leading to a suspension of civil and political rights. Many mentally ill persons are quite capable of conducting their own affairs while undergoing treatment. Yet, because of the assumption that the hospitalized are also incompetent, many elderly in mental hospitals have been deprived of their rights and stigmatized as "of unsound mind."³²

COMMITMENT PROCEDURE

The law has never made up its mind whether civil commitment proceedings should follow a criminal or therapeutic model. On the one hand, the criminal trial seems a useful model because personal rights may be taken away. As a result, notice, hearing, right to counsel, and a jury trial are sometimes required.³³ Yet the benign purpose of commitment and the lack of illegal conduct by the prospective patient indicate a "civil" label for the proceeding is appropriate.

This ambiguity has frequently led to a lack of procedural safeguards.³⁴ The client may not be personally notified that a commitment petition has been filed. If a formal hearing is held, he is often not required to be physically present. Legal counsel for the client is seldom required or appointed if he is poor. A jury trial is rare. The final indignity occurs when the client's own private statements to his doctor or psychiatrist are used against him to justify his hospitalization.

²⁶ Livermore, *supra* No. 17, at 83.

²⁷ Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 *Harv. L. Rev.* 1288, 1290 (1966).

²⁸ Dershowitz, *supra* No. 25, at 47.

²⁹ Comment, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 *Harv. L. Rev.* 1190, 1212 (1974).

³⁰ Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 *Mo. L. Rev.* 215, 232 (1975).

³¹ *Id.* at 233.

³² *Id.* at 234.

³³ American Bar Foundation, *supra* No. 4, at 51-55.

³⁴ *Id.* Comment, *supra* No. 29, at 1271-1316.

THE TREATMENT PROCESS

From a medical perspective, commitment of the elderly to a mental hospital may be fatal. Death rates of aged persons in the first year after admission are significantly higher than for people of the same age in other circumstances.³⁵ Conditions of life in an institution appear to be the main reason for this loss of health and life.³⁶

Admission to an institution triggers deep changes of personality, spirit, and attitude.³⁷ A patient may feel defeated and useless after being separated from familiar personal possessions, accustomed daily patterns, and a well-known environment. Reacting to a strange and apparently hostile new setting, the patient may display bizarre behavior as a defense which leads only to further isolation.

The hospital staff does little to offset this decline. Geriatric patients, classed as "failing status because of age and general debility," receive little more than custodial care. The staff prefers to work with younger patients whose chances of recovery may be better. The life remaining to the aged is an extended process of dying rather than a hopeful experience of treatment and repair.³⁸

To the conscientious physician, abuse of the aged is indefensible.³⁹ For many an elderly person, ordinary emotion may provoke behavior which leads a court to conclude there has been serious brain damage. Persons originally diagnosed as being confused and senile have proved, on second examination, to be no worse than depressed, anxious, or angry, despite a degree of chronic brain syndrome.⁴⁰ Many of their disorders are transient; often they respond quickly to treatment. Even in patients with severe brain damage, some efforts to heal are justified under the principle that all individuals are unique. Each individual's chances for recovery or repair warrant careful examination.⁴¹

Several recent court decisions have indicated that mental patients may have a constitutional right to be treated after commitment. In *O'Connor v. Donaldson*,⁴² the Supreme Court held that a patient civilly committed to a State mental hospital could not be kept in confinement if subsequently found by a jury (a) not to be dangerous to self or others, (b) to be capable of surviving safely if alone, and (c) to be receiving no treatment for the condition of mental illness in the hospital. The court deliberately narrowed this holding to the precise facts. It left unresolved three larger questions:

- (1) Do mentally ill persons, dangerous to themselves or others, have a right to treatment during confinement by the State?
- (2) May a State impose confinement on a nondangerous mental patient for the purpose of treatment?

³⁵ Markson, *The Geriatric House of Death: Hiding the Dying Elderly in a Mental Hospital*, 1 *Aging & Human Development* 37 (1970). See also Berezen & Stotsky, *The Geriatric Patient, in the Practice of Community Mental Health*, 220 (Grunebaum ed. 1970); Markson, *Symposium on the Aging Poor*, 23 *Syracuse L. Rev.* 66 (1972).

³⁶ Leiberhan, *Relationship of Mortality Rates to Entrance to a Home for the Aged*, 16 *Geriatrics* 515 (1961).

³⁷ Barray, *Social Services for the Aged: A Reconsideration*, in *New Thoughts on Old Age*, 207-08 (Kastenbaum ed. 1964).

³⁸ Markson, *supra* note 35, at 42.

³⁹ Goldfarb, *The Psychotherapy of Older Patients*, in *Aging Around the World: Medical and Clinical Aspects of Aging 106-07* (Blumenthal ed. 1962).

⁴⁰ *Id.* at 107.

⁴¹ *Group for the Advancement of Psychiatry*, Report No. 79, "Toward a Public Policy on Mental Health Care of the Elderly 664 (1970)."

⁴² 422 U.S. 563 (1975).

(3) May the State, for purely custodial or caretaking purposes, confine an individual not dangerous to others but not capable of living safely if unattended?

The neglected elderly who were committed as needing treatment but who in fact are not receiving it are covered by the Supreme Court's opinion. The State must either treat or release a patient. But may the elderly person refuse treatment and still obtain release? May the elderly person who is considered dangerous or subject to hazards or exploitation if living alone continue to be confined without treatment? At issue here are two fundamental and at times conflicting rights: individual self-determination and the right of the State to act in the best interests of its citizens.

The temptation to voice opinionated answers to these questions should be resisted. Those who would impose treatment at any price must not ignore the fact that many mentally ill but competent persons have the right to refuse to be treated. Those who would like to empty the institutions of elderly residents must not ignore the fact that freedom in itself is not necessarily a cure. The great need is to develop options other than the mental hospital for supplying care and treatment to the extent needed and desired by the infirm elder person.⁴³

GUARDIANSHIP

Short of civil commitment, another form of legal proceeding is to provide a caretaker for a helpless person. At common law these proceedings aimed to protect the disabled person's property, which was used to pay for the service and for the person's support during the period of incompetency.⁴⁴

The statutory criteria for guardianship and conservatorship need revamping.

Many State laws still reflect this concern with property in their elaborate provisions for the appointment of guardians of the estate, conservators, or committees. A second gradually evolving form of guardianship, directed at the care and welfare of the ward instead of the property, today uses the term guardianship of the person or simply guardianship. The Uniform Probate Code⁴⁵ proposes that the term conservator be used for persons appointed to manage property and business affairs⁴⁶ and that the term guardian be reserved for those whose main responsibility is the care and custody of the person.⁴⁷

CRITERIA

To justify appointment of a conservator or guardian, a court must declare the prospective ward to be incompetent.

An incompetent is defined traditionally as one who, by reason of mental illness, drunkenness, drug addiction, or old age is incapable of self care, of managing business affairs, or of exercising family re-

⁴³ Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 *Columbia L. Rev.* 897 (1975).

⁴⁴ American Bar Foundation, *supra* No. 4, at 2.

⁴⁵ National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code* (1969) [hereinafter cited as *UPC*].

⁴⁶ *UPC* § 1-201(16).

⁴⁷ *UPC* § 5-101(5).

sponsibilities, or as one who is liable to dissipate an estate or become the victim of designing persons.⁴⁸ In reality, the court must therefore affirm two findings: (1) that the person suffers from a particular condition affecting mental capacity, such as mental illness, alcoholism, addiction, or old age, and (2) that certain disabilities result from this condition, such as inability to do business, manage property, or conduct personal affairs.

The laws which require such findings and a declaration of incompetency in order to appoint a caretaker are so insensitive to the real condition of the aged that they appear to be open to challenge on constitutional grounds.

In general, these laws give too much emphasis to mental illness or deficiency in justifying appointment of a guardian. Every State considers mental illness to be grounds for naming a guardian: only about half of the States let the court appoint a guardian for other reasons, that is, for persons disabled by alcoholism, drug addiction, or old age. Only a few permit the court to name a guardian for someone with only a physical disability, such as a paraplegic.⁴⁹

One effect is that anyone, especially an older person, who needs a guardian is popularly assumed to be mentally ill. The aged person with a few of the symptoms of chronic brain syndrome, such as forgetfulness, is more likely to be judged mentally ill and therefore to be declared incompetent.⁵⁰

Although some courts use the condition of old age as sufficient grounds for ruling that the person needs a guardian, this criterion is not much better than the others. Fundamentally, old age refers to a number of birthdays, not to a mental or physical condition implying a loss of capability. The use of similar terms (such as senility, extreme old age, physical and mental weakness on account of old age, or mental infirmities of old age) is equally unsatisfactory. Because old age is listed in the statutes in the context of mental illness or deficiency, alcoholism, and addiction, the courts tend to regard old age as a scientifically distinct disease. Testimony by a physician may unintentionally reinforce this false inference. When courts rely on such testimony in framing a decision, old age in the eyes of the law then does become a synonym for incompetency,⁵¹ although the majority of elderly persons are competent as long as they live.

There may be a way out of this muddle. One may be to eliminate age entirely as a basis for ruling a person to be incompetent. A second may be to permit the court to appoint a guardian or conservator only for a person with a specific physical or mental condition. A third may be to use the term "old age," but to shift the emphasis away from mental illness toward the loss of ability to perform specific essential tasks. Such a shift from the currently dominant concern with mental illness toward specific findings about the ward's actual conduct and capabilities would be a useful feature of any of the reforms proposed above.⁵²

⁴⁸ American Bar Foundation, *supra* No. 4, at 266-72 (table 8.1).

⁴⁹ *Id.*

⁵⁰ Lehmann, "Guardianship," in *Social Welfare of the Aging*, 312 (Kaplan & Aldridge eds. 1962).

⁵¹ Horstman, *supra* No. 30, at 262-63.

⁵² *Id.* at 228-29.

In changing lanes, of course, it is necessary to move cautiously. Often, a court rules a person incompetent when no psychiatric testimony has been offered. In these cases, the court's ruling could be based on a person's erratic behavior, particularly in relation to mismanagement of property when there are indications of mental weakness. Mismanagement of property then tends to be regarded by the court as both the result and the proof of mental disorder.⁵³ With similar logic, the court might argue that poverty leads to crime and that crime is proof of poverty.

The Uniform Probate Code eliminates many of the problems caused by the traditional statutory criteria. A guardian (of the person) may be appointed to care for an incapacitated person, defined as:

* * * Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.⁵⁴

A "conservator" may be appointed if a court determines that:

* * * (1) The person is unable to manage his property for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (if) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.⁵⁵

These definitions are an improvement over the traditional statutory criteria, though not completely satisfactory. The UPC's emphasis on the person's behavior ("understanding or capacity to make or communicate responsible decisions") and on tangible outcomes (waste or dissipation of property and need for funds to support or care for the person or his dependents) encourages the court to exercise judgment about the need for appointing a guardian, instead of relying almost entirely on medical or psychiatric testimony as to the person's mental condition. The use of the term "incapacitated" person instead of "incompetent" may possibly protect the good reputation of the ward. On the other hand, appointment of a conservator is allowed for physical illness or disability alone, without reference to mental capacity. This justification is too broad and runs contrary to the right of self-determination of a person mentally capable of exercising that right.

Statutory revisions thus have the almost impossible task to avoid stigmatizing those with functional disabilities who need a caretaker and while authorizing caretakers for those who are mentally competent. The answer may be to permit involuntary guardianship only

⁵³ Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?* 73 Yale L. J. 676, 681 (1964).

⁵⁴ UPC § 5-101(1).

⁵⁵ UPC § 5-401(2).

when incompetency is established but at the same time allow the disabled easy access to a caretaker whom they freely choose. The disabled but competent adult who desires no help should be left alone.

THE PROCEEDINGS

As informality is usual in incompetency proceedings, it is to be expected that many of the defects noted earlier in civil commitment proceedings occur also in guardianship actions.

Usually any interested person may file a petition to have a guardian appointed for someone else. Notice of this action must be sent to the alleged incompetent and sometimes to one or more relatives. Yet some States permit the judge to reduce the statutory period for such notice or even dispense with it altogether, particularly if the person is already hospitalized.

The quality of this notice, however, is a different matter. It may simply order the person to appear in court at a particular date, time, and place to show cause why he should not be judged incompetent and subjected to an appointed guardian. Such notice "does little to convey to the alleged incompetent what is at stake for him or what rights he has if he wishes to defend himself."⁵⁶ He is not informed of the gravity of the charges against him nor of the consequences if he is found incompetent. He is not told of his rights to counsel, to present evidence, to cross-examine adverse witnesses, to a jury trial, or of other important evidentiary aspects of the hearing. Arguably, this notice is not "reasonably calculated under all the circumstances to apprise the proposed ward of the nature of the charges in order to afford him a real opportunity to present his objections."⁵⁷

At the hearing, the alleged incompetent seldom is present. Many States permit the court to waive the requirement of presence if such action is in the best interests of the person.⁵⁸ A doctor's certificate or affidavit stating that appearance in court might produce a harmful effect on the person usually is enough to induce the court to waive the person's attendance.⁵⁹ The hearing then becomes one-sided. The judge hears only the petitioner and the petitioner's lawyer. The court's determination will be based solely on the petitioner's evidence.

While all States allow the alleged incompetent to be represented by counsel at the hearing, few require appointment of a lawyer or guardian *ad litem*. In practice, the person is rarely represented by anyone.⁶⁰ It is arguable that, despite the civil label attached to guardianship proceedings, the "deprivation of liberty inherent in the nature of guardianship . . . would forcibly suggest that counsel is essential to the guarantee of due process" in these proceedings, as in a criminal trial.⁶¹ Even where private counsel is appointed, the meager fee does not encourage the defense to be anything but perfunctory.⁶²

⁵⁶ Horstman, *supra* No. 30, at 240.

⁵⁷ *Id.* at 241.

⁵⁸ American Bar Foundation, *supra* No. 4, at 280 (table 8.3).

⁵⁹ Horstman, *supra* No. 30, at 242-43.

⁶⁰ American Bar Foundation, *supra* No. 4, at 280-88 (table 8.3).

⁶¹ Horstman, *supra* No. 30, at 250.

⁶² Hearings on Legal Problems Affecting Older Americans Before the Senate Special Committee on Aging, 92d Cong., 2d Sess. 12 (1971).

Although trial by jury is not constitutionally mandated, some States require or at least permit it when requested by the alleged incompetent.⁶³ Failure to request a jury trial, however, may amount to a waiver, despite the fact that the person may never have been notified of the right to request a jury trial and may not even be represented by counsel. In practice, jury trials seldom occur in States that do not require them.⁶⁴

The first step toward reform of guardianship proceedings must, therefore, enhance the ability of the alleged incompetent to defend himself adequately. Notice of the proceedings which describes in detail the petitioner's allegations, the person's rights, and the consequences of the court's findings should be sent to the person and his close relatives sufficiently far in advance of the proceedings to permit adequate preparation. Representation by counsel should be mandatory, either through the person's choice or the court's appointment. The major duties of counsel representing an alleged incompetent should be specified by statute.

Moreover, to ensure that the court will be thoroughly informed of the reasons for and circumstances surrounding the proposed guardianship, investigative resources should be made available to the court to provide impartial information about the health of the alleged incompetent, his attitude toward the proposed guardian, and the proposed residence of the incompetent. The Uniform Probate Code deals with this problem by proposing a pre-hearing examination by a court appointed physician and an investigation by a "visitor," an agent of the court trained in law, nursing or social work, and lacking any personal interest in the proceedings.⁶⁵ An alternative would be to consolidate these examinations and investigations into a single investigative-evaluative team of physicians, psychiatrists and social workers who would prepare for the court a comprehensive report on all persons for whom guardians are petitioned. An additional phase of this team's work should include recommendations designed to implement the "least restrictive alternative" doctrine in the context of guardianship. This team could, of course, perform a similar evaluative function for all persons proposed for civil commitment. The Model Protective Services Act proposed later in these materials incorporates a provision for a "Geriatric Evaluation Service" designed to provide such services to the courts for elderly persons.⁶⁶

THE CONSEQUENCES OF APPOINTMENT OF A GUARDIAN

If a court finds that a person is incompetent, that person becomes virtually incapable of doing anything that has legal consequences.⁶⁷ He is severely limited in power to sue, charge a purchase, sign a contract, deed a property, marry or divorce, open a bank account,

⁶³ American Bar Foundation, *supra* No. 4, at 280-288 (table 8.3).

⁶⁴ Allen, Ferster, and Weihten, "Mental Impairment and Legal Incompetency," 84 (1968).

⁶⁵ UPC §5-303(b)-308.

⁶⁶ See text *infra* accompanying footnotes 119-22.

⁶⁷ American Bar Foundation, *supra* No. 4, 260-61.

or even vote. The person's eligibility for Government benefits, such as medicare, or a pension, may even be subject to special regulations. The court delegates authority to a guardian or conservator to assume the legal powers, rights, and responsibilities of the ward. If the incompetent is in a nursing home, the chief or a member of the staff sometimes assumes this authority without legal delegation, a risky course for all parties concerned.^{67a}

A guardian authorized by the court to act as legal substitute for the ward⁶⁸ may sue and be sued on the ward's behalf, may decide where the ward will live, and may void contracts the ward entered into before a guardian was named. If a court appoints a conservator rather than a guardian, primarily to manage the ward's property, prevent its waste, and provide for the ward's needs,⁶⁹ the conservator assumes possession, use, and control of the property and may even take title. Usually the conservator must account to the court periodically⁷⁰ and must obtain court permission for certain activities, especially those affecting transfers of real property, that is, land or buildings, including the ward's home.

Certain features of the guardian's powers and functions under present laws require further legislative treatment. Many statutes fail to separate clearly the respective responsibilities of the guardian and the conservator. Often the guardian's responsibilities either are described in vague terms or include powers more appropriate for a conservator. In practice, the two offices often are indistinguishable.

Another reason that guardianship law needs revision is that most statutes give the guardian complete control over the ward. The guardian assumes responsibility for virtually every decision in the life of the ward.

Although complete control may be necessary over a ward who is utterly incompetent, it is not suited to the needs of a ward whose loss of competence is only partial. Many elderly people may need help only with certain recurring events, such as cashing checks or paying bills, or with certain transactions, such as selling a house, buying an annuity, or selecting a nursing home. They need a flexible guardianship tailored to their individual capacity, one which allows them to retain control over activities they can perform unaided.

The cost of guardianship is usually high. Persons with limited means may find that the bulk of their assets goes to pay for the conservator's statutory fee.⁷¹ On the other hand, the poor or those living on small, fixed incomes may be deprived of any protective aid whatsoever because they have no way to pay for a guardian's time and services.

PROPOSED SOLUTIONS

Two techniques working singly or, preferably, together can assure protection of the elderly incompetent who hasn't much money: Social agencies or a public official or both could be guardians.

^{67a} Hall, "Overcoming Barriers to Protective Services for the Aged," 36 (1968).

⁶⁸ Alexander, "Surrogate Management of the Property of the Aged," 21 Syracuse L. Rev. 87, 138 (1969).

⁶⁹ Id. at 139.

⁷⁰ Review of the accounting is lax in some jurisdictions. Allen, *supra* No. 64, at 92-93.

⁷¹ ABA Commission on Problems Relating to Persons Under Disability, "Conservatorship: Present Practice and Uniform Probate Code Compared," 5 Real Property, Probate & Trust J. 507, 517 (1970).

SOCIAL AGENCIES AS GUARDIANS

The State may authorize private, nonprofit social agencies to serve as guardians, provided they are willing to do so and are duly appointed by a court. Many States deny such agencies permission to assume the guardian's role; they permit only natural persons or corporate fiduciaries (e.g., the trust department of a bank) to serve as guardians, although a social agency experienced in services for the elderly might readily summon the resources and skills required of guardians or conservators, especially if the ward is already receiving its service. Like the trust department of a bank, a social agency could provide continuing and dependable services. The ward would not depend on a private individual who, when needed, might be absent, ill, or distracted by other affairs. The social agency also could do more than others to treat the ward, create opportunities for recreation and friendship, and evaluate the client's physical and psychological needs and changes.

To protect the ward from exploitation by a social agency serving as guardian, the State welfare department could be empowered to certify agencies that, after careful screening, qualify for appointment. Periodic review of an agency's activities as guardian could be handled by the welfare department if not by the courts. The Model Protective Services Act provides for both the selection and regulation of such protective agencies.

PUBLIC GUARDIAN

The office of public guardian created by the State would be an official appointed by an officer of a State or local government or by the court and supported by public funds. This official would be eligible to serve, upon appointment, primarily as a guardian of last resort or, in some situations, as a guardian of choice by the prospective ward.

Several States have established such offices, notably California, which has the most extensive system.⁷³ In California, a county official designated as public guardian is authorized to apply for court appointment as guardian or conservator of the person, the estate, or both, of anyone committed to county mental health facilities, receiving public aid, or requiring assistance but lacking it from any other source. The court may designate a public guardian, even though a petition for appointment has been filed by a private party. The powers and duties of the public guardian are in general the same as those of private guardians or conservators. Ordinarily, public funds pay for the services of the public guardian, who is entitled also to costs and a fee if replaced by appointment of a private guardian or conservator. When the ward dies, the public guardian may file a claim against the ward's estate for reimbursement of expenses paid by the State.

The method of selection, the party designated, and the jurisdiction of the public guardian vary widely among States. Following the agency plan, the first-mentioned of these two methods, Georgia makes the Commissioner of Human Resources the nominal public guardian for welfare recipients.⁷⁴

⁷³ California Welfare and Institutions Code §§ 8000–ff.

⁷⁴ Georgia Code Annotated, § 49-604(d)(3) (1974, Supp. 1975).

Maine allows the department of health and welfare to serve as guardian for all "incapacitated."⁷⁵ Delaware created a separate State office, headed by a chancellor who is authorized to appoint public guardians.⁷⁶

The county plan of California is also popular. Illinois authorizes the Governor to appoint a public guardian in each county.⁷⁷ Oregon permits either the county court or county commissioners to establish the office of guardian.⁷⁸ A court plan, followed in limited fashion in South Carolina, allows the judge of the local court to serve as guardian of an estate if no one else is willing and fit to serve, with compensation the same as for a private guardian.⁷⁹ Upon request of a parent, relative, or next friend of the ward, Hawaii allows the clerk of the court to serve as guardian of an estate valued under \$3,000.⁸⁰

For more information, see Model Public Guardian Act in appendix 3.

OTHER FORMS OF INTERVENTION AND DELEGATION

Next to civil commitment or guardianship, the law employs several other systems to assume or delegate authority to act on behalf of others. The systems applicable to older persons are: (1) emergency intervention; (2) admission to a nursing home; (3) the substitute payee; (4) the power of attorney; (5) creation of a trust; and (6) joint tenancy. It should be noted these options may be chosen freely by an elderly person. Several also may be imposed involuntarily by Government action or the decision of private parties, such as members of the family. Therefore all of these options must be evaluated for their usefulness to the person and for the degree of protection they provide for the person's freedom and rights.

EMERGENCY INTERVENTION

Occasionally, elderly persons are found in such a state of failing health or hazardous living conditions that they need immediate aid. If they consent to assistance, no legal action is needed. When they refuse, legal questions arise. If there is doubt about a person's mental capacity to reach a rational decision, the next official step for those interested is to petition the courts for appointment of a guardian if not a conservator.

At the time, this petition is not much help. Typically, persons in a state of crisis are taken by police or an ambulance, regardless of their wishes, to a hospital emergency room. The legal basis for such action is not clear. It may be a doctrine of "implied consent," the belief that the person, if entirely rational, would wish the State to provide help.⁸¹

On a slightly different theory, State mental health law authorizes emergency commitment of a person suspected of being mentally ill and dangerous.⁸² Many jurisdictions permit a 72-hour confinement for

⁷⁵ Maine Rev. Stat. Ann., Title 18, § 3638 (1964, Supp. 1975).

⁷⁶ Delaware Code Annotated, Title 12, § 3991-97 (1974, Supp. 1975).

⁷⁷ Illinois Annotated Statutes, § 3-167 (Smith Hurd 1968).

⁷⁸ Oregon Rev. Statutes § 126.905 (1953, 1974).

⁷⁹ South Carolina Code of Laws § 31.101 (1962).

⁸⁰ Hawaii Revised Statutes § 551-21 (1968).

⁸¹ *Cobbs v. Grant*, 104 Cal. Rept. 505, 514, 8 Cal. 3d 229, 243, 502 P. 2d 1, 10 (1972).

⁸² E.g., Maryland Annotated Code, Act. 59, § 22 (1957, Supp. 1975).

observation if two physicians certify that the patient is potentially dangerous.⁸³ Sometimes, however, without apparent legal basis, police are called to take a person into custody for transportation to an emergency ward. Such action is a broad exercise of the State's police power.

The lack of clear theoretical grounds and well-defined procedures in the law for emergency intervention is evident in many statutes. The interests of the State need clarification, but so do the individual's rights need protection. Because this classic conflict is likely to be encountered often in protection of the elderly, the Model Protective Services Act establishes criteria and procedures for regulating emergency intervention, particularly when the client must change residence, however temporary.

The elderly person's entrance into a nursing home, though a drastic change, requires no legal authorization. Often it is forced on the elderly person through illness requiring extended care in a chronic disease hospital, the skilled services of a nursing facility, or the special services of an intermediate care facility. Sometimes the elderly person recognizes a need for "custodial care" (room, board, and assistance in certain routine tasks of daily living) and enters a residential care home or simply a boarding house for the elderly.

In all these situations, it is the usual presumption that such admissions are voluntary—that is, if consent was not stated or implied by the patient, it was supplied by next of kin.

In reality, the elderly person is often times not acting voluntarily. He may even be incapable of giving consent. He may have little choice but to accept a decision forced by a family unable or unwilling to provide care or refusing to allow the elderly person to live independently.

If the person shows serious symptoms of senility, legal proceedings to establish a guardianship often are ignored. Yet, well established legal procedures are needed to protect the elderly person's right to consent. When there is doubt about a person's capacity to consent to treatment, authorization could be sought through a duly-appointed guardian. If the person is capable of giving consent but evidently is under pressure to enter involuntarily, nursing homes should be prohibited from admitting that person; if they do, they should be subject to the penalties for false arrest or imprisonment or to loss of license.

The model legislation proposed in the appendix does not cover nursing home admissions sufficiently, although it provides for court authorization, called protective placement, whenever a social agency or guardian seeks to place an elderly person in an institution of any type or to transfer the patient from one institution to another with frequency.

SUBSTITUTE PAYEES

The task of managing money received by an incompetent sometimes is handled through a Federal law which authorizes certain agencies to appoint a substitute for the person entitled to receive Federal funds.⁸⁴

⁸³ Comment, *supra* No. 29, at 1266-67.

⁸⁴ 42 U.S.C. § 405(j) (1970) (Social Security Administration); 38 U.S.C. § 3202-03 (1970) (Veterans' Administration); 37 U.S.C. § 601-04 (1970) (Department of Defense); 45 U.S.C. § 228s (1970) (Railroad Retirement Board); 5 U.S.C. § 8345(e) (1970) (Civil Service).

The need for a substitute may come to an agency's attention in various ways, such as notice that the beneficiary is in a hospital, a call or letter from a friend, or a claim for disability benefits.⁸⁵ Once word is received of the beneficiary's alleged incompetence, all Federal agencies except the Social Security Administration⁸⁶ suspend further payments until an agency official or board determines whether the alleged incompetence is true.

An agency's usual procedure is to inquire whether the beneficiary can manage money.⁸⁷ The Social Security Administration, without regard to legal competence, asks merely whether the interest of the beneficiary would be served by the appointment of a substitute.⁸⁸

When the beneficiary is found incompetent, the agency tries to select a substitute who is genuinely concerned for the well being of the beneficiary or willing to serve, account for expenses, and inform the agency of other significant events in the beneficiary's life.⁸⁹ The substitute need not be a relative.

Supervision and review differ widely concerning how the substitute handles funds.⁹⁰ The periodic accounting required by the agencies is not governed by the same standards of accountability applied to legal guardians. Many substitutes have been inclined to put funds into savings rather than spend enough to satisfy the beneficiary's current needs.⁹¹

The entire system of substitutes is open to attack on constitutional grounds. The most telling point is the failure of agencies to provide even minimal notice and a hearing on the issue of competency.⁹² The decision to select a substitute is the board's alone. Needless to say, the absence of the other constitutional rights inherent in hearings, such as the right to counsel, to present evidence, and to cross-examine adverse witnesses, is objectionable also. Moreover, an agency's practice to suspend payments during an inquiry may be hard to justify. The Supreme Court, in *Goldberg v. Kelly*,⁹³ ruled that a hearing is required before welfare benefits are suspended.

The criteria to name a substitute are too vague. The Social Security Administration's concern for the best interests of the beneficiary is completely lacking in standards. And there appears to be no justification to deprive a beneficiary of money due while an agency inquires about competence. The same vagueness characterizes the Railroad Retirement Board's definition of an incompetent as one whose "condition is such that he is unable to handle his affairs" and, to a lesser degree, the definition used by the Veterans' Administration. No criterion of competence has been published by the Department of Defense or the Civil Service Commission.

⁸⁵ Allen, *supra* No. 64, at 116-17, 132.

⁸⁶ 20 C.F.R. § 404.1601 (1975).

⁸⁷ 38 C.F.R. § 3.353(a) (1975) (Veterans' Administration); 20 C.F.R. § 266.5(a) (1975) (Railroad Retirement Board).

⁸⁸ 20 C.F.R. § 404.1601 (1975).

⁸⁹ Allen, *supra* No. 64, at 121-22, 135.

⁹⁰ *Id.* at 124, 138.

⁹¹ *Id.* at 123, 128.

⁹² See, e.g., *Morris v. Weinberger*, 401 F.Supp. 1071 (D. Md. 1975). The Veterans' Administration, recently amended its regulations to require that, prior to determination of incompetency, the beneficiary be notified of the proposed action and of his right to a personal hearing on the issue. Routine suspension of payments due an incompetent beneficiary is also prohibited. 42 Fed. Reg. 2069 (Jan. 10, 1977).

⁹³ 397 U.S. 254 (1970). But see *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).

The system of paying substitutes should not be discarded, even though it needs reform. Its low cost is especially appealing,⁹⁴ although its usefulness is limited to the amount due from the Federal agency. The system might serve more effectively if it were part of other comparable State- or court-appointed guardianship arrangements, especially when the State provides a public guardian.

POWER OF ATTORNEY

The simplest and least expensive legal device for authorizing one person to manage the affairs of another is the power of attorney. In essence, it is a written agreement, usually with a close relative, an attorney, a business associate or financial advisor, authorizing that person to sign documents and conduct transactions on the individual's behalf. The individual can delegate as much or as little power as desired and end the arrangement at any time.

Unfortunately, the power of attorney in its traditional form is not always a suitable method of providing needed services for the elderly on a voluntary basis. The person creating the power must, at the time of signing, have the capacity to contract. Should there be any doubt as to the individual's mental competence at that time, the validity of the power of attorney is open to challenge. If the challenge is successful, any transaction completed under the agreement might be cancelled.

The power of attorney established by most State law ends automatically upon the death or disability of the person who assigned it. Thus an elderly person who establishes a power of attorney to aid him in managing affairs is cut off from such assistance precisely at the time when assistance is most needed.

Two proposals for model legislation have been formulated to overcome these drawbacks in traditional powers of attorney. The Uniform Probate Code would allow a principal to provide that the power of attorney shall not be affected by disability or it shall become effective only in the event of disability.⁹⁵ Disability in this sense means the need for appointment of a conservator or other protective order by a court.

The Uniform Law Commissioners developed a second approach: the Model Special Power of Attorney for Small Property Interests Act.⁹⁶ It is similar to the Uniform Probate Code in some respects, but is preferable because it requires judicial approval of the power of attorney.⁹⁷ In addition, it proposes standards of liability for the attorney.⁹⁸ An accounting will be required of the attorney only to the extent specified in the power itself, as directed by the approving court, or when the power or authority is revoked. This provision aims to avoid the unnecessary expense of frequent accounting.⁹⁹ These requirements of court approval and accounting protect the interests of the elderly person, who may not be fully aware of the implications of the power of attorney or of its uses or abuses.

⁹⁴ Allen, *supra* No. 64, at 128.

⁹⁵ UPC § 5-501.

⁹⁶ Legal Research and Services for the Elderly and National Council of Senior Citizens, *Legislative Approaches to the Problems of the Elderly: A Handbook of Model State Statutes*, 157 (1971) (Model Special Power of Attorney for Small Property Interests Act).

⁹⁷ *Id.* § 1(a).

⁹⁸ *Id.* § 7.

⁹⁹ *Id.* § 9.

CREATION OF A TRUST

A trust is usually a fund under legal regulation administered by a person or agency called a fiduciary on orders from one or more trustees. The fund may be set aside expressly to provide care for the elderly person. The trustee may be a person (e.g., a relative, attorney or financial adviser) or a corporation (e.g., a bank or trust company) with responsibility to use the money for the purpose stated. State law, typically, imposes strict duties and high standards of responsibility on the fiduciary. It also limits the types of investments and activities a trustee may order on behalf of the beneficiary.

A trust has little value for most elderly persons because management costs for a small estate are high. Corporate trustees ordinarily will not administer estates of less than \$100,000. Moreover, the fiduciary cannot manage personal or domestic affairs for the beneficiary. Therefore, a guardian might still be needed to provide care for an elderly person despite the protection by a trust.

JOINT TENANCY

Joint tenancy or tenancy by the entirety are expressions meaning that two or more people share ownership of a property or fund. Joint holdings often are used within families to serve convenience, provide mutual assistance, or safeguard ownership. If man and wife or parent and child hold funds jointly, one of the two may act if the other cannot. Joint tenancy applies only to assets or income under mutual control. It may be unwise to put all holdings in joint tenancy because, when one holder dies, the other may be without funds while the estate is settled. In addition, if both holders become disabled, they may not be able to provide for themselves.

SOME UNDERLYING THEMES: THE PRINCIPLE OF THE LEAST RESTRICTIVE ALTERNATIVE

If the State has the right to deprive a person of liberty by civil commitment for treatment or care, does it also have an obligation to provide care or treatment with the least necessary restrictions on that person's liberty and other civil rights?

STATUTORY BASIS

This question was explored first in *Lake v. Cameron*.¹⁰⁰ Catherine Lake, 60 years old, found wandering in the District of Columbia, was taken by a policeman to a general hospital and transferred subsequently to St. Elizabeths Psychiatric Hospital for observation. Commitment proceedings had been brought under code provisions allowing the hospitalization of mentally ill persons dangerous to themselves.¹⁰¹ She was found not to be dangerous to others nor likely to

¹⁰⁰ 364 F. 2d 657 (D.C. Cir. 1966).

¹⁰¹ The D.C. Hospitalization of the Mentally Ill Act provided that, if a court or jury found that a "person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or the public." D.C. Code Ann. § 21-545(b) (1967).

harm herself intentionally but prone to "wandering away and being out exposed at night or any time she is out."¹⁰²

Upon hearing her appeal from a denial of her petition for habeas corpus, the District of Columbia Court of Appeals held that she was not a proper subject for indeterminate commitment without a full exploration of other possible resources available for her care and treatment. The court based this ruling solely on the statutory provision authorizing courses of treatment which the court believed to be in the best interests of the individual. The court expressed no opinion on the constitutional issue, "whether so complete a deprivation of appellant's liberty basically because of her poverty could be reconciled with due process of law and the equal protection of the laws."¹⁰³ The lower court found that Ms. Lake needed supervision but, as no other sources of care could be had, her continued confinement at St. Elizabeths was justified.¹⁰⁴

CONSTITUTIONAL RIGHTS

Although the *Lake* decision by the court of appeals had a purely statutory basis, the constitutional issues discussed by the court suggest that the principle of the least restrictive alternative may be inferred from parts of the Bill of Rights.¹⁰⁵ The Supreme Court has already stated the principle in general terms:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose.¹⁰⁶

A liberty is considered fundamental in the Supreme Court's view "not because of its subjective importance to the individual but rather because it finds a place in the provisions of the Constitution or in the scheme of social organization the Constitution is believed to have sought to protect."¹⁰⁷ Among the fundamental rights lost to an individual committed to an institution are the right of wandering and strolling,¹⁰⁸ the right to gather in public places for social or political purposes,¹⁰⁹ the right to privacy of marriage and family life,¹¹⁰ the right to live at home,¹¹¹ the right in conjunction with a freely chosen physician to decide on proper treatment,¹¹² and the right to retain a deservedly favorable reputation.¹¹³ At the root of the loss or curtailment of these rights is deprivation of liberty, the most fundamental right of all.¹¹⁴

¹⁰² *Lake v. Cameron*, supra No. 100, at 658.

¹⁰³ *Id.* at 662, No. 19.

¹⁰⁴ *Lake v. Cameron*, 267 F. Supp. 155 (D.D.C. 1967).

¹⁰⁵ Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70 Mich. L. Rev. 1107 (1972).

¹⁰⁶ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

¹⁰⁷ Chambers, supra No. 105, at 1155.

¹⁰⁸ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-64 (1972).

¹⁰⁹ *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971).

¹¹⁰ *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972);

Griswold v. Connecticut, 381 U.S. 479 (1965).

¹¹¹ *Korematsu v. United States*, 323 U.S. 214, 220 (1944).

¹¹² *Roe v. Wade*, supra No. 110.

¹¹³ *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

¹¹⁴ Chambers, supra No. 105, at 1158.

Although infringement of basic rights has been accepted by courts when there is a "compelling State interest," the degree of infringement ought to be related to the degree of legitimate State interest in protecting society and treating the individual through civil commitment. The Federal court, in *Lessard v. Schmidt*, summed up the constitutional argument in one sentence:

It seems clear, then, that persons suffering from the condition of being mentally ill, but who are not alleged to have committed any crime, cannot be totally deprived of their liberty if there are less drastic means for achieving the same goal.¹¹⁵

SPECIFIC ALTERNATIVES

If the principle of the "least restrictive alternative" is accepted, what specific services must the State provide other than a mental hospital? The principle implies that treatment appropriate to the patient's disabilities must be furnished those who would otherwise be committed.¹¹⁶ These methods include, according to the court in *Lessard*:

Voluntary or court-ordered out-patient treatment, day treatment in a hospital, night treatment in a hospital, placement in the custody of a friend or relative, placement in a nursing home, referral to a community mental health clinic, and home health aide services.¹¹⁷

For those persons who require a guardian, the State may be obliged to provide a variety of arrangements. In addition to traditional legal practice, which transfers to a court-appointed manager complete control over the ward's property or person or both, a State would be obliged to establish less comprehensive arrangements. A court, finding that a person needed a manager, could specify the precise nature of the person's disability and confer on the manager only powers needed to compensate for the disability. The transfer of broad powers over a ward, currently authorized under many State laws, would have to give way to a process of matching powers to need.

Managerial assistance for the disabled poor or middle class persons as well as the wealthy might also be required of the State, in keeping with the principle of the least restrictive alternative. The State might have to provide guardianship services at rates below traditional private rates, according to the client's ability to pay. The State would either compensate private guardians for those paying less than full fees or establish an office of public guardian along lines discussed earlier.¹¹⁸

GERIATRIC EVALUATION

Legal acceptance of the principle of the "least restrictive alternative" does not guarantee that a genuine search for appropriate serv-

¹¹⁵ 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded for a more specific injunctive order, 414 U.S. 473 (1974), amended opinion, 379 F. Supp. 1376 (1974).

¹¹⁶ Horstman, *supra* No. 30, at 267.

¹¹⁷ *Lessard v. Schmidt*, *supra* No. 115, at 1096.

¹¹⁸ See text *supra* accompanying footnotes 73-80.

ices will occur in fact. Certain additional practical steps also are necessary.

The first is to provide a professional staff competent to determine the need for services and seek and select them appropriately.¹¹⁹ Various models for organizing this staff have been suggested.

One model uses a team of social workers and diagnostic psychiatrists to find a suitable treatment and residence for the client. The court would either employ this team directly or assign the task to a team attached to a local health center. A second model uses the staff of the State hospital to which the patient is to be committed. A third model permits the client to have some share in the decision (that is, an agency, funded by the Government, would provide an attorney for candidates for commitment and hire a psychiatric social worker to aid the attorney in devising treatment more suitable than a mental ward). In a fourth model, a professional team employed by the State mental health agency might recommend to the courts an appropriate court order in any proceeding which might otherwise cost the client unnecessary loss of liberty or rights.

The next step is to assure that appropriate treatment comes soon enough to spare the patient from the shock of displacement, however temporary. Generally, evaluation of the client's needs should form part of the court proceedings that come before the judge issues the orders. In an emergency, when immediate placement seems essential, an evaluation coming long afterward imposes on the client serious and continuing loss of rights. Recent Supreme Court decisions regarding the State criminal process for summary deprivation of personal liberty and summary seizure of a debtor's property by creditors suggest the remedy might be a two-stage hearing process.¹²⁰ The first would be a one-sided (*ex parte*) hearing at which the petitioner would ask the court to authorize emergency confinement because the patient reasonably appears to need it. The next step would be a full adversarial hearing 3 to 5 days after the initial commitment. During this brief period, the evaluating team would examine the client and prepare to present at the adversary hearing its findings and recommendations. Both of these steps imply the need to determine what particular form of treatment will suit each individual without more than really necessary restriction of personal liberty.

As Judge Bazelon has noted, the trend toward "deinstitutionalization" on a broad scale is no more of a panacea than the earlier movement toward institutional treatment:

* * * the real problem is that deinstitutionalization also represents a standardized response to a multitude of individual problems. Just as all patients cannot be helped by environmental or milieu therapy, not all patients will be helped by autonomy in the community.¹²¹

The model legislation proposes the creation of a geriatric evaluation service (GES) to assist courts in determining the appropriate setting for care and treatment and the degree of restriction on self-determina-

¹¹⁹ Chambers, *supra* No. 105, at 1168, 1172-77.

¹²⁰ See *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

¹²¹ Bazelon, *supra* No. 43, at 908.

tion.¹²² The GES is a team of medical, psychological, psychiatric, and social work professionals who would be required to evaluate any elderly person proposed to a court for involuntary commitment, guardianship, protective placement, or protective services. This evaluation would include (a) an assessment of the person's capacity to make decisions and maintain an independent life and (b) a recommendation to the court concerning the least restrictive program of services, care, or treatment consistent with the person's needs.

PERIODIC REVIEW

Consistent with the principle of the least restrictive alternative is a statute providing for periodic review of the person's need for previously approved assistance. Statutes regulating civil commitment and guardianship could require custodians or guardians to justify to the court at regular intervals the client's continuing need for their services. The burden of proving such need certainly belongs to the assisting party rather than to the disabled, on the principle that infringement of personal liberty must be justified. The disabled person should not be asked to prove sanity or competence any more than the accused criminal is expected to prove innocence.

LEGISLATING SOCIAL SERVICE REQUIREMENTS

The crucial question for appropriate and less restrictive treatment for the aged is whether the courts can force the State to create the needed services. Finding none suitable for Mrs. Lake in the District of Columbia, as noted above, the court renewed its order to commit her. In the more recent *Dixon v. Weinberger*,¹²³ however, the Federal court for the District of Columbia ruled that the same statute placed primary responsibility "upon the District Government to provide suitable alternative arrangements" for persons about to be committed but in need only of custodial care. For those already committed but found later to be suitable for less confining quarters, the court ruled that St. Elizabeths Hospital shared this responsibility for placement with the District. The court suggested nursing homes, foster homes, personal care homes, and halfway houses as more suitable than a hospital ward. The court also ordered the hospital and the District to submit statements describing "the budgetary patterns and/or sources of funding" and a tentative schedule for providing appropriate forms of placement and treatment.

The duty of a State to provide suitable forms of treatment for the mentally ill blends two constitutional principles: the right to treatment¹²⁴ and the right not to be deprived of liberty, except to the

¹²² Maryland recently enacted a statute requiring screening of all persons 65 years of age and older by a geriatric evaluation unit and an affirmative recommendation from this unit before involuntary admission could take place. The law, however, does not specify, as it should, that the purpose of such screening is to determine whether less restrictive alternative forms of care and treatment would be adequate and to recommend the appropriate setting. Maryland Annotated Code, art. 59, sec. 11(b) (1957, supp. 1976).

¹²³ 405 F. Supp. 974 (D.D.C. 1975).

¹²⁴ *Donaldson v. O'Connor*, 493 F. 2d 507 (5th Cir. 1974), vacated and remanded sub nom. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wyatt v. Stickney*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), enforcing 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), aff'd in part, remanded in part, decision reserved in part sub nom. *Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974).

extent necessary to achieve a valid State goal.¹²⁵ These rights require the State, as the price of being permitted to take away liberty totally for curative purposes, to provide less restrictive treatment when sufficient. Though costs of individual treatment run high and the merit of methods of treatment is debatable, individual treatment offers many advantages over crude mass confinement (e.g., private care costs less than institutional care and the recovery rate is probably higher).

It has been suggested that courts hearing suits to compel the State to establish various treatment programs might give maximum leeway to State discretion and planning by ordering the State to submit to the court a plan which would:

... (1) . . . make explicit the goals the State is seeking to serve through commitment, (2) . . . assess in the light of those goals the present and future needs of all classes of persons involved in the commitment process, (3) . . . assay the range of programs that might be instituted to meet those needs, and (4) . . . reach reasoned conclusions about which programs preserve the maximum level of freedom while serving the State's interests.¹²⁶

The practical conclusion of this argument is that a State has a duty to provide nursing homes offering various levels of care as well as a variety of community and home-based health care programs for those persons found by a court to be mentally ill and, as a result, in need of care and treatment. The *O'Connor* and *Wyatt* decisions indicate further that the quality of care in these homes and programs must be appropriate to the needs of the patient.

If this conclusion seems blindly optimistic for State legislatures under pressure to reduce State budgets, Congress might include such treatment and care either in the broader coverage of medicare and medicaid¹²⁷ or in a new national health insurance system.

PARENS PATRIAE AND ENFORCED THERAPY

Inherent in the concept of liberty is its limited acceptance of the *parens patriae* power of the State (i.e., its power to impose care or treatment on a person not dangerous to others). The exercise of such power in modern clinical settings has been questioned more and more with its increased use.

Two limitations on this power have been written into all the proposed statutes. First, no service—whether hospitalization, guardianship, placement in a treatment center or home, or home services—can be imposed on an individual who is mentally competent and refuses to accept assistance.¹²⁸ Consent to receive such services is essential.

Second, involuntary intervention may be authorized only by a court after finding that a person is mentally disabled (in the case of civil

¹²⁵ *Shelton v. Tucker*, supra No. 106, at 488.

¹²⁶ *Chambers*, supra No. 105, at 1197.

¹²⁷ Subcom. on Long-Term Care of the Senate Special Comm. on Aging. "Nursing Home Care in the United States: Failure in Public Policy." S. Rep. No. 93-1420, 93d Cong., 2d Sess. 109-10 (1974). See generally *New Perspectives in Health Care for Older Americans*, supra No. 2.

¹²⁸ Comment, supra No. 29, at 1212.

commitment), or incapable of giving consent (in the case of guardianship, conservatorship, protective services, or protective placement). The one exception to the requirement of court approval of involuntary treatment by a health institution occurs when it appears to a peace officer, from personal observation, that a person will otherwise suffer immediate and irreparable physical injury or death. In that event, the period of involuntary treatment is short. It is permitted only if the person is incapable of giving consent, and court authorization must be sought within 4 hours.

Despite these limitations, some argue that intervention for therapeutic purposes without consent is never justified.¹²⁹ They reach this conclusion on two grounds: (1) "mental illness" (or mental incapacity to give consent) is too vague and ultimately undefinable, and (2) involuntary "therapy" is a delusion and ineffective.

Both arguments have a kernel of truth but tend to be overstated. Although medical or legal labels of mental illness or incompetency in some cases may, in reality, express personal judgments on the conduct in question, most often true functional disability can be identified to justify appropriate intervention. If the courts relied more on the evidence of behavior and less on medical testimony, they would be more likely to determine true disability from merely questionable conduct.¹³⁰ The movement to define specific treatment, as in the *Wyatt* case,¹³¹ and require it be given when promised will help to avoid confusing therapy with mere institutionalization.

It is not the intent of the proposed legislation to rewrite the civil commitment laws, although they deserve much criticism. The proposed reforms aim primarily to assure medical, nutritional, and social services, which are less likely to be involuntary than commitment.

Despite the safeguards for curbing abuses of the intervention power, these proposed reforms accept the *parens patriae* power of the State. They would continue to empower the State to be the keeper of its disabled aged citizens, despite the conflict that involuntary intervention creates in the life of a free adult and despite the possibility that, in expanding the types of intervention legally authorized, these statutes may increase the number of persons treated unnecessarily.¹³²

The absence of reasonable alternatives has justified State intervention in the lives of the aged. If care and treatment are not furnished when the need first arises but cannot be perceived by the victim, eventually more drastic action must follow. The State relieves the situation by involuntary commitment, or the victim relieves it by dying. To shirk a duty to the disabled in the name of personal liberty when the victim is, by definition, incapable of a rational decision is grievously wrong because the liberty is no longer grounded on the ability to make a rational choice. The paradoxical but inescapable conclusion is that

¹²⁹ Szasz, Symposium on the Aging Poor, 23 Syracuse L. Rev. 45, 82 (1972).

¹³⁰ Horstman, supra No. 30, at 227-28.

¹³¹ *Wyatt v. Stickney*, supra No. 124.

¹³² Horstman, supra No. 30, at 267.

a controlled and limited exercise of the *parens patriae* power by the State is necessary if personal liberty is to be a reality and not a fiction.

MODEL LEGISLATION

The ideas and reforms suggested in this report appear in the appendixes as a set of five legislative proposals for consideration by State governments:¹³³

- (1) A Model Protective Services Act;
- (2) A Model Public Guardian Act;
- (3) Model guardianship and conservatorship legislation;
- (4) Model power of attorney legislation; and
- (5) Limited revisions of the civil commitment laws.

¹³³ See *supra* chapter 1, footnote 52, for a list of States which have already enacted services programs of one type or another.

A P P E N D I X E S

PREFACE

The reform of State statutory law controlling protective services is offered through the models contained in appendixes 1, 2, 3, and 4. Explanatory comments abound and, when appropriate, the relationship to the Uniform Probate Code is described.

Additionally, the authors offer for consideration the practical experience of an operating program in California.

Planned Protective Services, Inc., headquartered in Los Angeles, is an organization delivering conservatorship and guardianship assistance to the elderly. The description of this group's background and operations, prepared by the corporation staff and contained in appendix 5, is offered as a concrete example of one system for providing protective services. The reader should note, however, that significant differences exist between the California laws under which the corporation operates and those proposed earlier in this report.

Appendix 1

MODEL ADULT PROTECTIVE SERVICES ACT

INTRODUCTORY COMMENTS

As with any model statute, the general purpose of the Model Protective Services Act is to provide prototype legislation which the States may utilize in drafting their own protective services statutes. This act also has three particular objectives: (1) To provide the authority for a State to develop, organize, and supervise a State program of protective services; (2) to outline guidelines and criteria for the design and operation of a protective services system; (3) to authorize the courts to issue orders for involuntary protective services and protective placement after making specific findings and following designated procedures.

The last objective should be seen in a wider context. All States currently permit certain types of involuntary intervention in the lives of their citizens, including the elderly. The kinds of intervention relevant to the elderly are typically authorized through civil commitment proceedings involving admission to a State mental hospital or guardianship proceedings transferring authority over the ward or his property to a court-appointed fiduciary. This act does not modify or replace such legislation, but rather is intended to provide legal authority to intervene involuntarily in situations requiring less drastic interference with a person's civil rights.

Two specific situations receive particular attention. The first concerns the person whose health or living conditions pose serious danger to himself or others and consequently short-term emergency action is necessary. The court order for this problem is called an "emergency order for protective services." Intervention for a longer period must follow the existing guardianship laws.

The other situation for which legally authorized intervention is necessary is the involuntary transfer of an elderly person's residence to an institution other than a mental hospital, such as a nursing home. This intervention is referred to as "protective placement."

In both instances, current State law concerning civil commitment or guardianship is either wide of the mark, which is to fill a particular need of a person, or offers too drastic a solution by declaring the person incompetent and stripping him of all or most of his rights. The Model Protective Services Act attempts to fill the gaps in existing law and at the same time to authorize only the least restrictive and appropriate form of intervention.

This explanation of the act's methods for authorizing involuntary intervention through legal channels should not, however, divert attention from the act's other objectives. The protective services system contemplated by this act will function on a voluntary basis in the

vast majority of cases. Indeed, a system which requires frequent involuntary intervention may well be suspect. It is expected that the wide range of services provided in this system to assist the elderly in maintaining independent lifestyles will prove attractive to them and invite their cooperation. The potential for involuntary intervention and, hopefully, its infrequent but necessary occurrence under the provisions of this act, will distinguish the protective services system created by this act from existing programs of home or community-centered services.

Accompanying the Model Protective Services Act is other suggested legislation. One important adjunct is the Model Public Guardian Act designed to provide guardianship services for the financially needy. Suggested revisions of the State guardianship, conservatorship, and power of attorneys laws based largely on the Uniform Probate Code are also proposed. The final proposal contains a short but significant change in State civil commitment to require courts to consider whether less drastic alternative programs than commitment are available and adequate.

The net results of the enactment of all this proposed legislation will be a program of services to the elderly to assist them to avoid institutionalization and a spectrum of alternative forms of legally authorized intervention in the elderly person's life calibrated to provide only the specific services necessary to meet immediate needs and avoid more drastic interference.

SUGGESTED LEGISLATION

(Title, enacting clause, etc.)

SECTION. 1. (Short title.) This act may be cited as the Adult Protective Services Act.

SECTION 2. (Declaration of Policy and Legislative Intent.) The legislature of the State of [————] recognizes that many elderly citizens of the State, because of the infirmities of aging, are unable to manage their own affairs or to protect themselves from exploitation, abuse, neglect, or physical danger. Often such persons cannot find others able or willing to render assistance. The legislature intends through this act to establish a system of protective services designed to fill this need and to assure their availability to all elderly citizens. It is also the intent of the legislature to authorize only the least possible restriction on the exercise of personal and civil rights consistent with the person's need for services, and to require that due process be followed in imposing such restrictions.

Comments on section 2

The protective services system established by this act is designed to benefit only the elderly because, as an identifiable segment of society, their need for such services is imperative. Moreover, many States have already developed for their elderly citizens systems of supportive and preventive services which can be readily integrated into the proposed protective services system. The additional costs of the proposed program for the elderly will therefore be small, as compared with the costs of creating an entirely new services program for all residents of the State.

SECTION 3. Definitions—As used in this act:

(1) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(2) "Court" means the court or branch having jurisdiction in matters relating to the affairs of decedents, this court in this State is known as [].

(3) "Department" means the [State agency responsible for community-based services to the elderly].

(4) "Elderly" means a person 60 years of age or older, who is a resident of the State.

(5) "Emergency" means that an elderly person is living in conditions which present a substantial risk of death or immediate and serious physical harm to himself or others.

(6) "Emergency services" are protective services furnished to an elderly person in an emergency pursuant to the provisions of section 10 of this act.

(7) "Geriatric evaluation service" is a team of medical, psychological, psychiatric, and social work professionals established by the [State agency responsible for community-based services to the elderly] for the purpose of conducting a comprehensive physical, mental, and social evaluation of an elderly person for whom a petition has been filed in a court for commitment to a mental hospital, appointment of a conservator or guardian, an emergency order for protective services, or an order for protective placement.

(8) "Guardian" means a person who has qualified as a guardian of an incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(9) "Hazardous living conditions" means a mode of life which contains a substantial risk of or actual exploitation, abuse, neglect, or physical danger.

(10) "Incapacitated person" means [alternative A: any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other causes (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person]. [Alternative B: any person for whom a guardian has been appointed by the court.]

(11) "Independent living arrangements" means a mode of life maintained on a continuing basis outside of a hospital, Veterans' Administration hospital, nursing home, or other facility licensed by or under the jurisdiction of any State agency.

(12) "Infirm person" means a person who, because of physical or mental disability, is substantially impaired in his ability to provide adequately for his own care or custody.

(13) "Interested person" means any adult relative or friend of an elderly person, or any official or representative of a protective services agency or of any public or nonprofit agency, corporation, board or organization eligible for designation as a protective services agency.

(14) A "protected person" is a person for whom a conservator has been appointed or other protective order has been made.

(15) "Protective placement" means the transfer of an elderly person from independent living arrangements to a hospital, nursing home, or domiciliary or residential care facility, or from one such institution to another, for a period anticipated to last longer than 6 days.

(16) "Protective services" means the services furnished by a protective service agency or its delegate, as described in section 6 of this act.

(17) "Protective services agency" means a public or nonprofit private agency, corporation, board or organization authorized by the Department pursuant to section 4(f) of this act to furnish protective services to elderly infirm, protected or incapacitated persons and/or to serve as conservators or guardians of the person for elderly protected or incapacitated persons upon appointment by a court.

(18) "Public guardian" means the office of the public guardian.

(19) A "ward" is a person for whom a guardian has been appointed.

Comments on section 3

The terminology of the Uniform Probate Code has been adopted here to describe the persons principally involved in guardianship and conservatorship proceedings. "Incapacitated persons" are those for whom guardians (of the person) are appointed, while "protected persons" are those for whom conservators have been appointed or other protective orders issued by a court.

The term "infirm persons" refers to the elderly whose degree of impairment is substantial, but is not so serious as to justify appointment of a guardian or conservator.

SECTION 4. Establishment of protective services system.

(a) Planning and development of system.—The Department shall develop a coordinated system of protective services for elderly infirm and incapacitated persons. In planning this system, the Department shall obtain the advice of agencies, corporations, boards, and associations currently involved in the provision of social, health, legal, nutritional and other services to the elderly, as well as of organizations of the elderly themselves.

(b) Advisory board.—In order to provide continuing advice to the Department concerning the protective services system, an advisory board composed of [nine] members appointed by the Governor is established.

(c) Provision of services by Department.—The Department may provide direct protective services.

(d) Contracts for services.—The Department may contract with any protective service agency for the provision of protective services.

(e) Utilization of resources.—The Department shall utilize to the extent appropriate and available existing resources and services of public and nonprofit private agencies in providing protective services.

(f) Designation of protective services agencies.—The Department may designate any public or nonprofit private agency, corporation, board or organization as a protective services agency. The Department shall issue regulations establishing criteria and procedures for the

designation of protective services agencies. Preference shall be given to agencies with consumer or other citizen representation.

(g) Limitation.—No public or private agency, corporation, board or organization may furnish protective services to an elderly person under court order or serve as guardian of the person unless the Department has designated such a body as a protective services agency pursuant to subsection (f) above.

(h) Emergencies.—The Department shall designate at least one protective services agency in each [city and county] which shall be responsible for rendering protective services in an emergency.

(i) Coordination and supervision of system.—Upon establishment of the protective services system, the Department shall be responsible for continuing coordination and supervision of the system. In carrying out these duties, the Department shall:

- (1) Adopt rules and regulation for the system;
- (2) Continuously monitor the effectiveness of the system and perform evaluative research about it; and
- (3) Utilize to the extent available grants from Federal, State, and other public and private sources to support the system.

Comments on section 4

This section sets forth the powers and duties of the State agency responsible for organizing a protective services system. The structure and detailed organization of this system, however, are left to the agency and are not included in the legislation.

The chief duties of the agency are: (1) to develop a protective services system; (2) to obtain wide ranging professional and consumer advice in planning and operating the system; (3) as part of the system, to designate local protective services agencies for emergency situations; and (4) to coordinate and supervise the system on an ongoing basis.

The State agency is given a variety of powers in providing protective services, but States may wish to select those it believes most in accord with its system and resources and therefore delete other powers. Thus the agency itself may provide protective services; it may contract for these services at State expense; it may simply designate existing organizations as providers of protective services; or it may choose a combination of these approaches. Subsection (e) states a preference for the use of existing community resources, while subsection (h) indicates a further preference for organizations with broad citizen representation.

Where protective services are to be furnished by an organization, subsection (g) requires this organization to be approved for this purpose by the State agency. The requirement for approval as well as its power will enable the State agency to limit the provision of services to responsible organizations which meet agency criteria.

SECTION 5. Protective services agencies.

(a) Powers.—A protective services agency is authorized:

- (1) to furnish protective services to an elderly person with his consent;
- (2) to petition the court for appointment of a conservator or guardian, for issuance of an emergency order for protective services, or for an order for protective placement;

(3) to furnish protective services to an elderly infirm person without his consent on an emergency basis pursuant to section 10 of this act;

(4) to furnish protective services to an elderly incapacitated or protected person with the consent of such person's guardian or conservator;

(5) to serve as conservator, guardian, or temporary guardian of an elderly protected or incapacitated person;

(6) to enter into protective arrangements and to conduct single transactions authorized by a court pursuant to [section 5-409 of the Uniform Probate Code].

(b) Reports.—A protective services agency shall make such reports as the Department or a court may require.

Comments on section 5

Once having been designated a "protective services agency" by the State agency, the protective services agency is required to obtain permission before it may provide services. This permission may come from the elderly person himself (subsection (a) (1)), that person's conservator or guardian (subsection (a) (4)), or a court. Court authorization will be given by issuance of an emergency order (subsection (a) (3)), by appointment of the protective services agency as conservator or guardian (subsection (a) (5)), or by granting power to conduct particular transactions for the elderly person (subsection (a) (6)).

The protective services agency is also empowered under subsection (a) (2) to petition the court for appointment of a conservator or guardian and for issuance of orders for protective services on an emergency basis or for protective placement.

SECTION 6. Nature of Protective Services.

(a) Definition.—Protective services are services furnished by a protective services agency or its delegate to an elderly infirm, incapacitated, or protected person with the person's consent or appropriate legal authority, in order to assist the person in performing the activities of daily living, and thereby maintain independent living arrangements and avoid hazardous living conditions.

(b) Services.—The services furnished in a protective services system may include but are not limited to: social case work; psychiatric and health evaluation; home care; day care; legal assistance; social services; health care; and other services consistent with the purpose of this act. Such services do not include protective placement.

(c) Service-related activities.—In order to provide the services listed in subsection (a) above, a protective services system may include but is not limited to the following service-related activities: outreach; identifying persons in need of services; counselling; referring persons for services; evaluating individuals; arranging for services; tracking and following up cases; referring persons to the public guardian; petitioning the courts for the appointment of a conservator or guardian of the person; and other activities consistent with the purposes of this act.

(d) Costs of services.—The costs of providing protective services shall be borne by the provider of such services, unless the elderly person agrees to pay for them or a court authorizes the provider to receive reasonable reimbursement from the person's assets after a finding that the person is financially able to make such payment.

Comments on section 6

The definition of protective services in subsection (a) indicates that such services are intended to be only a specific portion of a broader program whose purpose is to prevent or delay institutionalization of the elderly. The characteristics that distinguish protective services from these larger programs are: (1) their target population is the infirm, incapacitated, or protected elderly; (2) the services are provided by a designated protective services agency or its delegate; and (3) unless the elderly client consents to accept the services, the protective service agency may intervene only with court authorization.

Subsections (b) and (c) provide examples of the services that may be included in a protective services program. Protective placement, defined in section 3(15) above, is excluded from these services. Section 11 establishes special proceedings to obtain court authorization for involuntary transfers of residence.

Subsection (d) establishes the presumption that the protective services will be paid for by the provider agency, which may in turn be reimbursed from Federal or State sources if such funding is available. The provider agency may obtain reimbursement from the elderly person only if the client consents or a court authorizes such payment. The criterion to be applied by the court is deliberately framed in general terms, viz, the "financial ability" of the elderly person to afford the services. See also section 9(c). "Financial ability" is a variable dependent on the nature, extent, and liquidity of the person's assets; his disposable net income; the type, duration and complexity of the services required and rendered; and any other foreseeable expenses.

A rigid means test should be avoided. On the other hand, elderly persons who desire to receive protective services and can afford to pay for them are not precluded from receiving them under this section.

In the event that the elderly client will pay for protective services, the criterion for reimbursement is the reasonable cost of the services.

See also section 9(c).

SECTION 7. Geriatric evaluation service—

(a) Establishment.—The Department shall establish a geriatric evaluation service for the purpose of conducting a comprehensive physical, mental, and social evaluation of an elderly person for whom a petition has been filed in a court for commitment to a mental hospital, appointment of a conservator or guardian, an emergency order for protective services, or an order for protective placement.

(b) Evaluation.—The evaluation of an elderly person conducted by the geriatric evaluation service should include at least the following:

(1) The name and address of the place where the person is residing and of the person or agency, if any, who is providing services at present;

(2) A description of the treatment and services, if any, presently being provided to the person;

(3) An evaluation of the person's present physical, mental, and social conditions; and

(4) A recommendation concerning the least restrictive course of services, care or treatment consistent with the person's needs.

(c) Costs.—The cost of this evaluation should be borne by the Department.

Comments on section 7

The geriatric evaluation service (GES) is a team of medical, psychological, psychiatric, and social work professionals. Its function is to provide the courts with impartial professional advice to assist them in making determinations which by their very nature involve the assessment of an elderly person's capacity to continue independent living and decisionmaking. The direct responsibility of the GES is to the court, not the petitioner or the elderly person, and therefore its recommendations will hopefully be free of partisanship. For the same reason, the costs of this evaluation are borne by the State under subsection (c) instead of by the parties to the proceedings. At the same time, however, the evaluation conducted by the GES is not exclusive, and therefore the parties to the proceedings may also offer similar evaluations in evidence. See section 12(a)(4).

One important feature of the evaluation described in subsection (b)(4) is the GES' recommendation concerning the least restrictive course of services, care or treatment consistent with the elderly person's needs. The theme that intervention should be as minimal as necessary to achieve valid goals for the person appears elsewhere in the act. See sections 9(b), 11(a)(6), 11(g)(3), and 11(l). Section 14 also authorizes the elderly person to appeal the court's finding on this issue required in section 11(a)(6).

SECTION 8. Voluntary protective services.

(a) **Consent required.**—Any elderly person may receive protective services, provided the person requests or affirmatively consents to receive these services. If the person withdraws or refuses consent, the services shall not be provided.

(b) **Interference with services.**—No person shall interfere with the provision of protective services to an elderly person who requests or consents to receive such services. In the event that interference occurs on a continuing basis, the Department, a protective services agency, or the public guardian may petition the court to enjoin such interference.

(c) **Publicity for services.**—The Department shall publicize throughout the State the availability of protective services on a voluntary basis for elderly persons.

Comments on section 8

It is expected that protective services will ordinarily be provided to the elderly who desire such assistance. In such case, proceedings to establish guardianships or conservatorships, if necessary, will be nonadversarial.

Subsections (b) and (c) are consistent with the principle of voluntary acceptance of services by prohibiting interference with these services by others and by requiring the State agency to make the elderly aware of the availability of this assistance.

SECTION 9. Involuntary Protective Services.

(a) **Lack of consent.**—If an elderly person lacks the capacity to consent to receive protective services, these services may be ordered by a court on an involuntary basis, (1) through an emergency order pursuant to section 10 of this act, or (2) through appointment of a

conservator or guardian pursuant to [the provisions of the Model Guardianship and Conservatorship Act].

(b) Least restrictive alternative.—In ordering involuntary protective services, the court shall authorize only that intervention which it finds to be least restrictive of the elderly person's liberty and rights, while consistent with his welfare and safety. The basis for such finding shall be stated in the record by the court.

(c) Payment for services.—The elderly infirm, incapacitated, or protected person shall not be required to pay for involuntary protective services unless such payment is authorized by the court upon a showing that the person is financially able to pay. In this event the court shall provide for reimbursement of the reasonable costs of the services.

Comments on section 9

Protective services may be provided to elderly persons without their consent only with court authorization. Such authorization may take two forms: (1) the issuance of an emergency order under section 10 or (2) the appointment of a conservator or guardian. If this authorization has not been obtained or has been denied and the elderly person refuses to accept the services voluntarily, no organization or individual may intervene on its own authority.

The underlying principle here is that the elderly person alone should decide whether or not to accept these services, regardless of the opinion of others about the possible detrimental effects on the person who refuses to accept assistance. Involuntary intervention authorized by the courts, therefore, requires findings that: (1) The elderly person lacks capacity to consent to services, for example, to make intelligent decisions about his person or property; and (2) that conditions exist justifying an emergency order under section 10 or appointment of a conservator or guardian. It is not enough that the older person refuses services or other persons disagree with his decisions.

Discussions of subsection (b) appear in the comments on section 7 and of subsection (c) in the comments on section 6.

SECTION 10. Emergency order for protective services.

(a) Petition and findings.—Upon petition by the Department, the public guardian, a protective services agency, or an interested person, a court may issue an order authorizing the provision of protective services on an emergency basis to an elderly person after finding on the record, based on clear and convincing evidence, that:

(1) the elderly person is infirm or incapacitated, as defined in section 3 of this act;

(2) an emergency exists, as defined in section 3(5) of this act;

(3) the elderly person lacks the capacity to consent to receive protective services;

(4) no person authorized by law or court order to give consent for the elderly person is available to consent to emergency services; and

(5) the proposed order is substantially supported by the findings of the geriatric evaluation service, or if not so supported, there are compelling reasons for ordering services.

(b) Limitations on emergency order. In issuing an emergency order, the court shall adhere to the following limitations:

(1) Only such protective services as are necessary to remove the conditions creating the emergency shall be ordered; and the court shall specifically designate the approved services in its order.

(2) Protective services authorized by an emergency order shall not include hospitalization or a change of residence unless the court specifically finds such action is necessary and gives specific approval for such action in its order.

(3) Protective services may be provided through an emergency order only for 72 hours. The original order may be renewed once for a 72 hour period upon a showing to the court that continuation of the original order is necessary to remove the emergency.

(4) In its order the court shall appoint the petitioner, another interested person, or the public guardian as temporary guardian of the elderly person with responsibility for the person's welfare and authority to give consent for the person for the approved protective services until the expiration of the order.

(5) The issuance of an emergency order and the appointment of a temporary guardian shall not deprive the elderly person of any rights except to the extent validly provided for in the order or appointment.

(6) To implement an emergency order, the court may authorize forcible entry of the premises of the elderly person for the purpose of rendering protective services or transporting the person to another location for the provision of such services only after a showing to the court that attempts to gain voluntary access to the premises have failed and forcible entry is necessary. Persons making authorized forcible entry shall be accompanied by a peace officer.

(c) Contents of petition.—The petition for an emergency order shall set forth the name, address, and interest of the petitioner; the name, age and address of the elderly person in need of protective services; the nature of the emergency; the nature of the person's disability, if determinable; the proposed protective services; the petitioner's reasonable belief, together with facts supportive thereof, as to the existence of the facts stated in subsection (a) (1) through (4) above; and facts showing petitioner's attempts to obtain the elderly person's consent to the services and the outcomes of such attempts.

(d) Notice of petition.—Notice of the filing of such petition, and other relevant information, including the factual basis of the belief that emergency services are needed and a description of the exact services to be rendered, the rights of the person in the court proceeding, and the consequences of a court order, shall be given to the person, to his spouse, or if none, to his adult children or next of kin, to his guardian, if any, to the public guardian, and to the geriatric evaluation service. Such notice shall be given in language reasonably understandable by its intended recipients at least 24 hours prior to the hearing for emergency intervention. The court may waive the 24-hour notice requirement upon showing that (1) immediate and reasonably foreseeable physical harm to the person or others will result from the 24-hour delay, and (2) reasonable attempts have been made to notify the elderly person, his spouse, or if none, his adult children or next of kin, his guardian, if any, and the public guardian. Notice of the court's final order shall also be given to the above named parties.

(e) **Hearing on petition.**—Upon receipt of a petition for an emergency order for protective services, the court shall hold a hearing pursuant to the provisions of section 12 of this act. This hearing shall be held no earlier than 24 hours after the notice required in subsection (d) above has been given, unless such notice has been waived by the court.

(f) **Review of court order.**—The elderly person, the temporary guardian or any interested person may petition the court to have the emergency order set aside or modified at any time, notwithstanding any prior findings by the court that the elderly person is infirm.

(g) **Report.**—Where protective services are rendered on the basis of an emergency order, the temporary guardian shall submit a report describing the circumstances including the name, place, date, and nature of the services, and the use of forcible entry, if any, to the court and the public guardian. This report shall become part of the court record.

(h) **Continued need for services.**—If the person continues to need protective services after the renewal order provided in subsection (b) (3) above has expired, the temporary guardian or the public guardian shall immediately petition the court to appoint a conservator or guardian and/or to order protective placement pursuant to section 11 of this act.

(i) **Immunity of petitioner.**—The petitioner shall not be liable for filing the petition if he acted in good faith.

(j) **Emergency placement.**—When from personal observation of a peace officer, it appears probable that an elderly person will suffer immediate and irreparable physical injury or death if not immediately placed in a health care facility, that the elderly person is incapable of giving consent, and that it is not possible to follow the procedures of this section, the peace officer making such observation may transport the elderly person to an appropriate medical facility. The Department and the persons entitled to notice under subsection (d) above shall be notified of such detention within 4 hours. The Department shall file a petition pursuant to subsection (a) above within 24 hours after the transfer of the elderly person has taken place. The court shall hold a hearing on this petition and render its decision within 48 hours after the transfer has occurred.

Comments on section 10

This section provides the legal authority to deal with a situation where an elderly person is living in highly dangerous conditions or is himself in a state of severe physical deterioration, and therefore swift action is necessary to provide a remedy. Despite the emergency character of the situation, court authorization on an expedited basis is still required for involuntary intervention. The only exception to the need for a court order is the provision for emergency placement in subsection (j).

Subsection (a) lists the findings which the court must make to support issuance of an order for protective services to be furnished in an emergency. These findings must be supported by "clear and convincing evidence" and not merely a preponderance of the evidence to emphasize the caution with which involuntary intervention must be authorized. The basis for these findings should appear in the court record and are appealable under section 14.

Even though a court finds issuance of an order to be justified, the scope and duration of the order are subject to the limitations of subsection (b). In conformity with the "least restrictive action" principle enunciated earlier, the court may authorize only those services needed to remove the emergency, not an extended care program of rehabilitation or treatment designed to restore the elderly person to his full potential. These services must be specified in the court order, and may not include hospitalization or a change of residence except as provided in subsection (b) (2). Two 72-hour programs of services are permissible under subsection (b) (3). If emergency protective services are needed beyond this 6-day period, proceedings for appointment of a guardian or conservator or full protective placement must be initiated, as provided in subsection (h). Forcible entry of the elderly person's premises to implement the court order is also controlled in subsection (b) (16).

To avoid having the elderly person exclusively in the care of the provider of services for the duration of the court order, subsection (b) (4) requires the court to appoint a temporary guardian for this period whose duties are to be responsible for the elderly person's welfare, and to petition for further court actions under subsection (h) if services continue to be necessary. The provider of services may be appointed as temporary guardian if the court so chooses, but it is preferable that some other party serve as guardian to prevent the elderly person from becoming completely dependent on the provider even for the limited duration of the emergency order.

This section is intended to replace for elderly persons section 5-310 of the Uniform Probate Code, which authorizes the appointment of a temporary guardian in two situations. The UPC provides that, when an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing. This provision appears to be unnecessary in the light of section 10 of the Adult Protective Services Act. Under the UPC a temporary guardian may also be appointed, with or without notice, when an appointed guardian is not effectively performing his duties and the court finds that the welfare of the incapacitated person requires immediate action. Again, the combination of a short-term guardianship under section 10 of this act and further proceedings for a new appointment of a permanent guardian seems better suited to protect the interests of the elderly person because of their strict criteria and procedural requirements.

Subsections (c), (d), and (e) describe the procedure to be followed by the petitioner and the court for issuance of an emergency order for protective services. A philosophy of full disclosure has been adopted, both as to the contents of the petition and as to the persons entitled to be notified of the filing of the petition. Such disclosure will afford interested parties the opportunity to intervene or participate in the proceedings, to assist the court, and to protect the interests of the elderly person.

The provision for emergency placement in subsection (j) attempts to deal with the situation where there is not sufficient time to obtain an emergency court order. Peace officers are authorized to make on-the-spot determinations based on personal observation that certain specified conditions probably exist. This determination is analogous to decisions based on probable cause, with which police are familiar in the

areas of warrantless arrests and searches in criminal contexts. Once the transfer to a health care facility has occurred, however, appropriate parties must be notified of this action and regular proceedings under section 10 must be started. The court is required to reach a decision within a specified time limit because transfer of the elderly person has already occurred and should be validated or not as quickly as possible.

SECTION 11. Protective placement.

(a) Findings.—If the elderly person refuses to consent, protective placement shall not take place unless ordered by a court after a finding on the record based on clear and convincing evidence that :

(1) The elderly person is incapacitated, as defined in section 3(10) of this act [or as defined in sections _____ or _____ of the State code], and a petition to appoint a guardian accompanies this petition for protective placement;

(2) The elderly person is so totally incapable of providing for his own care or custody that his condition creates a substantial risk of serious physical harm to himself or others. Serious harm may be occasioned by overt acts or acts of omission;

(3) The elderly person has a disability which is permanent or likely to be permanent;

(4) The elderly person needs full-time residential care or treatment;

(5) The proposed order is substantially supported by the recommendation of the geriatric evaluation service, as provided for in subsection (g) below, or if not so supported, there are compelling reasons for ordering such placement; and

(6) No less restrictive alternative course of care or treatment is available which is consistent with the incapacitated person's welfare and safety.

(b) Who may petition.—The Department, a protective services agency, a conservator, a guardian, the public guardian, or a person applying for a conservatorship or guardianship pursuant to [the provisions of the uniform probate code] may petition the court for protective placement.

(c) Contents of petition.—The petition shall state with particularity the factual basis for the allegations specified in subsection (a) above and shall be based on the petitioner's personal knowledge of the elderly person alleged to need protective placement.

(d) Order of consideration.—A petition for appointment of a conservator or guardian accompanying a petition for protective placement shall be heard and decided prior to the petition for protective placement.

(e) Notice of petition.—Notice of a petition for protective placement shall be served upon the elderly person sought to be placed by personal service at least 10 days prior to the time set for a hearing. Notice shall be given in language reasonably understandable by the elderly person, and he shall be informed orally of its complete contents. The notice shall include the names of all petitioners, the factual basis of the belief that protective placement is needed, the rights of the elderly person in the court proceedings, the name and address of the proposed placement, and the consequences of an order for protective placement. The person serving the notice shall certify to the

court that the petition has been delivered and notice given. Notice shall also be given to the person's guardian ad litem; legal counsel; persons having physical custody of the elderly person whose names and addresses are known to the petitioner or can with reasonable diligence be ascertained; any governmental or private body or group from whom the elderly person is known to be receiving aid; the geriatric evaluation service; the public guardian; and such other persons or entities as the court may require.

(f) **Hearing on petition.**—Upon receipt of a petition for protective placement, the court shall hold a hearing pursuant to the provisions of section 12 of this act.

(g) **Evaluation of person.**—In order to make the finding required in subsections (a) (2), (3), (4), and (6) above, the court shall direct that a comprehensive evaluation of the elderly person alleged to be in need of placement be conducted by the geriatric evaluation service. The evaluation shall include at least the following information:

(1) The address of the place where the person is residing and the person or agency, if any, which is providing care treatment or services at present;

(2) A résumé of the professional treatment and services provided to the person by the Department or agency, if any, in connection with the problem creating the need for placement;

(3) A medical, psychological, a psychiatric, and social evaluation and review, where necessary, and any recommendations for or against maintenance or partial legal rights as provided in _____ of this code. Such evaluation and review shall include recommendations for placement consistent with the least restrictive environment required.

(h) **Choice of facilities.**—In ordering protective placement, the court shall give consideration to the choice of residence of the elderly person. The court may order placement in such facilities as hospitals, nursing homes, domiciliary or personal care facilities, sheltered care residences, foster care homes, or other appropriate facilities. It may not order placement in facilities for the acutely mentally ill; placement in such facilities is governed by [the civil commitment provisions] of this code.

(i) **Duration of order.**—The court may authorize protective placement of an elderly person for a period not to exceed 6 months.

(j) **Renewal of order.**—At the time of the expiration of an order for protective placement, the guardian, the original petitioner, or any interested person may petition the court to extend its order for protective placement for an additional period not to exceed 6 months. The contents of the petition shall conform to the provisions of subsections (a) and (c) above. Notice of the petition for the extension of placement shall be made in conformity with subsection (e) above. The court shall hold a hearing to determine whether to renew the order. Any person entitled to a notice under subsection (e) above may appear at the hearing and challenge the petition; in this event, the court shall conduct the hearing pursuant to the provisions in section 12 of this act.

(k) **Transfer.**—The residence of an elderly person which has been established pursuant to an order for protective placement shall not

be changed unless the court authorizes the transfer of residence after finding compelling reasons to justify the transfer.

(l) *Temporary placement.*—When an elderly person lives with his guardian, the guardian may petition the court to order an alternative temporary placement of the elderly person for good cause, such as to allow the guardian to take a vacation or to release the guardian temporarily for a family emergency. Such placement may be made for not more than 18 days, but the court may grant upon application an additional period not to exceed 30 days. The petition shall include such information as the court deems necessary and adequate. In ordering the alternative placement, the court shall provide for the least restrictive placement consistent with the needs of the elderly person and comparable to his previous residence. Petitions for alternative temporary placement shall not be granted more than once a year except in an emergency.

(m) *Discharge from placement.*—Prior to discharge from protective placement, the Geriatric Evaluation Service shall review the need for continued protective services after discharge, including the necessity for a conservator or guardian. Such recommendation and report shall be made to the Department, the public guardian, the elderly person's conservator or guardian, all persons notified of the original petition for protective placement, and the court where appropriate.

(n) *Duties of the guardian.*—A guardian of an elderly person placed under this section shall have the duty to take reasonable steps to assure that the elderly person is well treated, properly cared for, and provided with the opportunity to exercise his legal rights.

(o) *Confidentiality of records.*—Any records of the Department or other agency pertaining to an elderly person who is protected under this act or for whom an application has ever been made for such protection are not open to public inspection. Information contained in such records may not be disclosed publicly in such a manner as to identify individuals, but the record shall be available upon application for cause to persons approved by the court.

(p) *Voluntary request for placement.*—Any elderly person may request protective placement under this act. No legal rights are relinquished or modified as a result of such placement.

(q) *Costs of placement.*—The costs of providing protective placement shall be borne by the elderly person, unless he is placed in a public facility or is eligible for assistance under Federal or State programs, or the facility is willing to provide placement without charge.

Comments on section 11

An involuntary change of residence of an elderly person to an institutional setting, or from one institution to another, often produces major effects in the person's physical and mental health as well as in his civil rights, and therefore special proceedings to authorize such actions are necessary. The degree of incapacity required to justify protective placement as compared with protective services is greater, in that for the former the person must be found to be incapacitated to the extent that appointment of a guardian is justified. The definition of an "incapacitated person" in subsection (a)(1) is presented in the alternative to permit a jurisdiction with a different

definition in its guardianship laws to utilize that definition in lieu of the one offered in section 3(10) of this act. The other findings required in subsection (a), particularly as to the gravity of the person's disability and its consequent risk of harm to others or himself, again emphasize that orders for protective placement should be given only when a solid justification for such action has been established in court.

The procedural provisions of subsections (c), (e), and (j) generally follow those discussed earlier under section 10 for emergency orders for protective services. Because the order for protective placement requires a finding that the person is incapacitated, subsection (d) requires that the accompanying petition for appointment of a guardian be heard and decided first, in that such appointment includes a finding of incapacity.

The role of the geriatric evaluation service has already been discussed under section 7.

Subsection (h) requires the court to consider the preference of the elderly person himself for placement, even though by definition he has refused consent to such action. This section may not be used as a vehicle to avoid the State's civil commitment law, and therefore the court may not authorize placement in a mental hospital.

Orders for protective placement are only temporary; that is, 6 months in duration, under subsection (i). The burden to obtain renewal of the order is placed by subsection (j) on a party other than the elderly person. If no such party seeks renewal, the elderly person is free to leave the residence established by the last court order. To obtain renewal of the order, the petitioner must file a petition similar in form to that previously filed and notify the persons previously entitled to notice. The court's hearing on the petition for renewal, however, may be of an ex-parte nature unless the elderly person himself or any other party entitled to notice desires to contest the petition. In this event, a hearing pursuant to section 12 must be held.

Subsection (k) places an additional burden of justification on a petitioner who wishes to transfer again the residence of a person who has already experienced displacement as a result of an order for protective placement. This provision is designed to prevent transfers of "convenience" intended to benefit the provider or the petitioner rather than the elderly person.

Subsection (m) requires the geriatric evaluation service to evaluate the person's need for assistance if discharge from protective placement occurs. The GES' recommendations are intended to assist the guardian or conservator in caring for the person or his property. If the guardianship or conservatorship is also terminated upon discharge, then the elderly person is free to accept or not the GES' recommendations.

Subsection (n) emphasizes that a guardian of an institutionalized person has a special responsibility to monitor the care and treatment of this person. If this care and treatment prove deficient, the guardian should exercise the remedies provided by Federal or State law.

Unlike section 6(d) which placed initial responsibility for the costs of protective services on the provider, subsection (g) makes the elderly person himself primarily responsible for the costs of protective

placement. This principle is consistent with current Federal and State law concerning institutional care of the elderly. The alternative of making the institution responsible without providing for reimbursement would create insurmountable difficulties and nullify protective placement except for those eligible for governmental assistance.

SECTION 12. Hearing on petition.

(a) **Hearing procedure.**—The hearing on a petition for an emergency order for protective services or for an order for protective placement shall be held under the following conditions:

(1) The elderly person shall be present unless he has knowingly and voluntarily waived the right to be present or cannot be present because of physical or mental incapacity. Waiver or incapacity may not be presumed from nonappearance but shall be determined on the basis of factual information supplied to the court by counsel or a visitor appointed by the court.

(2) The elderly person has the right to counsel whether or not he is present at the hearing, unless he intelligently and voluntarily waives the right. If the person is indigent or lacks the capacity to waive counsel, the court shall appoint counsel. Where the person is indigent, the State shall pay reasonable attorney's fees; that is, such compensation as is customarily charged by attorneys in this State for comparable services.

(3) The elderly person shall have the right to trial by jury upon request by the person or his counsel.

(4) The elderly person has the right at his own expense, or if indigent at the expense of the State, to secure an independent medical and/or psychological or psychiatric examination relevant to the issue involved in any hearing under this section, and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing.

(5) The elderly person may present evidence and cross-examine witnesses.

(b) **Duties of counsel.**—The duties of counsel representing an elderly person for whom a petition for an emergency order for protective services or for an order of protective placement has been filed shall include: personally interviewing the elderly person; counselling the person with respect to this act, his rights, and any available alternative resources or causes of action; arranging for an independent medical and/or psychological or psychiatric examination of the person relevant to the issue involved in the hearing; and providing competent representation at all proceedings.

(c) **Statement of findings.**—The court shall issue for the record a statement of its findings in support of any order for emergency protective services or protective placement.

Comments on section 12

Subsection (a) sets forth the basic procedural rights of the elderly person at hearings on petitions for an emergency order for protective services or an order for protective placement. In some details these provisions are more protective of the person than many State laws concerning guardianship and conservatorship, or even the Uniform Probate Code itself. This added protection appears warranted by the

substantial deprivation of personal liberty which may be the outcome of these hearings.

If anything, those States should consider strengthening the procedural rights of parties who are the subject of guardianship and conservatorship proceedings to emphasize the fact that such proceedings are at root adversarial in nature, and rightly so, and therefore the paternalistic undercurrents of many older laws should be abandoned. The rights and interests of all parties to these proceedings are best preserved when proceedings are truly adversarial.

The right to counsel provided in subsection (a) (2) is of special importance in these proceedings. Waiver of the right is permitted, but the court should exercise caution in concluding that the person is waiving this right, because the petitions in these cases may be based on allegations of mental incapacity of the person to make responsible decisions. If these allegations are taken at face value, then a waiver of the right to counsel may be subject to the same incapacity.

This subsection and subsection (a) (4) require the State to afford the indigent elderly counsel and professional evaluations at public expense. Counsel might be provided through legal aid or legal services offices or by the Public Defender. In appointing counsel the courts should be sensitive to their responsibility to appoint as counsel, where possible, attorneys with special competence or expertise in mental health proceedings.

Subsection (b), by listing in detail some of the duties of counsel, is intended to avoid permitting attorneys to provide only pro forma representation similar to that given by the guardian ad litem in many jurisdictions.

SECTION 13. Duty to report.

(a) Nature of duty.—Any person having reasonable cause to believe that an elderly person is infirm, incapacitated, or in need of protection shall report such information to the Department or the public guardian.

(b) Procedure for reporting.—The report may be made orally or in writing. It shall include the name, age, and address of the elderly person; the name and address of any other person responsible for the elderly person's care; the nature and extent of the elderly person's condition; the basis of the reporter's knowledge; and other relevant information.

(c) Immunity.—Any person making a report pursuant to subsection (a) above, testifying in any judicial proceeding arising from the report, or participating in a required evaluation, shall be immune from civil or criminal liability on account of such report, testimony, or participation, unless such person acted in bad faith or with a malicious purpose.

(d) Action on report.—Upon receipt of a report, the Department shall make a prompt and thorough evaluation to determine whether the elderly person is in need of protective services and what services are needed, unless the Department determines that the report is frivolous or is patently without a factual basis. The evaluation shall include a visit to the person and consultation with others having knowledge of the facts of the particular case. After completing the evaluation, the director shall make a written report of his findings

to the elderly person, his spouse or next of kin, and the person making the report.

If the director determines that the elderly person needs protective services according to the criteria set forth in section 10(a) of this act, the director, the elderly person, his spouse or any interested person may petition the court for an emergency order for protective services pursuant to section 10 of this act.

Comments on section 13

Subsection (a) imposes a duty on all citizens to inform the State agency or the public guardian of the status of persons who are believed to be infirm, incapacitated, or in need of protection. No penalty, however, is imposed on one who fails to make such a report. Subsection (c) authorizes immunity from civil or criminal liability for persons making a report, except where the reporter acted in bad faith or with a malicious purpose, such as intent to harass the elderly person or to force the person to undertake a transaction against his will. The State agency is expected to investigate all such reports unless it finds that the report is frivolous or clearly without a basis in fact.

SECTION 14. Right to appeal.

An elderly person, his conservator or guardian may appeal any findings of a court under sections 10(a), 11(a), 11(j), or 11(k) of this act. Such appeal shall be handled on an expedited basis by the appellate court.

Comments on section 14

The provision for an explicit right to appeal particular findings of a court is consistent with the act's philosophy that the proceedings authorized under it be truly adversarial and that the findings of courts be specific and based on clear evidence.

SECTION 15. Severability. (Insert severability clause.)

SECTION 16. Repeal. (Insert repealer clause.)

SECTION 17. Effective date. (Insert effective date.)

Appendix 2

MODEL GUARDIANSHIP, CONSERVATORSHIP AND POWER OF ATTORNEY LEGISLATION

GUARDIANSHIP AND CONSERVATORSHIP

Because the following proposed Guardianship and Conservatorship statute is based upon Article V of the Uniform Probate Code, its main features are explained in the General Comments which precede the Article in the Uniform Probate Code. Article V was chosen primarily for its procedural safeguards and the great leeway which it gives the Court in fashioning appointments.

Any changes made in the Article fall into six categories. First, Part 2 has been omitted entirely since it pertains only to the guardianship of minors. Some parts of the General Comment and certain sections and subsections have been deleted for the same reason. If a state adopts the entire Uniform Probate Code, the deleted parts should be inserted.

Secondly a few subsections have been strengthened to prevent the use of appointment of a guardian as the sole basis for commitment (5-304, 5-312) and to indicate that appointment of a conservator does not constitute a judgment on the capacity of an individual.

The priority ranking for appointment as guardian in Section 5-311 has been revised so that it will more closely conform to conservator priority ranking.

Section 1-401 of the Uniform Probate Code has been inserted parenthetically to provide easy reference to its notice requirements.

A few sections, subsections, and citations to other sections have been bracketed since they pertain to minors only or refer to other parts of the Uniform Probate Code which have not been included in the proposed statute. Alternatives to the bracketed portions are italicized.

Finally, certain sections have been modified to make the Article complementary to the proposed Protective Services, Public Guardian and civil commitment statutes.

All italicized words are additions to the Uniform Probate Code provisions.

The original comments to the Uniform Probate Code are identified in this draft as "Commissioners' Comments." Further comments added in the preparation of this draft to explain the additions and changes are identified as "Editor's Notes."

A substantial part of the text of the "Editor's Notes" and of the statutory revisions was prepared by the staff of the Legislative Research Center of the University of Michigan Law School and published in 1971 by Legal Research and Services for the Elderly. The current editors of the notes and statute have drawn liberally on that

material without specific attribution for the sake of simplicity of presentation.

Commissioners' general comment

Article V, entitled "Protection of Persons Under Disability and Their Property," embodies separate systems of guardianship to protect persons of minors and mental incompetents. It also includes provisions for a type of power of attorney that does not terminate on disability of the principal which may be used by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. Finally, Part 4 of the Article offers a system of protective proceedings, including conservatorships, to provide for the management of substantial aggregations of property of persons who are, for one reason or another, including minority and mental incompetence, unable to manage their own property.

It should be emphasized that the Article contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former. A new device, tending to simplify necessary protective proceedings, is found in provisions in Part 4 which permit a judge to make appropriate orders concerning the property of a disabled person without appointing a fiduciary.

The highspots of the several parts of Article V, considered in somewhat more detail, include the following:

(a) A provision in Part 3 authorizes a parent or spouse to designate a guardian for an incapacitated person by will. Such designation becomes effective upon probate of the will and the filing of an acceptance by the guardian. Thereafter the status of guardian and ward arises. It is like guardianship of the person, rather than of estate. It is described as a parental relationship without the parental obligation of support. The relationship follows the guardian and ward and is property recognized and implemented, as and when necessary, by the courts of any jurisdiction where these persons may be located.

(b) A guardian is permitted to delegate his authority for short periods as necessitated by anticipated absence for incapacity.

(c) As previously mentioned, Part 4 of the Article deals with protective proceedings designed to permit substantial property interests of minors and others unable properly to manage their own affairs to be controlled by court order or managed by a conservator appointed by the court. The causes for inability of owner-management that are listed by the statute are quite broad. Technical incompetency is but one of several reasons why one may be unable to manage his affairs. See Section 5-401(2). The draftsmen's view was that reliance should be placed on the fact that the court applying the statute would be a full power court and on the various procedural safeguards, including a right to jury trial, to protect against unwise use of the proceedings, rather than to attempt to state and rely upon a narrow or technical test of lack of ability.

Section 5-409 is important, for it makes it clear that a court entertaining a protective proceeding has full power, through its orders, to

do anything the protected person himself might have done if not disabled. Another provision broadens the form of relief so that the court may handle a single transaction, like renewal of a mortgage, or a sale and related investment of proceeds, which is recommended in respect to the affairs of a protected person directly by its orders rather than through the appointment of a conservator.

(d) If a conservator is appointed, provisions in Part 4 of the draft give him broad powers of management that may be exercised without a court order. On the other hand, provision is made for restricting the managerial or distribution powers of a conservator, provided notation of the restriction appears on his letters of appointment. Unless restricted, the fiduciary may be able to distribute and end the arrangement without court order if he can meet the terms of the Act. Among other kinds of expenditures and disbursements authorized, payments for the support and education of the protected person as determined by a guardian of the protected person, if any, or by the conservator, if there is no guardian, are approved. Also, certain payments for the support of dependents of the protected person are approved by the Code and hence would require no special approval.

(e) Other provisions in Part 4 round out the relationship of protective proceedings to creditors of the protected person and persons who deal with a conservator. Claims are handled by the conservator who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common law rule that contracts of a guardian are his personal responsibility. A conservator is not liable personally on contracts made for the estate unless he agrees to such liability. A section buttresses the managerial powers given to conservator [sic] by protecting all persons who deal with them.

(f) Another section seeks to reduce the importance of state lines in respect to the authority of conservators by permitting appointees of foreign courts to act locally. Also, it follows the pattern of Article III dealing with ancillary administration of decedents' estates by giving the conservator appointed at the domicile of the protected person priority for appointment locally in case local administration of a protected person's assets become necessary.

(g) The many states which have adopted the Uniform Veterans Guardianship Act now have two systems for protection of the property of minors and mental incompetents, one of which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration *and* its minor or incompetent owner is or has been a beneficiary of the Veterans Administration, and the other of which applies to all other property. It is sometimes difficult to ascertain whether a person has ever received a benefit from the Veterans Administration and commonly impossible to determine whether property was derived in part from benefits paid by the Veterans Administration. Part 4 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and would

permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.

Editor's note

Parts of the General Comment which deal solely with the provisions of this Article concerning minors have been deleted.

[PART I]

[GENERAL PROVISIONS]

Section 5-101. **[Definitions and Use of Terms.]**

Unless otherwise apparent from the context in this Code:

(1) "Conservator" means a person who is appointed by a Court to manage the estate of a protected person.

(2) "Court" means the Court or branch having jurisdiction in matters relating to the affairs of decedents. This Court in this state is known as **[]**.

(3) "Disability" means cause for a protective order as described by Section 5-401(1).

(4) "Elderly" means a person sixty (60) years of age or older, or that person's spouse, regardless of age, who is a resident of the State.

(5) "Estate" means all of the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(6) The "Geriatric Evaluation Service" is a team of medical, psychological, psychiatric and social work professionals established by the **[State agency responsible for community-based services to the elderly]** for the purpose of conducting a comprehensive physical, mental and social evaluation of an elderly person for whom a petition has been filed in a court for commitment to a mental hospital, appointment of a conservator or guardian, an emergency order for protective services, or an order for protective placement.

(7) "Guardian" means a person who has qualified as a guardian of a **[minor or]** incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(8) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

(9) A "protective proceeding" is a proceeding under the provisions of Section 5-401 to **[determine that a person cannot effectively manage or apply his estate to necessary ends either because he lacks the ability or is otherwise inconvenienced, [or because he is a minor,] and to]** secure administration of his estate by a conservator or other appropriate relief.

(10) A "protected person" is a **[minor or other]** person for whom a conservator has been appointed or other protective order has been made.

(11) "Protective placement" means the transfer of an elderly person from independent living arrangements to a hospital, nursing home,

domiciliary or residential care facility, or from one such institution to another, for a period anticipated to last longer than six (6) days.

(12) *“Protective services” means the services furnished by a protective service agency or its delegate, as described in Section 5 of the Protective Services Act.*

(13) *“Protective services agency” means a public or nonprofit private agency, corporation, board or organization authorized by the [State agency responsible for community-based services to the elderly] pursuant to Section 3(f) of the Protective Services Act to furnish protective services to elderly infirm, protected or incapacitated persons and/or to serve as conservators or guardians for elderly protected or incapacitated persons upon appointment by a court.*

(14) *“Public guardian” means the office of Public Guardian created by the Public Guardian Act.*

(15) A “ward” is a person for whom a guardian has been appointed. [A “minor ward” is a minor for whom a guardian has been appointed solely because of minority.]

Editor’s note

Definitions (1), (2), (3), (5) and (7) have been taken from Section 1–201 of the Uniform Probate Code. Definitions (8), (9), (10) and (15) are from Section 5–101. The other definitions are similar in content to those used in the Protective Services Act and the Public Guardian Act.

The definition of a “protective proceeding” has been changed to avoid confusion. The operative criteria used by a court in such a proceeding now appear only in Section 5–401.

Section 5–102. [Jurisdiction of Subject Matter; Consolidation of Proceedings.]

(a) The Court has jurisdiction over protective proceedings and guardianship proceedings.

(b) When both guardianship and protective proceedings as to the same person are commenced or pending in the same Court, the proceedings may be consolidated.

[Section 5–103 has been omitted.]

Section 5–104. [Delegation of Powers by Parent or Guardian]

A parent or a guardian of [a minor or] incapacitated person, by a properly executed power of attorney and with approval of the court, may delegate to another person, for a period not exceeding 6 months, any of his powers regarding care, custody, or property of the [minor child or] ward [, except his power to consent to marriage or adoption of a minor ward], *except as provided in Section 10(l) of the Protective Services Act. Such delegation shall be requested by the guardian from the court, and the court shall approve or deny the petition for cause within 14 days after the filing of the petition.*

Commissioners’ comment

This section permits a temporary delegation of parental powers. For example, parents (or guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate power

of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

Editor's note

The bracketed words pertain to minors and are included in the Uniform Probate Code. *Section 10(l) of the Protectice Services Act limits temporary placement of an elderly ward because of the adverse effects changes of residence have on the elderly.*

[PART 2 has been omitted.]

[PART 3]

[GUARDIANS OF INCAPACITATED PERSONS]

Section 5-301. **[Testamentary Appointment of Guardian For Incapacitated Person.]**

(a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given 7 days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the Court in which the will is informally or formally probated, if prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given 7 days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the Court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

(c) This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

(d) On the filing with the Court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the Court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the succeeding sections of this Part.

Commissioners' comment

This section, modeled after Section 5-205, is designed to give the surviving parent, or the spouse, of an incapacitated person, the ability to confer the authority of a guardian on a person designated by will.

This opportunity may be most useful in cases where parents, during their lifetime, have arranged an informal or voluntary commitment of an incompetent child, and are anxious to designate another who can maintain contact with the patient and act on his behalf without the necessity of a sanity hearing. The person designated by will must act by filing acceptance of the appointment. This provides a check against will directions which might prove to be unwise or unnecessary after the parents' death. Moreover, the testamentary designee will have the risk of the possibility that the ward is not in fact incapacitated to prevent him from using the authority conferred to restrain the liberty of the ward. In cases of doubt, the testamentary appointee should petition for a Court appointment under Section 5-303.

Section 5-302. [Venue]

The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a Court of competent jurisdiction, venue is also in the county in which that Court sits.

Commissioners' comment

Venue in guardianship proceedings lies in the county where the incapacitated person is present, as well as where he resides. Thus, if the person is temporarily away from his county of usual abode, the Court of the county where he happens to be may handle requests for guardianship proceedings relating to him. In protective proceedings, venue is normally in the county of residence. See Section 5-403. See Section 1-303 for disposition when venue is in two counties, and for transfer of venue.

Section 5-303. [Procedure for Court Appointment of a Guardian of an Incapacitated Person.]

(a) The incapacitated person, a *public guardian* or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.

(b) *The petition for appointment of a guardian shall state facts showing:*

(1) *The name, address, and corporate or agency status of the petitioner;*

(2) *The petitioner's reasons for concern for the personal well-being of the proposed ward, if the proposed ward is not the petitioner;*

(3) *The necessity for the appointment of a guardian;*

(4) *The name, age, and post-office address of the proposed ward;*

(5) *The name and address of the person or institution having care or custody of the proposed ward;*

(6) *The name, post-office address and relationship of the proposed guardian to the proposed ward, if the proposed guardian is named in the petition.*

(c) [(b)] Upon the filing of a petition, the Court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. *If the*

person is indigent, the State shall pay reasonable attorney's fees, i.e., such compensation as is customarily charged by attorneys in this State for comparable services. The person alleged to be incapacitated shall be examined by a physician appointed by the Court who shall submit his report in writing to the Court and be interviewed by a visitor sent by the Court. The visitor also shall interview the person seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the Court. If the person alleged to be incapacitated is elderly, he shall be evaluated by the Geriatric Evaluation Service, pursuant to Section 7 of the Protective Services Act. The Service shall also interview the person seeking appointment as guardian and visit the present place of abode of the person alleged to be incapacitated and the place in which it is proposed he will be detained or reside if the requested appointment is made. Upon concluding its inquiry, the Geriatric Evaluation Service shall submit in writing to the Court a report of its findings and recommendations.

(d) The person alleged to be incapacitated is entitled to be present at the hearing unless he has knowingly and voluntarily waived the right to be present or cannot be present because of physical or mental incapacity. Waiver or incapacity may not be presumed from non-appearance but shall be determined on the basis of factual information supplied to the court by counsel or a visitor appointed by the Court. The person alleged to be incapacitated is also entitled to present evidence to cross-examine witnesses, including representatives of the Geriatric Evaluation Service and to trial by jury. The issue may be determined at a closed hearing [without a jury] if the person alleged to be incapacitated or his counsel so requests.

(e) The person alleged to be incapacitated has the right at his own expense, or if indigent at the expense of the State, to secure an independent medical and/or psychological examination relevant to the issue of incapacity, and to present a report of this independent evaluation or the evaluator's personal testimony as evidence of the hearing.

(f) The duties of counsel representing a person alleged to be incapacitated shall include: personally interviewing the person, counselling the person with respect to this Act, his rights and any available alternative resources or causes of action, arranging for an independent and/or psychological examination of the person relevant to the issue of incapacity; and providing competent representation at all proceedings.

Commissioners' comment

The procedure here is similar to, but not precisely the same as, protective proceedings for certain disabled persons. It is not required that the visitor be a lawyer. In urban areas, the visitor may be a social worker capable of determining the needs of the person for whom the appointment is sought. By brackets, the National Conference indicates that enacting states should decide whether it is appropriate to create a right to jury trial.

Editor's note

The inclusion of the words "a public guardian" in subsection (a) is designed to indicate clearly that a public guardian may himself peti-

tion for appointment. It is anticipated that the public guardian will intervene only as a last resort; thus there should rarely be anyone else whose appointment as guardian he could seek. In any case the public guardian's role should not be primarily investigative, searching to discover who might need a public guardian. His role should be the more passive one of acting on outside information that comes to his attention through independent sources, such as social workers and neighbors of the person in need.

Evaluation by and a recommendation from the geriatric evaluation service, created by the Protective Services Act, has been added in subsection (c) in cases where the proposed ward is elderly.

Provision is made in subsection (d) for the right of personal appearance at the hearing by the person alleged to be incapacitated. The special needs of indigent persons are provided for in subsection (c) and (e) by requiring that counsel and expert testimony be made available to him at State expense.

While the duties of counsel in subsection (f) might appear self-evident, an explicit listing of the major duties is desirable to prevent *pro forma* representation and to ensure that the proceedings are truly adversarial in nature.

Section 5-304. [Findings; Order of Appointment.]

(a) The Court may appoint a guardian as requested [if it is satisfied] *after findings in the record based on clear and convincing evidence:*

(1) That the person for whom a guardian is sought is incapacitated;

(2) That the appointment is necessary [or desirable] as a means of providing continuing care and supervision of the person of the incapacitated person;

(3) *That, if the incapacitated person is elderly, the appointment is supported by the findings of the Geriatric Evaluation Service, or if not so supported, there are compelling reasons for making the appointment; and*

(4) *That no less restrictive form of intervention is available which is consistent with the incapacitated person's welfare and safety.*

Alternatively, the Court may dismiss the proceeding or enter any other appropriate order.

(b) *No individual shall be committed to any mental institution solely because he has been declared incapacitated for the purpose of appointing a guardian under this Act, nor shall the individual's place of residence be changed except as provided in Section 11(k) of the Protective Services Act.*

Commissioners' comment

The purpose of guardianship is to provide for the care of a person who is unable to care for himself. There is no reason to seek a guardian in those situations where the problems to be dealt with center around the property of a disabled person. In that event, a protective proceeding under Part 4 may be in order.

It is assumed that the standards suggested by the definition in Section 5-101 for the "incapacitated" person are different from those which will determine when a person may be committed as mentally

ill. For example, involuntary commitment proceedings may well be inappropriate unless it is determined that the patient is or probably will become dangerous to himself or the person or property of others. As indicated in 5-101, the meaning of "incapacitated" turns on whether the subject lacks "understanding or capacity to make or communicate responsible decisions concerning his person." There is overlap between the two sets of standards, but they are different. Hence, a finding that a person is "incapacitated" does not amount to a finding that he is mentally ill, or can be committed. In the reverse situation, if a person has been committed to institutional care and custody because of mental illness, it may be unnecessary to appoint a guardian for him. Nonetheless, it may be desirable to have a personal guardian for one who is or may be committed, or who will be cared for by an institution. For one thing, a guardian, having custody, might arrange for a voluntary care arrangement like that which a parent for a minor and incapacitated child could establish. Moreover, the limited authority of a guardian over property of his ward may be appropriate in cases where the ward is committed. Because of [sic] the relationship between existing guardianship legislation and the handling of committed persons appears to vary considerably from state to state, the Code was deliberately left rather general on points relevant to the relationship. Section 5-312 qualifies the power of a guardian to determine the place of residence of a ward who has been committed.

Editor's note

Subsection (b) has been added to emphasize the belief that grounds for the appointment of a guardian should not necessarily be grounds for commitment of the ward.

Section 5-305. **[Acceptance of Appointment; Consent to Jurisdiction.]**

By accepting appointment, a guardian submits personally to the jurisdiction of the Court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the Court records and to his address as then known to the petitioner.

Commissioners' comment

The proceedings under Article V are flexible. The Court should not appoint a guardian unless he is necessary [or desirable] for the care of the person. If it develops that the needs of the person who is alleged to be incapacitated are not those which would call for a guardian, the Court may adjust the proceeding accordingly. By acceptance of the appointment, the guardian submits to the Court's jurisdiction in much the same way as a personal representative. Cf. Sec. 3-602.

Section 5-306. **[Termination of Guardianship for Incapacitated Person.]**

The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in Section 5-307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

Section 5-307. [Annual Review of Guardianship; Removal or Resignation of Guardian; Termination of Incapacity.]

(a) *The guardian shall file an annual report with the Court indicating the present place of residence and health status of the ward, the guardian's plan for preserving and maintaining the future well-being of the ward, and the need for continuance or cessation of the guardianship or for any alteration in the powers of the guardian. The Court shall renew the appointment of the guardian if it is satisfied that the grounds for the original appointment stated in Sec. 5-304(a) above continue to exist. If the Court believes such grounds may not exist, it shall hold a hearing, similar to that provided for in Sec. 5-303 above, at which the guardian shall be required to prove that such grounds exist. If the Court does not make these findings or the guardian declines to participate in the hearing, the Court shall order the discontinuance of the guardianship.*

(b) [(a)] On petition of the ward or any person interested in his welfare, the Court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the Court may accept his resignation and make any other order which may be appropriate.

(c) [(b)] An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in his welfare may petition for an order that he is no longer incapacitated, and for removal or resignation of the guardian. A request for this order may be made by informal letter to the Court or judge and any person who knowingly interferes with transmission of this kind of request to the Court or judge may be adjudged guilty of contempt of Court. *Unless the request is obviously without merit, the Court shall hold a hearing similar to that provided for in Sec. 5-303 above, at which the guardian shall be required to prove that the grounds for appointment of a guardian contained in Sec. 5-304(a) above continue to exist.*

(d) [(c)] Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the Court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor, or if the ward is elderly, a representative of the Geriatric Evaluation Service, to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the Court.

Commissioners' comment

The ward's incapacity is a question that may usually be reviewed at any time. However, provision is made for a discretionary restriction on review. In all review proceedings, the welfare of the ward is paramount.

Section 5-308. [Visitor in Guardianship Proceeding.]

A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing or social work and is an officer, employee or special appointee of the Court with no personal interest in the proceed-

ings. *If the person alleged to be incapacitated or the ward is an elderly person, the visitor shall be a representative of the Geriatric Evaluation Service.*

Commissioners' comment

The visitor should have professional training and should not have a personal interest in the outcome of the guardianship proceedings.

Section 5-309. [Notices in Guardianship Proceedings.]

(a) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) the ward or the person alleged to be incapacitated and his spouse, parents and adult children;

(2) any person who is serving as his guardian, conservator or who has his care and custody; **[and]**

(3) in case no other person is notified under (1), at least one of his closest adult relatives, if any can be found;

(4) *the individual or protective services agency, if any, proposed as guardian;*

(5) *the Public Guardian; and*

(6) *the Geriatric Evaluation Service, if the ward or alleged incapacitated person is elderly.*

(b) Notice shall be served personally on the alleged incapacitated person, and his spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in Section 1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

(c) *Notice shall be given in language reasonably understandable by the ward or the alleged incapacitated person. If notice is served personally, this person shall also be informed orally of its complete contents.*

(d) *The notice shall contain the names of all petitioners, the grounds alleged for appointment of a guardian, the rights of the alleged incapacitated person in the proceeding, and the consequences of a finding that the person is incapacitated and of the appointment of a guardian.*

Commissioners' comment

The persons entitled to notice in a guardianship proceeding are usually fewer in number than those in a protective proceeding. Cf. Sec. 5-405. Required notice shall be given in accordance with the general notice provision of the Code. See Section 1-401.

Editor's note

Paragraphs (4), (5) and (6) of Subsection (a) have been included to allow for notice to non-petitioning proposed guardians, the Public Guardian and the Geriatric Evaluation Service if an elderly person is the subject of a petition.

【Section 1-401. 【Notice; Method and Time of Giving.】

(a) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least 14 days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy thereof to the person being notified personally at least 14 days before the time set for the hearing; or

(3) if the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for 3 consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least 10 days before the time set for the hearing.

(b) The Court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.】

Editor's note

Section 1-401 has been inserted here parenthetically to allow convenient reference to the notice provisions of the Uniform Probate Code.

Section 5-310. 【Temporary Guardians.】

(a) If an incapacitated person *who is not elderly* has no guardian and an emergency exists, the Court may exercise the power of a guardian pending notice and hearing. If an appointed guardian *of a person who is not elderly* is not effectively performing his duties and the Court further finds that the welfare of the incapacitated person requires immediate action, it may, with **【or without】** notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed **【6 months】** *30 days, and it shall order with notice a hearing similar to that provided for in Sec. 5-303 above to be held within this period concerning the removal of the guardian and the appointment of a new guardian.* A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the Court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any report the Court requires. In other respects the provisions of this Code concerning guardians apply to temporary guardians.

(b) *If an elderly person is alleged to be incapacitated, an emergency exists, and no consent can be obtained, the Court shall follow the provisions of Section 10 of the Protective Services Act in ordering the provision of protective services.*

Commissioners' comment

The temporary guardian is analogous to a special administrator under Sections 3-614 through 3-618. His appointment would be obtained in emergency situations or as a protective device against default by a guardian. The temporary guardian has all the powers of a guardian, except as the order appointing him may provide otherwise.

Editor's comment

Section 10 of the Protective Services Act makes special provision for dealing with the provision of protective services to elderly persons unable to give consent. Section 10(b) (4) requires the Court authorizing such services to appoint a temporary guardian who has responsibility for the elderly ward's welfare and is authorized to give consent on his behalf for the approved protective services for the term of the court order. This order is valid only for 72 hours and is reviewable once for another 72 hour period. If the need for services continues beyond that period, proceedings for appointment of a regular guardian under the guardianship laws must begin immediately.

The net effect of these provisions is to limit temporary guardianship to a period of six days plus the time needed for appointment of a regular guardian. By contrast, the UPC permits a six month temporary guardianship for emergencies. This period seems too long for a guardianship created essentially to deal with an emergency, and therefore Section 10 of the Protective Services Act is proposed as an alternative in subsection 5-310(b), at least for the elderly.

Section 5-311. **Who May be Guardian: Priorities**

(a) Any competent person, **or a suitable institution** corporation, a protective services agency, or the Public Guardian may be appointed guardian of an incapacitated person. *However, no institution receiving financial reimbursement for the care of the incapacitated person may be appointed as guardian.*

(b) Persons who are not disqualified have priority for appointment as guardian in the following order:

(1) *an individual, corporation, protective services agency or public guardian nominated by the incapacitated person prior to the filing of the petition for a finding of incapacity if at the time of nomination he was 14 or more years of age and had, in the opinion of the Court, sufficient mental capacity to make an intelligent choice, and the nomination is contained in a writing signed by the protected person and attested by at least two witnesses;*

(2) *an individual, corporation, protective services agency or public guardian nominated by the incapacitated person at any time and in any manner if at the time of nomination he was 14 or more years of age and had, in the opinion of the Court, sufficient mental capacity to make an intelligent choice;*

(3) the spouse of the incapacitated person;

(4) an adult child of the incapacitated person;

(5) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(6) any relative of the incapacitated person with whom he has resided for more than 6 months prior to the filing of the petition;

(7) a person nominated by the person who is caring for him [or paying benefits to him];

(8) a protective services agency;

(9) the Public Guardian.

(c) A person in priorities (3), (4), (5), (6), or (9) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the Court shall select the one who is best qualified of those willing to serve. The Court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

(d) The Court may appoint a public guardian as guardian even though he has nominated a person to serve in his stead.

Editor's note

Subsection (a) has been amended to prevent a conflict of interest where an institution such as a nursing home or a mental hospital receiving financial reimbursement for the ward's care would also serve as his guardian.

The first priority for appointment as guardian under this Section has been changed from the spouse of the incapacitated person to a prior nominee of the now incapacitated person. This change will allow deference to any planning done by the incapacitated person in anticipation of incapacity. The language of paragraphs (1) and (2), subsection (b), has been taken literally from Section 5-410 (a) (2) and (3) of this draft.

The addition of Subsections (c) and (d), taken from Section 5-410 (b) and (c) of this draft, allows the Court to overlook the priority scheme for good cause. If, for example, conditions have changed since the incapacitated person nominated a guardian, the Court might decide to reject the nominee; or if the Court has evidence that the spouse might take unjust advantage of the guardianship, the Court might pass over the spouse.

A public guardian is listed last, since it is anticipated that if a person who falls within categories (1) through (7) (excluding the public guardian who is nominated under category (1)) is available and willing to serve as guardian, his appointment generally will be preferable considering the interests of both the incapacitated person and the public guardian.

Section 5-312. [General Powers and Duties of Guardian.]

(a) A guardian of an incapacitated person 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:

(1) 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. *However, a ward may not be committed to a mental institution without the involuntary commitment pro-*

ceedings prescribed by law, nor may an elderly ward be subjected to protective placement without his consent except as provided in Section 11 of the Protective Services Act, nor may the guardian transfer an elderly ward's place of abode without permission of the Court.

(2) 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.

(3) 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.

(4) If no conservator for the estate of the ward has been appointed he may:

(i) 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;

(ii) 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 incompetent ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

(5) 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 the Court or court rule.

(6) 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.

(b) 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.

(c) *The provision of subsection (b) of this section concerning compensation to a guardian for his services and for room and board furnished to the ward does not apply to a public guardian.*

(d) *The Court may limit the guardian's powers or impose additional duties on him if it deems such action desirable for the best interests of the ward.*

Commissioners' comment

The guardian is responsible for the care of the person of his ward. This section gives him the powers necessary to carry out this responsibility. Where there are no protective proceedings, the guardian also has limited authority over the property of the ward. Where the ward has substantial property, it may be desirable to have protective proceedings to handle his property problems. The same person, of course, may serve as guardian and conservator. Section 5-408 authorizes the Court to make preliminary orders protecting the estate once a petition for appointment of a conservator is filed.

Editor's note

The second sentence of subsection (a) (1) has been added to complement the belief expressed in Section 5-304 that grounds for appointment of guardian and grounds for commitment are not necessarily the same.

Subsection (c) has been added to conform this section to the proposed Public Guardian statute.

Section 5-313. **【Proceedings Subsequent to Appointment; Venue.】**

(a) The Court where the ward resides has concurrent jurisdiction with the Court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the Court located where the ward resides is not the Court in which acceptance of appointment is filed, the Court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other Court, in this or another State, and after consultation with that Court determine whether to retain jurisdiction or transfer the proceedings to the other Court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the Court in which acceptance of appointment is filed.

【PART 4】**【PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS】**Section 5-401. **【Protective Proceedings.】**

Upon petition and after notice and hearing in accordance with the provisions of this Part, the Court may appoint a conservator or make other protective order for cause as follows:

Appointment of a conservator or other protective order may be made *in relation to the estate and affairs of a person if the Court* **【determines】** *makes findings in the record based on clear and convincing evidence that* (i) the person **【is unable to manage his property and affairs effectively】** *lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his estate for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance;* **【and】** (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the

support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds; [.] (iii) that, if the person is elderly, the appointment is supported by the findings of the Geriatric Evaluation Service, or if not so supported, there are compelling reasons for making the appointment; and (iv) no less restrictive form of intervention is available which is consistent with the person's needs.

Commissioners' comment

This is the basic section of this part providing for protective Proceedings for minors and disabled persons. "Protective proceedings" is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. "Disabled persons" is used in this section to include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property.

Since the problems of property management are generally the same for minors and disabled persons, it was thought undesirable to treat these problems in two separate parts. Where there are differences, these have been separately treated in specific sections.

The Comment to Section 5-304, *supra*, points up the different meanings of *incapacity* (warranting guardianship), and *disability*. [Emphasis in original.]

Editor's note

Subsection (1) of the Uniform Probate Code Section applies only to minors and has been omitted. This section is Section 5-401 (2) of the Uniform Probate Code.

The first criterion for appointment of a conservator has been changed to identify the basis for appointment as a functional incapacity to perform in a decision-making role, rather than as a failure to produce effective management results. The person should be permitted to make responsible decisions as long as he has the capacity to make such decisions. The adjective "responsible" means that the decision is a rational choice in the circumstances, not that it is the best or wisest choice.

Section 5-402. [Protective Proceedings; Jurisdiction of Affairs of Protected Persons.]

After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the Court in which the petition is filed has:

- (1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated ;
- (2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of his dependents;
- (3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim.

Commissioners' comment

While the bulk of all judicial proceedings involving the conservator will be in the court supervising the conservatorship third parties may bring suit against the conservator or the protected person on some

matters in other courts. Claims against the conservator after his appointment are dealt with by Section 5-428.

Section 5-403. [Venue.]

Venue for proceedings under this Part is:

- (1) In the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or
- (2) If the person to be protected does not reside in this state, in any place where he has property.

Commissioners' comment

Venue for protective proceedings lies in the county of residence (rather than domicile) or, in the case of the non-resident, where his property is located. Unitary management of the property is obtainable through easy transfer of proceedings (Section 1-303(b)) and easy collection of assets by foreign conservators (Section 5-431).

Section 5-404. [Original Petition for Appointment or Protective Order.]

(a) The person to be protected, any person who is interested in his estate, affairs or welfare including his parent, guardian, or custodian, the *Public Guardian*, a *protective services agency*, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition shall set forth, to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of his guardian, if any; the name and address of his nearest relative known to the petitioner; a general statement of his property with an estimate of the value thereof, including any compensation, insurance, pension or allowance to which he is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

Editor's note

The public guardian and protective services agencies are added to the list of persons who may petition.

Section 5-405. [Notice.]

(a) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents, must be served personally with notice of the proceeding at least 14 days before the date of hearing if they can be found within the state, or if they cannot be found within the state, they must be given notice in accordance with Section 1-401 [Waiver by the person to be protected is not effective unless he attends the hearing, or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.]

(b) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to:

- (1) *The adult children of the person to be protected;*
- (2) *any person serving as his guardian or conservator or who has his care or custody;*

(3) *in case no other person is notified under (a) or (b)(1) above, at least one of his closest adult relatives, if any can be found;*

(4) *the individual or protective services agency, if any, proposed as conservator;*

(5) *the Public Guardian;*

(6) *the Geriatric Evaluation Service, if the person is elderly; and*

(7) any person who has filed a request for notice under Section 5-406 and to interested persons and other persons as the Court may direct.

(c) Except as otherwise provided in (a), notice shall be given in accordance with Section 1-401 and 5-309(c) and (d).

Editor's note

Section 1-401 has been inserted parenthetically after Section 5-309 of this draft.

Section 5-406. **【Protective Proceedings; Request for Notice; Interested Person.】**

Any interested person who desires to be notified before any order is made in a protective proceeding may file with the Registrar a request for notice subsequent to payment of any fee required by statute or Court rule. The clerk shall mail a copy of the demand to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and his address, or that of his attorney, and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

Section 5-407. **【Procedure Concerning Hearing and Order on Original Petition.】**

(a) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the Court shall set a date for hearing.

(b) Unless the person to be protected has counsel of his own choice, the Court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. *If the person is indigent, the State shall pay reasonable attorney's fees, i.e., such compensation as is customarily charged by attorneys in this State for comparable services.*

(c) If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the Court may direct that the person to be protected be examined by a physician designated by the Court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The Court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the Court. *If the person is elderly, the Court shall direct that he be examined and evaluated by the Geriatric Evaluation Service, pursuant to Section 7 of the Protective Services Act. The Service shall also interview the party seeking appointment as conservator. Upon concluding its inquiry, the Geriatric*

Evaluation Service shall submit in writing to the Court a report of its findings and recommendations.

(d) *The person to be protected is entitled to be present at the hearing unless he has knowingly and voluntarily waived his right to be present or cannot be present because of physical or mental incapacity. Waiver or incapacity may not be presumed from nonappearance but shall be determined on the basis of factual information supplied to the Court by counsel or a visitor appointed by the Court.*

(e) *The person to be protected is entitled to present evidence, to cross-examine witnesses, including representatives of the Geriatric Evaluation Service, and to trial by jury. The issue of disability may be determined at a closed hearing [without a jury] if the person to be protected or his counsel so requests.*

(f) *The person to be protected has the right at his own expense, or if indigent at the expense of the State, to secure an independent medical and/or psychological examination relevant to the issue of disability, and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing.*

(g) *The duties of counsel representing the person to be protected shall be those stated in Section 5-303(f) above.*

Commissioners' comment

The section establishes a framework within which professionals, including the judge, attorney and physician, if any, may be expected to exercise good judgment in regard to the minor or disabled person who is the subject of the proceeding. The National Conference accepts that it is desirable to rely on professionals rather than to attempt to draft detailed standards or conditions for appointment.

Editor's note

Subsection (a) of the Uniform Probate Code has been omitted since it pertains to minors only. The two subsections retained have been relettered.

Section 5-408. [Permissible Court Orders.]

The Court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the Court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the Court has, for the benefit of the person and members of his household, [all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will,] *only those powers, except the power to make a will, which it finds are necessary to supply for the disability of the protected person.* These powers include, but are not limited to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety,

to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(3) The Court may exercise or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20 percent of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.

(4) An order made pursuant to this Section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person. *A statement to this effect shall be included in every protective order and in every conservator's letter issued by the Court.*

Commissioners' comment

The Court, which is supervising a conservatorship, is given all the powers which the individual would have if he were of full capacity. These powers are given to the Court that is managing the protected person's property since the exercise of these powers have important consequences with respect to the protected person's property.

Editor's note

Subsection (2) of the Uniform Probate Code has been omitted since it pertains to minors only. The subsections retained have been renumbered.

Subsection (2) has been amended to limit the scope of a protective order so that the loss of powers by a protected person is measured by the type and degree of disability found to exist by the Court. The purpose of this limitation is to make the protective order more flexible in meeting the needs of the protected person and thus not deprive him of any powers he might still be able to exercise.

The last sentence of Subsection (4) has been added to emphasize that appointment of a conservator has no effect on a protected person's capacity.

Section 5-409. [Protective Arrangements and Single Transactions Authorized.]

(a) If it is established in a proper proceeding that a basis exists as described in Section 5-401 for affecting the property and affairs of a person 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. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or prop-

erty, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in Section 5-401 for affecting the property and affairs of a person 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.

(c) 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.

Commissioners' comment

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternative to full conservatorship. Under present law, a guardianship often must be established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

Section 5-410. **Who May Be Appointed Conservator; Priorities.**

(a) The Court may appoint an individual, a corporation with general power to serve as trustee, *a protective services agency, or the Public Guardian*, as conservator of the estate of a protected person. *However, no institution receiving financial reimbursement for the care of the protected person nor any of his creditors may be appointed as conservator.* The following are entitled to consideration for appointment in the order listed:

(1) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(2) an individual, *protective services agency, the public guardian* or a corporation nominated by the protected person *prior to the filing of the petition for a protective order* if *at the time of nomination he was 14 or more years of age and had, in the opinion of the Court, sufficient mental capacity to make an intelligent choice, and the nomination is contained in a writing signed by the protected person and attested by at least two witnesses,*

(3) *an individual, protective services agency, corporation, or public guardian nominated by the protected person at any time and in any manner if at the time of nomination he was 14 or more years of age and had in the opinion of the Court, sufficient mental capacity to make an intelligent choice;*

(4) the spouse of the protected person;

- (5) an adult child of the protected person ;
- (6) a parent of the protected person, or a person nominated by the will of a deceased parent ;
- (7) any relative of the protected person with whom he has resided for more than 6 months prior to the filing of the petition ;
- (8) a person nominated by the person who is caring for him [or paying benefits to him] ;
- (9) a protective services agency ;
- (10) the public guardian.

(b) A person in priorities (1), (4), (5), (6), (7), or (10) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the Court shall select the one who is best qualified of those willing to serve. The Court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

(c) *The Court may appoint a public guardian as conservator even though he has nominated a person to serve in his stead.*

Commissioners' comment

A flexible system of priorities for appointment as conservator has been provided. A parent may name a conservator for his minor children in his will if he deems this desirable.

Editor's note

Paragraphs (2) and (3) of Subsection (a) have been added to allow an individual to plan ahead with assurance for a time when a conservator may become necessary. Cf. Section 5-427.

Category (10) was added to subsection (a) to provide for a public guardian and to give him the lowest priority. It is anticipated that unless he is a nominee under category (1), a public guardian will be appointed conservator only as a last resort. Under subsection (b) the public guardian may nominate someone else to serve and by (c) the Court may refuse to accept the nomination and appoint the public guardian anyway. Subsection (c) is intended mainly to prohibit the public guardian from refusing additional conservatorships because of grounds such as overwork.

Section 5-411. [Bond.]

The Court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus one year's estimated income minus the value of securities deposited under arrangements requiring an order of the Court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without Court authorization. The Court in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

Commissioners' comment

The bond requirements for conservators are somewhat more strict than the requirements for personal representatives. Cf. Section 3-603.

Section 5-412. [Terms and Requirements of Bonds.]

(a) The following requirements and provisions apply to any bond required under Section 5-411:

(1) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;

(2) By executing an approved bond of a conservator, the surety consents to the jurisdiction of the Court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a part defendant. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the Court where the bond is filed and to his address as then known to the petitioner;

(3) On petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;

(4) The bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

Section 5-413. [Acceptance of Appointment; Consent to Jurisdiction.]

By accepting appointment, a conservator submits personally to the jurisdiction of the Court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the Court and to his address as then known to the petitioner.

Section 5-414. [Compensation and Expenses.]

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. *This section does not apply if a public guardian is appointed conservator.*

Editor's note

The last sentence of this section has been inserted to guarantee that a public guardian will provide low cost conservatorship services. The proposed Public Guardian statute provides for his compensation and expenses.

Section 5-415. [Death, Resignation or Removal of Conservator.]

The Court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation or removal, the Court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

Section 5-416. [Petitions for Orders Subsequent to Appointment.]

(a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing Court for an order (1) requiring bond or security, or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief.

(b) A conservator may petition the appointing Court for instructions concerning his fiduciary responsibility.

(c) Upon notice and hearing, the Court may give appropriate instructions or make any appropriate order.

Commissioners' comment

Once a conservator has been appointed, the Court supervising the trust acts only upon the request of some moving party.

Section 5-417. **【General Duty of Conservator.】**

In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees **【as described by Section 7-302.】** *as provided by law.*

Editor's note

If a State adopts the Uniform Probate Code as a whole, the italicized phrase should be omitted and the bracketed phrase inserted.

Section 5-418. **【Inventory and Records.】**

Within 90 days after his appointment, every conservator shall prepare and file with the appointing Court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of 14 years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

Section 5-419. **【Accounts.】**

(a) The conservator shall file an annual report with the Court indicating the present personal status of the protected person, the conservator's plan for preserving and maintaining the future well-being of the protected person, and the need for continuance or cessation of the conservatorship or for any alteration in the powers of the conservator. The Court shall review the appointment of the conservator if it is satisfied that the grounds for the original appointment stated in Section 5-401 above continue to exist. If the Court believes such grounds may not exist, it shall hold a hearing similar to that provided for in Section 5-407 above, at which the conservator shall be required to prove that such grounds exist. If the Court does not make these findings or the conservator declines to participate in the hearing, the Court shall order the discontinuance of the conservatorship.

(b) Every conservator must account to the Court for his administration of the trust upon his resignation or removal, and at other times as the Court may direct. On termination of the protected person's minority or disability, a conservator may account to the Court, or he

may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the Court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the Court may specify.

Commissioners' comment

The persons who are to receive notice of intermediate and final accounts will be identified by Court order as provided in Section 5-405 (b). Notice is given as described in Section 1-401. In other respects, procedures applicable to accountings will be as provided in court rule.

Editor's note

Section 1-401 has been inserted parenthetically after Section 5-309 of this draft.

Section 5-420. **【Conservators; Title by Appointment.】**

【The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact.】

Unless the Court orders otherwise, title to all property of the protected person shall remain in such person, subject, however, to the possession of the conservator and to the control of the Court for the purposes of administration, sale, or other dispositions. If title is not transferred to the conservator, the Court may order that any contracts, conveyances or dispositions made by the protected person shall be voidable at the option of the conservator for a period of —— after such transaction. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

Commissioners' comment

This section permits independent administration of the property of protected persons once the appointment of a conservator has been obtained. Any interested person may require the conservator to account in accordance with Section 5-419. As a trustee, a conservator holds title to the property of the protected person. The appointment of a conservator is a serious matter and the Court must select him with great care. Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the Court.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions.

Editor's note

In keeping with the principle that the conservator should be given only those powers necessary to supply the needs of the protected person, title to the protected person's property is transferred to the conservator only to the extent permitted by specific court action. It is important that elderly protected persons retain as much power of self-determination as is consistent with their need for protection.

Section 5-421. [Recording of Conservator's Letters.]

Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or his successors. Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be filed or recorded to give record notice of title as between the conservator and the protected person.

Section 5-422. [Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable, Exceptions.]

Any sale or encumbrance to a conservator, his spouse, agent or attorney, of any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the Court after notice to interested persons and others as directed by the Court.

Section 5-423. [Persons Dealing with Conservators; Protection.]

A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a Court order as provided in Section 5-408, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in Section 5-426 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

Section 5-424. [Powers of Conservator in Administration.]

(a) A conservator has all of the powers conferred herein and any additional powers conferred by law or trustees in this state. [In addition, a conservator of the estate of an unmarried minor under the age of 18 years, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in Section 5-209 until the minor attains the age of 18 or marries, but the parental rights so

conferred on a conservator do not preclude appointment of a guardian as provided by Part 2.】

(b) A conservator has power without Court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without Court authorization or confirmation to:

(1) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with subsection (b);

(6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset for a term within or extending beyond the term of the conservatorship in connection with the exercise of any power vested in the conservator;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the

security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person for advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectable;

(20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or a dependent of the person who is a minor or incompetent, without liability to the conservator, by paying the sum to the distributor or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

(23) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

Editor's note

The bracketed part of this section is part of the Uniform Probate Code, but applies to minors only.

Section 5-425. [Distributive Duties and Powers of Conservator.]

(a) A conservator may expend or distribute income or principal of the estate without Court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents in accordance with the following principles:

(1) The conservator is to consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent or guardian, if any. He

may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(2) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to (i) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him; (ii) the accustomed standard of living of the protected person and members of his household; (iii) other funds or sources used for the support of the protected person.

(3) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support.

(4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 percent of the income from the estate.

[(c) When a minor who has not been adjudged disabled under Section 5-401(2) attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.]

(d) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

This section does not apply to any expenses incurred by a public guardian in the actual administration of an estate.

(e) If a protected person dies, the conservator shall deliver to the Court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after [40] days from the death of the

protected person no other person has been appointed personal representative and no application or petition for appointment is before the Court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice **[under Section 3-204]** *as provided by law* and to any person nominated executor in any will of which the applicant is aware, the Court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this Section shall have the effect of an order of appointment of a personal representative as provided **[in Section 3-308 and Parts 6 through 10 of Article III]** *by law* except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

Commissioners' comment

The Section sets out those situations wherein the conservator may distribute property or disburse funds during the continuance of or on termination of the trust. Section 5-416(b) makes it clear that a conservator may seek instructions from the Court on questions arising under this Section. Subsection (e) is derived in part from § 11.80.150 Revised Code of Washington **[RCWA 11.80.150]**.

Editor's note

The second sentence of subsection (d) has been added to the Uniform Probate Code subsection to make the subsection conform to the model Public Guardian statute cost provisions.

If the entire Uniform Probate Code is adopted the italicized phrases in subsection (e) should be omitted and the bracketed phrases inserted.

Other bracketed parts of this Section apply only to minors.

Section 5-426. **[Enlargement or Limitation of Powers of Conservator.]**

Subject to the restrictions in Section 5-408(4), the Court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by Sections 5-424 and 5-425, any power which the Court itself could exercise under Sections 5-408(2) and 5-408(3). The Court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by Sections 5-424 and 5-425, or previously conferred by the Court, and may at any time relieve him of any limitation. If the Court limits any power conferred on the conservator by Section 5-424 or Section 5-425, the limitation shall be endorsed upon his letters of appointment.

Commissioners' comment

This Section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales and mortgages of land, only with special Court

authorization. In the latter case, a conservator would be in much the position of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the provisions for protection of third parties have full effect. The Veterans Administration may insist that, when it is paying benefits to a minor or disabled, the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act and require the conservator to file annual accounts.

The Court may not only limit the powers of the conservator but may expand his powers so as to make it possible for him to act as the Court itself might act.

Section 5-427. [Preservation of Estate Plan.]

In investing the estate, and in selecting assets of the estate for distribution under subsections (a) and (b) of Section 5-425, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the Court, the conservator and the Court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

Section 5-428 [Claims Against Protected Person; Enforcement.]

(a) A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods: (1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed; (2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the Court and deliver or mail a copy of the statement to the conservator. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 60 days after its presentation. The presentation of a claim tolls any statute of limitation relating to the claim until thirty days after its disallowance.

(b) A claimant whose claim has not been paid may petition the Court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(c) If it appears that the estate in conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance and education of the protected person or his dependents and existing claims for expenses of administration.

Section 5-429. [Individual Liability of Conservator.]

(a) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a conservator in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable therefor.

(d) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action.

Section 5-430. [Termination of Proceeding.]

The protected person, his personal representative, the conservator or any other interested person may petition the Court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The Court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to his successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected persons or his successors, to evidence the transfer.

Commissioners' comment

The persons entitled to notice of a petition to terminate a conservatorship are identified by Section 5-405.

Any interested person may seek the termination of a conservatorship when there is some question as to whether the trust is still needed. In some situations (e.g., the individual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservatorship.

An order terminating a conservatorship may be recorded as evidence of the transfer of title from the estate. See 5-421.

Section 5-431. [Payment of Debt and Delivery of Property to Foreign Conservator Without Local Proceedings.]

Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate or other like fiduciary appointed by a Court of the state or residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(1) that no protective proceeding relating to the protected person is pending in this state; and

(2) that the foreign conservator is entitled to payment or to receive delivery.

If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

Commissioners' comment

Section 5-410(a)(1) gives a foreign conservator or guardian of property, appointed by the state where the disabled person resides, first priority for appointment as conservator in this state. A foreign conservator may easily obtain any property in this state and take it to the residence of the protected person for management.

[PART 5]

[POWERS OF ATTORNEY]

Section 5-501. **[When Power of Attorney Not Affected by Disability.]**

Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

Commissioners' comment

This Section permits a person who is sui juris to execute a power of attorney which will become or remain effective in the event he should later become disabled. If the Court should subsequently appoint a conservator, the latter may either permit the attorney in fact to continue to act or revoke the power of attorney. The Section is based in part on Code of Va. (1950), Sec. 11-9.1.

Section 5-502. **[Other Powers of Attorney Not Revoked Until Notice of Death or Disability.]**

(a) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than a power as described by Section 5-501, does not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(b) An affidavit, executed by the attorney in fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(c) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

Commissioners' comment

This section adopts the civil law rule that powers of attorney are not revoked on death or disability until the attorney in fact has actual knowledge of the death or disability. Provision is made for proving lack of knowledge by affidavit and the recordation of the affidavit to protect transactions that might otherwise be invalidated at common law. The section is based on *Code of Va.* (1950), Sec. 11-9.2.

Appendix 3

MODEL PUBLIC GUARDIAN ACT

INTRODUCTORY COMMENTS

The proposed position of public guardian provides free or low-cost guardian and conservator services for two classes of individuals. First, the public guardian would be available to serve as guardian or conservator for those persons who have no friends or relatives within the jurisdiction of the court able and willing to serve as guardian or conservator. Second, the public guardian would be available to persons whose income or wealth is inadequate to provide the requisite compensation to a private guardian or conservator. Although public guardians are currently provided in several States, none has such a wide range of powers as the public guardian under this proposal. The proposed public guardian is designed to serve a greater number of people than does a public guardian under any current statute. A third distinction is that the proposed public guardian will be available at little or no cost to most individuals he serves.

Four alternative systems for incorporating the office of public guardian into State or local government are offered for selection at the option of the States. In each case the powers of the public guardian are nearly identical with those of a private guardian or conservator as provided by the Uniform Probate Code. The methods of paying for the services of public and private guardians and conservators differ.

A private guardian or conservator is paid out of the ward's or protected person's assets. Even assuming that an individual's income or estate is large enough for a profitmaking institution to be willing to serve as guardian or conservator, the income or estate may still be eaten away by administrative expenses. In contrast, the services of a public guardian would be provided at public expense unless the court determined that the income or the estate of the individual was large enough to bear the costs of the administration of the protective service.

The services of the proposed public guardian are available to anyone who would qualify for a private guardian or conservator, although it is anticipated that a public guardian will be appointed primarily when no one else is available and willing to serve. While traditional kinds of private guardians and conservators, such as spouses, trusted friends and corporate trustees, generally should be appointed ahead of the public guardian, for many persons a public guardian may be the only guardian or conservator available. (NOTE.—Most of the above comments are taken verbatim from the "Handbook of Model State Statutes at 153.")

SUGGESTED LEGISLATION

(Title, enacting clause, and so forth.)

SECTION 1. (Short title.) This act may be cited as the (State) Public Guardian Act.

SECTION 2. (Declaration of policy and legislative intent.) The legislature of the State of _____ recognizes that many elderly citizens of the State, because of the infirmities of aging, are unable to manage their own affairs or to protect themselves from exploitation, abuse, neglect, or physical danger. Often such persons cannot find others able or willing to render assistance. The legislature intends through this act to establish the office of public guardian for the purpose of furnishing guardianship and conservatorship services to such persons at minimal or no cost to them, as well as to elderly persons desiring such services and able to pay for them.

SECTION 3. (Definitions.) As used in this act:

(1) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(2) "Court" means the court or branch having jurisdiction in matters relating to the affairs of decedents, this court in this State is known as _____.

(3) "Department" means the (State agency responsible for community-based services to the elderly).

(4) "Elderly" means a person sixty (60) years of age or older, who is a resident of the State.

(5) "Emergency" means that an elderly person is living in conditions which present a substantial risk of death or immediate and serious physical harm to himself or others.

(6) "Emergency services" are protective services furnished to an elderly person in an emergency pursuant to the provisions of section 10 of the (Model Protective Services Act).

(7) "Guardian" means a person who has qualified as a guardian of an incapacitated person pursuant to testamentary or court appointed, but excludes one who is merely a guardian ad litem.

(8) "Incapacitated person" means (alternative A: any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other causes (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person). (Alternative B: any person for whom a guardian has been appointed by the court.)

(9) "Infirm person" means a person who, because of physical or mental disability, is substantially impaired in his ability to provide adequately for his own care or custody.

(10) "Interested person" means any adult relative or friend of an elderly person, or any official or representative of a protective services agency or of any public or nonprofit private agency, corporation, board, or organization eligible for designation as a protective services agency.

(11) A "protected person" is a person for whom a conservator has been appointed or other protective order has been made.

(12) "Protective placement" means the transfer of an elderly person from independent living arrangements to a hospital, nursing home, or domiciliary or residential care facility, or from one such institution to another, for a period anticipated to last longer than six (6) days.

(13) "Protective services" means the services furnished by a protective services agency or its delegate, as described in section 6 of the (Model Protective Services Act).

(14) "Protective services agency" means a public or nonprofit private agency, corporation, board, or organization authorized by the Department pursuant to section 4 of the (Model Protective Services Act) to furnish protective services to elderly infirm, protected or incapacitated persons and their spouses, and/or to serve as conservators or guardians of the person for elderly protected or incapacitated persons upon appointment by a court.

(15) "Public guardian" means the office of the public guardian.

(16) A "ward" is a person for whom a guardian has been appointed.

Comments on section 3

The definitions used here are the same as those employed in section 3 of the Model Protective Services Act and are explained in the comments to that section.

SECTION 4. (Establishment of office.)

Alternative A:

(a) Establishment of office.—The position of public guardian for elderly persons is established within (each court of this State which has original jurisdiction in guardianship and conservatorship hearings).

(b) Appointment.—The (chief judge; presiding judge) of each court which has a position of public guardian shall appoint a public guardian. He shall serve for good behavior and may be removed only by the (county board of supervisors).

(c) Part-time appointments.—If in the discretion of the (chief judge; presiding judge) the needs of the jurisdiction do not require a full-time public guardian, the (chief judge; presiding judge) may appoint to the position an individual other than a public official or judge on a part-time basis with appropriate compensation.

(d) Supervision by chief administrative judge.—The chief administrative judge of the State shall issue regulations governing the administration of the various offices of public guardians throughout the State.

(e) Compensation.—The compensation for the position of public guardian shall be fixed (in the same manner as the compensation for other nonelective positions within the court where the office is located).

Alternative B:

(a) Establishment of office.—The office of public guardian for elderly persons is established in the executive branch of the Government of the State of _____.

(b) Appointment.—The head of the office shall be the public guardian, who shall be appointed by the Governor of the State, upon consultation with appropriate agencies and individuals concerned with elderly persons, for a term of (5) years from the time of appointment.

(c) Compensation.—The compensation for the public guardian shall be such salary as is provided in the budget.

Alternative C:

(a) Establishment of office.—The office of public guardian for elderly persons is established within the (State office on aging; the State department of social services; the State department of health and mental hygiene).

(b) Appointment.—Upon consultation with appropriate agencies and individuals concerned with elderly persons, the Governor shall appoint the public guardian, who shall hold office for a term of (5) years from the time of appointment.

(c) Compensation.—The compensation for the position of public guardian shall be such salary as is provided in the budget.

Alternative D:

(a) Establishment of office.—Each county within the State shall establish the office of public guardian for elderly persons.

(b) Appointment.—Upon consultation with appropriate agencies and individuals concerned with elderly persons, the county (board of supervisors; council) shall appoint the public guardian, who shall hold office for a term of (5) years from the time of appointment.

(c) Part-time appointments.—If the needs of the county do not require that a person hold only the position of public guardian, the county (board of supervisors; council) may appoint an individual as guardian on a part-time basis, with appropriate compensation.

(d) Supervision by attorney general.—The attorney general of the State shall issue regulations governing the administration of the various offices of public guardians through the State.

(e) Compensation.—The compensation for the position of public guardian shall be fixed by the county (board of supervisors; council).

Comments on section 4.

Four alternative systems for integrating the office of public guardian into State or local government are presented for adoption at the option of the States. All limit the office's jurisdiction to elderly persons.

Alternative "A" makes the public guardian an official of the court which has jurisdiction over the creation of guardianship and conservatorships. In this respect it follows the approach proposed in the "Handbook of Model State Statutes" published several years ago by Legal Research and Services for the Elderly. One important feature of alternative "A", however, that differs from the handbook proposal is subsection (d), which gives rulemaking power over local public guardians to the chief administrative judge of the State. Such power will allow the courts to achieve whatever degree of statewide uniformity in the administration of the public guardian's office they believe to be necessary.

Alternatives "B" and "C" both place the office of public guardian at the State level of government. Alternative "B" creates an independent State office directly under the Governor, and is modeled on public defender offices in some States. Alternative "C" instead makes the public guardian a division of the State agency into which the State legislature believes it best fits. The latter approach may afford the public guardian easier access to services for his wards, but it sacrifices the

greater independence and client-oriented responsibility inherent in alternative "B".

Alternative "D" makes the public guardian a local official, which carries with it the obvious advantage of making him more sensitive to the needs of the elderly of a particular county. Subsection (d) allows the State attorney general to regulate these local officials for the purpose, as stated earlier, of achieving some degree of uniformity of administration, if this goal seems desirable.

All of the alternatives contain flexible provisions concerning both the appointment of part-time guardians instead of full-time officials and their compensation.

SECTION 5. Powers and duties.

(a) Appointment by court.—The public guardian may serve as conservator and/or guardian, after appointment by a court pursuant to the provisions of the (conservatorship or guardianship law of the State).

(b) Same powers and duties.—The public guardian shall have the same powers and duties as a private conservator or guardian, except as otherwise limited by law or court order.

(c) Power to petition court.—The public guardian may petition the court to have himself or another appointed as conservator or guardian, to issue an emergency order for protective services pursuant to section 10 of the (Model Protective Services Act) and to order protective placement pursuant to section 11 of the (Model Protective Services Act).

(d) Intervention.—The public guardian may, on his own motion or at the request of the court, intervene at any time in any conservatorship or guardianship proceeding involving an elderly person by appropriate motion to the court, if he or the court deem such intervention to be justified because an appointed conservator or guardian is not fulfilling his duties, the estate is subject to disproportionate waste due to the costs of the guardianship or conservatorship, or the best interests of the incapacitated or protected person require such intervention.

(e) Interference with protective services.—The public guardian pursuant to section 8 of the (Model Protective Service Act) may petition the court to enjoin interference by any person with the provision of protective services.

(f) Subordinates.—The public guardian may employ subordinates necessary for the proper performance of his duties, to the extent authorized in the budget for his office.

(g) Delegation of powers and duties.—The public guardian may delegate to members of his staff his powers and duties as conservator or guardian and such other powers and duties as are created by this act, although the public guardian retains ultimate responsibility for the proper performance of these delegated functions.

(h) Other powers and duties.—The public guardian :

(1) May formulate and adopt such procedures as are necessary to promote the efficient conduct of the work and general administration of his office, its professional staff and other employees.

(2) Shall establish and maintain working relationships with other governmental bodies and public and private agencies, institutions, and organizations so as to assure the most effective conservatorship or guardianship program for each elderly person.

(3) May contract for services necessary to carry out the duties of his offices.

(4) May accept the services of volunteer workers or consultants at no compensation or at nominal or token compensation and reimburse them for their proper and necessary expenses.

(5) Shall keep and maintain proper financial and statistical records concerning all cases in which the public guardian provides conservatorship or guardianship services, or petitions a court to appoint a guardian, to issue an emergency order to protective services or to order protective placement.

Comments on section 5

The principle underlying subsections (a) and (b) is that the public guardian may perform the same functions with the same powers and duties as a private conservator or guardian upon court appointment.

Subsections (c), (d), and (e) go further and cast the public guardian in the role of an "interested person" who has the discretion but not the duty to petition the courts to order various types of intervention, to alter interventions previously authorized, or to prevent interference with the provision of protective services. It is thus apparent that the public guardian's functions are not essentially passive, in that they depend on court initiative to bring them into being. The act contemplates a moderately aggressive posture for the public guardian of actively seeking to provide services in appropriate cases through court authorization. No provision is made for actual solicitation of cases by the public guardian, which is therefore neither encouraged nor precluded by this act.

SECTION 6. Persons eligible for services; petition by elderly person.

(a) Eligible persons.—Any elderly person residing in the State is eligible for the services of the public guardian.

(b) Petition by elderly person.—An elderly person may petition the court to have the public guardian appointed as his conservator or guardian with the powers and duties ordinarily conferred by law on conservators and guardians or for certain limited purposes described in the petition which are consistent with the conservatorship and guardianship laws of this State. If the petition requests that only limited powers be granted, the court shall incorporate such limitations into its order of appointment. The filing of such a petition shall not be the basis for any inference concerning the competence of the elderly person, nor for any loss of civil rights or benefits.

Comments on section 6

Access to the services of the public guardian is open to any elderly person residing in the State, rather than limited to the needy or those receiving public assistance. The rationale of this approach is that guardianship and conservatorship services are a resource which ought to be available to all members of the public who need such assistance. Traditionally, such services have been provided outside of the family only by private institutions or persons to those who can afford them. The creation of the office of public guardian would change this tradition in two respects: (1) A public provider of these services would become available as an alternative to the traditional providers; and (2) access to such services would no longer depend on financial ca-

pability or familial relationship, but would be available to all the elderly. Section 7 deals with the problem of payment of costs by those who can afford them.

In subsection (b), the elderly person who petitions the court to appoint a guardian or conservator may limit the powers conferred on this fiduciary. This provision will encourage use of these services for particular purposes by the elderly who might not wish to delegate power over certain other areas of their lives to these fiduciaries. A requirement that broad powers be delegated may deter these persons from using the services of the public guardian. For a court to confer on the guardian or conservator more power than is requested by the elderly person, the proceedings must be converted from the consensual *ex parte* type in subsection (b) to the more formal adversarial proceedings provided by the Uniform Probate Code.

SECTION 7. Allocation of costs.

(a) Determination of costs.—If a public guardian is appointed conservator or guardian for an elderly person, the administrative costs of his services and the costs incurred in the appointment procedure shall not be charged against the income or the estate of the incapacitated person, unless the court determines at any time that the person is financially able to pay all or part of such costs.

(b) Financial ability.—The ability of the income or estate of the incapacitated or protected person to pay for administrative costs of a public guardian or costs incurred in the appointment procedure shall be measured according to the person's financial ability to engage and compensate a private guardian. This ability is a variable dependent on the nature, extent and liquidity of assets; the disposable net income of the person; the nature of the conservatorship or guardianship; the type, duration and complexity of the services required; and any other foreseeable expenses.

(c) Investigation of financial ability.—The public guardian shall investigate the financial status of a person who requests the appointment of the public guardian as his guardian or for whom a court is considering the appointment of the public guardian. In connection with such investigation, the public guardian shall have the authority to require the elderly person to execute and deliver such written requests or authorizations as may be necessary under applicable law to provide the public guardian with access to records of public or private sources, otherwise confidential, as may be needed to evaluate eligibility. The public guardian is authorized to obtain information from any public record office of the State or of any subdivision or agency thereof upon request and without payment of any fees ordinarily required by law.

(d) Claim against estate.—The reasonable value of the services rendered without cost to an incapacitated or protected person shall be allowed as a claim against the estate upon the death of the person.

Comments on section 7

Payment of administrative costs and costs of appointment of the public guardian from public funds is automatic under subsection (a) unless the court takes the affirmative action of determining that the elderly person's income or estate is large enough to pay all or part

of these costs. This approach is likely to discourage courts from being overly zealous in the protection of public funds and too little concerned for depletion of the person's assets. See "Handbook" at 156.

The test of "financial ability" framed in subsection (b) is stated in general terms to avoid fixing maximum income or asset levels for the elderly person beyond which the public guardian would have to be reimbursed. It implicitly recognizes, therefore, the problem of persons of moderate income who cannot afford the high costs of traditional guardianships but who are not destitute or eligible for public assistance. Subsection (d) will encourage courts not to require immediate payment of costs in cases involving persons of modest means, in that such costs can be recovered by the public guardian after the elderly person's death.

SECTION 8. (Term of Appointment; Accounting; Review of Appointment; Hearing Procedure.)

(a) **Term of Appointment.**—The initial appointment by a court of the public guardian as conservator or guardian shall be for a term of 1 year. Successive appointments for a 1-year term may be made by the court upon findings that (1) the person is still in need of a conservator or guardian; (2) the person is still a resident of this State; and (3) the inventory, account, and plan of the public guardian submitted in accord with subsection (b) below are satisfactory.

(b) **Accounting and Review of Appointment.**—No later than 30 days prior to the expiration of his term as conservator or guardian, the public guardian shall file with the court an inventory and account in accord with the provisions of (section _____ of the conservatorship or guardianship law of the State), which shall be subject to examination pursuant to the provisions of (section _____ of the conservatorship or guardianship law of the State). At the same time he shall file a statement setting forth facts which indicate (1) the present personal status of the incapacitated person; (2) the public guardian's plan for preserving and maintaining the future well-being of the person; and (3) the need for the continuance or discontinuance of the conservatorship or guardianship, or for any alteration of the powers of the public guardian.

(c) **Hearing.**—The court shall hold a hearing to determine for the purpose of making the findings set forth in subsection (a) above concerning renewal of the appointment of the public guardian.

(d) **Presence of Incapacitated or Protected Person.**—The incapacitated or protected person shall be present at the hearing unless he has knowingly and voluntarily waived the right to be present or he is physically or mentally incapable of being present. Waiver may not be presumed from nonappearance but shall be determined on the basis of factual information supplied to the court by counsel or a visitor appointed by the court.

(e) **Counsel.**—The incapacitated or protected person has the right to counsel whether or not he is present at the hearing, unless he intelligently and voluntarily waives the right. If the person is indigent or lacks the capacity to waive counsel, the court shall appoint counsel. Where the person is indigent, the State shall pay reasonable attorney's fees, that is, such compensation as is customarily charged by attorneys in this State for comparable services.

(f) Trial by Jury.—The incapacitated or protected person shall have the right to trial by jury upon request by the person or his counsel.

(g) Evaluation.—The incapacitated or protected person has the right at his own expense, or if indigent, at the expense of the State, to secure an independent medical or psychological examination relevant to the issues involved in this hearing, and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing.

(h) Right To Present Evidence.—The incapacitated or protected person may present evidence and cross-examine witnesses.

(i) Duties of Counsel.—The duties of counsel representing an incapacitated or protected person at this hearing shall include: a personal interview with the person; counseling the person with respect to his rights; and arranging for an independent medical and/or psychological examination of the person, as provided in subsection (g) above.

Comments on section 8

Section 8 departs from the traditional philosophy that guardianship and conservatorship appointments are indefinite and that the burden of terminating them rests on the ward.

Subsection (a) limits the term of appointment of the public guardian to 1 year. Reappointment is possible only after a hearing, required under subsection (c), and specific findings by a court that the need for a guardian or conservator continues to exist and that the public guardian is performing his duties satisfactorily.

At the hearing for reappointment of the public guardian as guardian or conservator, subsections (d) through (h) create procedural rights for the elderly person similar to those in section 12 of the Model Protective Services Act. The comments following that section explain the reasons for these subsections and subsection (i).

SECTION 9. (Termination.) The public guardian may be discharged as conservator or guardian by a court upon petition of the incapacitated or protected person or any interested person or upon the court's own motion, when it appears that the services of the public guardian are no longer necessary.

SECTION 10. (Succession to Position of Public Guardian, Vacancies.)

(a) Succession in Office.—When for any reason a person is appointed to the position of public guardian, he succeeds immediately to all rights, duties, responsibilities, and powers of the preceding public guardian.

(b) Continuation of Subordinates' Activities.—When the position of public guardian is vacant, subordinate personnel employed under section 5 of this act shall continue to act as if the position of public guardian were filled.

(c) Vacancy.—When the position of public guardian is vacant, the court may act temporarily as public guardian until the position is filled.

(d) Time limit to fill vacancy.—When the position of public guardian becomes vacant, a successor in office must be appointed within 45 days.

SECTION 11. (Court costs.) In any proceeding for appointment of a public guardian, or in any proceeding involving the estate of a protected or incapacitated person for whom a public guardian has been appointed conservator or guardian, the court may waive any court costs or filing fees.

SECTION 12. (Bond required.)

(a) Upon taking office a public guardian shall file with the clerk of the court in which he is to serve a general bond in the amount of _____ dollars payable to the State or to people of the county in which the court is seated and issued by a surety company approved by the (chief judge; presiding judge) of the court. The bond shall be purchased with the (general funds of the State or county) and be conditioned upon the public guardian's faithful performance of his duties as conservator or guardian.

(b) The general bond and oath of a public guardian and in lieu of the bond and oath required of a private conservator or guardian.

SECTION 13. Severability. (Insert severability clause.)

SECTION 14. Repeal. (Insert repealer clause.)

SECTION 15. Effective Date. (Insert effective date.)

Appendix 4

PROPOSED AMENDMENT TO STATE CIVIL COMMITMENT STATUTES

The following provision, with appropriate variations as needed, is proposed for incorporation into State statutes which establish criteria for involuntary admission of patients to mental hospitals:

If the person is 60 years of age or older, no less restrictive form of care and treatment, such as home services, community services, outpatient services, or services rendered in a facility other than a mental institution is adequate for the person's needs, as certified by the geriatric evaluation service.

COMMENT

This provision should appear in those portions of the State code which specify the findings to be made by courts in civil commitment proceedings and which authorize hospitals to accept involuntary admittees without prior court approval. It is also recommended that similar language be added to the legislation which authorizes State agencies or information services to conduct periodic review of patients already residing in mental hospitals, as well as to statutory provisions for judicial release of patients.

It is important to note that the only standard proposed in the recommended provision is whether a less restrictive alternative form of care and treatment would be adequate for the person's needs, not whether such an alternative is actually available. The drastic curtailment of personal liberty which results from civilian commitment to a mental hospital is difficult to justify solely on the basis of the lack of alternatives.

Appendix 5

PROTECTIVE SERVICES: A PRIVATE SECTOR APPROACH

(Prepared by Planned Protective Services, Inc., Los Angeles, Calif.)

THE NEED FOR PROTECTIVE SERVICES

The typical recipient of protective services is an aging widow, widower, or couple experiencing difficulty in coping with changes brought about in regard to living arrangements, bill payment, transportation, medical treatment and insurance, credit, psychological adaptation to change, ability to deal with salesmen, contractors, nurses, homemakers, and governmental organizations. The difficulties may have arisen from the onset of physical disability or weakness, organic mental deterioration, low income and inflation, as well as from psychological depression resulting from these and other problems.

Mere possession of money is not always sufficient to avoid many of the above stress situations. In fact, one of the seamiest human traditions has been the preying upon the elderly infirm through ill advised or fraudulent schemes pushed upon afraid and confused individuals by "artful or designing persons" in the guise of bargains, investments, easy money, false promises of free or inexpensive services, oral agreements, and written agreements containing confusing legal jargon or fine print. Homes have been lost, sizeable estates depleted, valuable personal property relinquished for a fraction of value, worthless land purchased, and cheap or worthless goods and services bought at many times real value. Complex financing has been portrayed as simple and inexpensive, though it has often involved repayment plans impossible for the fixed-income senior to follow, thus inviting foreclosure and repossession. Individuals have been locked in hospitals and residential care facilities of varying types, sometimes without need, sometimes involuntarily, with little regard for medical and psychological bases for level of care, and often in surroundings of ill-conceived social planning and poor hygiene.

Although many people caught up in these situations may have no close relatives or no relatives at all, there exist in the southern California area alone thousands of cases where relatives (greedy or well meaning) either are a part of the problem or fail to come to grips with the situation due to their own pressing affairs, their inability to deal effectively with the elderly relative, or their geographical distance from him or her. Husbands, wives, sons, daughters, brothers, sisters, grandchildren, and nieces and nephews have all been known to seize the assets of their elderly relatives and place them in shame-

ful custodial care facilities to waste away and die as one means of "avoiding probate."

Obviously there are available legally based sources of protective services aimed at providing court supervision of the personal and financial affairs of infirm individuals as managed by another party. As will be seen, the nature, scope, and accessibility of these services vary greatly. Some of these sources are traditional and well known; others are relatively new and deserve more study. Still others, of course, are yet to be developed and perfected.

AVAILABLE COURT-SUPERVISED PROTECTIVE SERVICES

In California, legal guardianship has long been a practice whereby a relative or close friend of an infirm individual is appointed, under court jurisdiction, to manage the personal and financial affairs of his ward. Although court supervision is mandated by the California Mental Health Code and Probate Code, it is more or less limited to the appointment process, the inventory and appraisal, and the current and final accountings. (Negotiation of certain contractual arrangements as well as sales of securities and real property do require additional court involvement.) However, legal guardianship has inherent negative aspects, both generally and as practiced by the inexperienced guardian—the so-called one time situation.

First, guardianship involves a finding of incompetency. This results in almost total lack of control and even of input by the ward concerning his or her personal preferences about living arrangements, investment, contracts for services, and other related decisions. This total isolation from direction or control of one's affairs brings on, in the more mentally active wards, feelings of uselessness, low self-esteem, and accelerated further mental and physical deterioration.

Second, even well-meaning lay guardians are themselves called upon to make financial, social, legal, and management decisions often without personal experience or ability. The planning involved, both long and short term, can be a difficult proposition for the lay person. Wrong decisions have been made resulting in financial loss and psychological distress to the ward. Also, increased usage of attorney time due to the lay guardian's inability to make some of the required decisions out of his own prior experience can severely inflate guardianship costs.

These factors indicate a need for alternatives both to the one time guardian pattern and to the somewhat extreme nature of the legal guardianship itself. And in California, these alternatives do exist.

Since the late 1950's, the California Probate Code has provided for a middle ground between guardianship and complete self-reliance for the elderly infirm. Legal conservatorship (of the person, estate, or of both) now provides for court-supervised financial and/or personal management involving the same legal safeguards as guardianship, but without the stigma of incompetency. The conservatee has a legal right to consultation with the conservator about the full range of affairs. The conservatee also retains a right to make certain contracts on his own. The conservator is required to take adequate consideration of the wishes of the conservatee as a part of the decisionmaking process. Disposition of assets can only be allowed where need or

justification can be shown to the court, either prior to or subsequent to such disposition.

In cases where after-the-fact approval of disposition is not obtained, the conservator may be surcharged personally, or through his required bond, for any amounts involved. In Los Angeles County, probate judges are requiring that conservators promise under penalty of perjury that their conservatees will not be placed in any health care facility against their will. Many conservatees live in their own homes or apartments, or live happily in board and care environments, in the latter case often retaining their own furniture. Where medical and psychiatric advice indicate, conservatees can drive automobiles, travel at will on public transportation, and even move from one county to another, involving only a change in court jurisdiction for the conservatorship. Conservatees have often recovered to an extent that they can do without the protection of conservatorship; in these cases an orderly and prompt termination, accounting, and release is obtainable through the court in approximately 6 weeks, during which time the conservator is responsible for aiding the conservatee in resuming control.

Although family members can be appointed as probate conservators, the same pitfalls await "one time" conservators as their guardian counterparts. The alternatives to relative involvement ideally should offer total impartiality, ready access to expertise in:

- Accounting,
- Bookkeeping,
- Property management,
- Business management,
- Long- and short-range financial planning,
- Insurance,
- Debt collection,
- Creditor relations,
- Paralegal services, and
- Personal financial counseling.

These services should be available at reasonable cost.

For conservatorship of the person, good alternative sources of protective services should offer:

- Visitation, both routine and in crises,
- Coordination of medical consultations with both internists and specialists, as inpatient, outpatient, and in-office visits,
- Transportation,
- Access to professional and semiprofessional nursing services, where indicated by medical advice,
- Adequate physician and nurse screening and supervision,
- Access to all types of government aid and reimbursement, including aid in filing of claims,
- Referral to psychiatric and psychological treatment as inpatient and outpatient (especially where covered by medicare),
- Maintenance of existing private medical insurance,
- Shopping,
- Budgeting, and
- Aid in corresponding with friends and relatives.

In addition, where institutional care is medically required, close supervision of care quality, including hygiene, therapy, exercise, security of personal belongings, food value and appeal, ventilation, warmth and air conditioning, and employee attitude toward the patient, should be practiced. All of these services to the person of a conservatee should be provided by or directed and supervised by a competent, professional person or persons, ideally educated in gerontology and social service, and where available, a licensed social service practitioner. Individual caseworkers should be mature, adaptable, experienced in dealing with elderly people, and importantly, capable of inspiring trust and confidence; these caseworkers and their supervisor should work toward fostering maximum retention of individual initiative and drive.

Because the organized conservatorship deals with two distinct but interwoven areas of life management, person and estate, the optimum situation is one in which the two areas are served by the same entity. This is because most decisions inevitably require coordination of the two areas of protective services. For example, budgetary considerations, long and short term alike, involve important inputs juxtaposing available funds and required levels of service. When one organization manages both the person and the estate, this coordination is readily attained.

In southern California, as in most regions, banks and trust companies are regularly serving as legal fiduciaries in live estates such as guardianships and conservatorships. However, these firms are not allowed in California to handle guardianship and conservatorship of the person. Another entity must be provided if the protection of the person is required. Furthermore, because these firms are profitmaking in character, they have found it financially unrewarding to accept appointments in estates under \$90,000 and, with few exceptions, do not now take on smaller cases.

For years, the only organized conservator of the person and estate combined was the county public guardian. In Los Angeles County, this office traditionally has been a backwater appendage of the county public administrator's office, handling decedent estates. Press coverage and public testimony has indicated in the recent past that the public guardian has, because of staff shortages, poor management, and lack of sufficient budget, been remiss in responding to needful situations, in processing the onset of guardianship or conservatorship, in properly maintaining the supervision of personal care, in effectively responding to complaints, changes in care quality, in institutionalizing individuals before need, and in slow response to improvements in physical or mental condition which might indicate termination of the protective service.

For the past several years, however, a private sector approach to organized protective services has been developed, serving several southern California counties. It is Planned Protective Services, Inc., a non-profit, charitable, Federal and State tax exempt, nonsectarian California corporation, specifically incorporated for the purpose of providing court-supervised, bonded, expert, professional personal and financial management, through conservatorship, to the elderly infirm,

as well as to certain other people of more moderate age with management disabilities.

HISTORY OF PLANNED PROTECTIVE SERVICES

As early as 1967, a year-long investigation of the need for new sources of protective services was conducted by the Committee on Aging of the Los Angeles Welfare Planning Council (now a Red Feather agency). Testimony from a broad spectrum of public and private agencies and individuals was heard. The conclusion of the study was that an overwhelming unserved need for protective services to the aging existed, and that the county public guardian was not able to meet that need. The council recommended the establishment of a model nonprofit, charitable corporation in Los Angeles and that work be initiated toward eventual passage of legislation to alter the probate code whereby such a corporation could be named to serve as conservator or guardian of the person and estate. PPS was incorporated in 1969 and received charitable designation and tax-exempt status from the Federal and State governments in that year.

During the early years, the president of PPS was the appointed guardian or conservator, and he employed the resources, facilities, and staff of the corporation to aid his wards and conservatees. In turn, when he was awarded court reimbursement, he turned over his fees to the corporation. As the culmination of a long, drawn-out effort, legislation was enacted in 1974, largely through the cooperation and efforts of Assemblyman Alan Sieroty, that effectively allowed Planned Protective Services, Inc. to be appointed directly by the probate court. A copy of the enabling legislation is part of the appendix to this report.

Since 1969, Planned Protective Services, Inc. has grown from a one-room operation (its first quarters were located in a donated room in the Los Angeles Episcopal Cathedral) to a set of offices on Wilshire Boulevard in the McArthur Park section of Los Angeles, as well as a branch office in Torrance serving the south portion of the county. Recently, staff and space were acquired in San Diego as a part of an affiliation program with an organization prominent in social services aid to the elderly in that county. In spring of 1976, the corporation received its first appointment as a conservator in San Diego.

Future plans include the addition of other suburban branch offices, a senior services center for aid and referral of seniors in a variety of problem areas which will include housing, transportation, medical and nursing care and legal services, as well as preretirement counselling. For more than 1 year, PPS has been involved in very promising negotiations with the Social Security Administration, working toward implementation of a large scale representative payee program for SSA beneficiaries who may not require outright court-appointed aid, but who do need some assistance in bill-payment and budgeting.

OPERATION OF PLANNED PROTECTIVE SERVICES, INC.

*Under the direction of John M. Mills, PPS employs personnel trained in property management, bookkeeping, fund raising, medical insurance claims processing, and of course a large social service staff, supervised by two professional social workers.

The agency receives requests from many quarters for investigation and aid where elderly individuals are in need of protective services. Referrals have come from acute hospitals, physicians, nursing services, attorneys, family, friends, judges, as well as from individuals seeking aid for themselves. Many referrals have come directly from the Social Security Administration and the Veterans Administration as a result of study by those organizations into PPS' record as a social agency and after the development of a close working relationship between PPS and SSA and the VA.

Staff members of PPS meet personally with proposed conservatees on a confidential basis, in the presence, whenever possible, of their own lawyer or a trusted friend, relative, or neighbor. All aspects of need are investigated, and the nature of conservatorship is explained clearly and in depth. PPS personnel are in contact with the personal physician or psychiatrist, and attempt to interview all persons interested in the care and welfare of each individual.

One of the most interesting facets of the protective services offered by the corporation is the lack of redtape involved. In cases of real crisis, because of the professional experience of PPS in its field, and due to its excellent reputation with the courts, the bar, hospitals, and the medical profession, the agency is sometimes appointed as temporary conservator within as little as 48 hours after the first crisis call.

Once appointed on this temporary basis, the agency moves to secure adequate medical treatment, food and shelter and, when necessary, in-home care or placement. Staff members immediately secure real and personal property and begin in-depth investigation of needs, assets, potential losses and liabilities, and seek information about lost relatives. In a significant number of cases, PPS discovers that some assets of its conservatees have been stolen or misappropriated, and moves toward regaining them. Within a month, all known relatives have been contacted and made aware of the situation, and a court hearing has been held to determine need for longer term conservatorship protection. PPS conservatees are brought into court whenever possible, and only when a medical declaration (under penalty of perjury) by the attending physician is filed with the court may the agency be appointed without the conservatee present. Only complete physical inability to attend court is satisfactory under the probate code in such situations.

Once appointed, the corporation (which must carry a separate bond for each case in the amount of the total annual income of the conservatee plus the value of all personal property) provides a complete and accurate inventory of assets to the court. Every 14 months, or more often, if necessary, the agency provides to the court a complete accounting of all income received and all disbursements made.

Among the many achievements of Planned Protective Services, Inc. in its backlog of individual case histories are: recovery of real property taken over by the State for back taxes, removal of squatters, avoidance of trust deed note foreclosures, rescission of prior sales of real property at a fraction of market value, psychiatric treatment of some conservatees resulting in their return to individual living arrangements, and the obtaining of competent medical care for individuals who may not have seen a doctor for years.

A paramount objective of the agency is the maintaining of the personal character of its services. Each case is examined and periodically discussed at staff meetings so that the full organization is aware of the variety of needs and desires and feelings of each conservatee. The client is not merely a name in a log or a number on a computer printout. In many instances, the relationship between the caseworker and client becomes very close, similar to that of an older and younger relative or that of longtime friends.

THE COST OF CONSERVATORSHIP

Compared with attorney costs of from \$50 to \$75 per hour, and bank or trust company charges of from \$30 to \$50 per hour, the Planned Protective Services, Inc. fee guideline of only \$15 per hour is a bargain. Furthermore, due to the efficiency of the agency, it has been able to guarantee that it will care for the conservatee for life, even if medical care and hospitalization outlays eventually deplete all of the conservatee's assets. Planned Protective Services, Inc. never in its history has requested to be relieved of a case due to lack of funds. No payments are ever received in advance, and only if the court determines that services provided were necessary and reasonable is payment endorsed by the supervising judge in each case.

PPS has been developing a program for volunteer services, to keep the cost of conservatorship low. The corporation has held a biannual ball for donation of funds to support aid to needy conservatees. Several large corporations, including TRW and Northrop, have been involved in yearly donations of funds and gifts, especially at holiday time, for the benefit of the agency's clients. The present ratio of charity cases to private cases is about 31 percent. No public funds have ever been expended by Planned Protective Services, Inc.

LONG-TERM CARE PLACEMENT

Most people, lay and professional alike, believe the optimum living arrangement is as a couple or as an individual, in one's own home or apartment. Planned Protective Services works toward supporting its conservatees in this type of personal environment. At-home conservatees, combined with clients living in their own rooms but receiving meals in a residential care setting together make up between 50 and 60 percent of the PPS caseload.

Where inability to walk or incontinence requires placement in a convalescent care facility, the corporation still asserts great care and effort in picking the proper situation for each client in terms of location and quality of care. PPS tries to place such an individual in a neighborhood close to his or her traditional residence area, so that old friends and acquaintances, many of whom have difficulty with transportation, are more likely to continue a relationship with the conservatee. The level of care provided in such facilities is constantly being monitored by the agency, and such facilities are aware that deteriorating conditions of care will cause prompt removal of clients.

As indicated earlier, the probate conservator is not allowed to place its conservatees involuntarily in any medical care facility. In those rare instances where a difficulty arises in this regard, PPS has managed to provide professional outside psychological or psychiatric evalua-

tion combined with its own caring and low key counseling to bring an understanding of the situation to its client. In only one case has the agency been required to submit a conservatee to county investigation and legal hearing under Mental Health Code regulations leading to due process involuntary commitment. (In California an involuntary commitment requires an intensive, involved arbitrary proceeding transacted by a county designated public sector investigating agency, supervised by a special superior court branch.)

SUMMARY: THE PRIVATE SECTOR SOLUTION

This is an era when social problem-solving has begun to look away from Government control and responsibility and tax-based financing of social services. And the southern California experience has provided the nongovernmental model. The slow but steady growth of Planned Protective Services, Inc., which has resulted in a vast amount of practical experience in protective services application, from legal, financial, medical and psychological standpoints alike, demonstrates the viability of this private sector approach. Legally administered protective services have been made available to many persons without public fund expenditures through this program. It is expected that the amount of available services will continue to expand, both in terms of numbers and geographical scope.

