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# SURROGATE MANAGEMENT OF THE PROPERTY OF THE AGED†

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## PREFACE

Walter M. Beattie, Jr.\*

This article by Professor Alexander raises fundamental questions as to the personal and property rights of the older individual and the role of society, through its law and courts, in the protection of such rights.

How to protect the rights of older individuals has long been a concern of social workers and has become an increasing concern of lawyers, physicians, trust officers of banks, public health departments and of the courts. Under the broad heading of "protective services for the aging" a new body of literature is emerging pointing to the need for greater societal understanding and responsibility for a coordinated program of social, legal, and medical services, organized to protect the older person. The need for this occurs through the inability of older persons with limited mental functioning due to mental deterioration, emotional disturbance, or extreme infirmity to manage their own affairs in such areas as providing for personal and physical needs, planning and decision making, and handling of finances.

The purpose of such a coordinated program is to protect the civil rights and personal welfare of older persons from the neglect and/or exploitation by relatives, "friends", the aged individual himself, and the community.

While Professor Alexander's article goes beyond the question of protecting the rights of the older person to identifying and clarifying the legitimate interests of wards or surrogates, his suggestions are provocative, particularly in regard to the concept of a legal assistant. Certainly there is need for much discussion and debate as to how society can be more responsive and responsible to the requirements of the increasing numbers of the elderly in the society with special needs. The paper which follows hopefully will add to such a dialogue. It should give rise to additional perspectives on the social and medical considerations of protective services as these relate to new forms of legal and societal responsibility.

## I

### THE PHYSICAL AND MENTAL DISORDERS AFFLICTING AGED PERSONS

Many aged persons may be unable to manage their affairs efficiently due to the "syndrome of bodily change (including changes in the brain)" which accompanies the aging process. These affairs may be of a personal, and/or

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financial nature. To illustrate, an aged person may be physically infirm due to arthritis and therefore unable to care for his bodily needs; he may be unable because of organic mental illness, i.e. senile degeneration of the brain cells causing loss of memory, to conduct his business affairs in what others would consider a prudent, non-wasteful manner; he may be too physically and mentally infirm due to a stroke to manage either his personal or business affairs.

Most writers attempting a description of the syndrome of bodily change have used a "typical situations" approach.<sup>1</sup> This approach consists primarily of a description of what the individual is incapable of doing, and secondarily of a description of the physical and mental disorders that cause him to be incapable.<sup>2</sup> That approach is somewhat justified by the existence of numerous physical and mental disorders that occur in innumerable combinations and render aged persons incapable. In contrast, the attempt here will be to list and briefly describe the most prevalent physical and mental disorders that comprise the syndrome of bodily change affecting the aged.

An aged person may be rendered incapable due to any one or a combination of the multitudinous physical ailments that arise for the first time or worsen in old age. To list and describe all of them would be an insurmountable task. Instead the classification system formulated by Dr. Martin will be employed to identify the most prevalent debilitating physical ailments that may beset the aged person.<sup>3</sup> He formulated four categories of debilitating physical disorders that beset the aged—vascular, muscle-skeletal, painful feet and sensory loss.

The major vascular deficiency is arteriosclerosis (hardening of the arteries). This affliction begins early in life and progressively worsens with age. Usually, it becomes debilitating only in old age. It substantially involves a narrowing of the vascular channels, and results in a reduced flow of blood to the vital organs. The effect of this reduced blood flow is to deprive vital organs of essential nutrition; ultimately, this results in cellular death and a progressive impairment of functional ability. There may also be a thrombosis (clotting of the blood) resulting in the complete obstruction of an artery, and the death of the tissues which it supplied. The debilitating afflictions that occur due to vascular change include heart attacks, strokes, malfunction in the kidneys, and poor circulation in the legs with resulting gangrene.

The other major category of physical change that causes disability is muscle-skeletal. Osteoarthritis (arthritis) is the most prevalent form of muscle-skeletal disorder. This disease attacks the limb joints—knees, hip, finger joints, discs and the small joints of the spine, among others. It makes

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1. See, e.g., DISTRICT OF COLUMBIA—INTERDEPARTMENTAL COMMITTEE ON AGING, PROTECTIVE SERVICES FOR ADULTS (App. A, Mar. 29, 1967).

2. See SOCIAL AND MEDICAL PROBLEMS OF THE ELDERLY, (K. Hazell ed., rev. 21ed. 1966).

3. J. Martin, *Physical Disorders*, in AGING AND HEALTH 13-15 (J. Boyne ed. 1966).

these limb joints stiff, swollen and possibly immobile. Osteoarthritis may cause difficulty in walking, loss of manual dexterity, stiff neck, lumbago (severe backache) or sciatica (severe pain in the back of the thighs and legs). The causes of osteoarthritis include sudden injury to a joint, obesity, long standing strains from certain occupations, poor posture and certain structural abnormalities such as scoliosis (curvature of the spine). Another common muscle-skeletal debilitating disorder is osteoporosis (demineralization of the spine due to a reduction of calcium). It is caused by a lack of female hormones (this is the reason why osteoporosis is so common in post-menopausal women), inadequate intake of calcium or its excessive loss, long term administration of cortizone or prolonged bed rest. From a perusal of the factors that cause osteoarthritis and osteoporosis, it can easily be understood why so many senior citizens suffer from these two afflictions.

The third classification is "painful feet". Feet that are so painful as to result in disability are due to callouses, bunions, hammer toes and arch strain. The final category of prevalent debilitating physical disorders is sensory loss. Sight loss, hearing loss, and loss of sensation in the hands are the examples used by Dr. Martin.<sup>4</sup>

Although the great majority of people over the age of 65 are mentally alert, many old people do suffer from mental disorders. These vary in degree from mild to severe and create corresponding inability to manage either personal or proprietary affairs or both.<sup>5</sup> Practically all mental disorders are products of complex, interrelated factors—physiological, psychological, hereditary, social and economic. When speaking of the aged suffering from incapacitating mental disorders, however, the disorders are classified as either organic (physically caused, resulting from the syndrome of bodily change that besets the aged) or functional (emotionally caused, resulting from the socio-economic factors encountered in the aged person's environment).

Aged persons are much more prone to suffer from organic mental disorders than are younger persons because of the bodily change syndrome, and because of the lowered resistance of the elderly to infectious disease, poisons in the body such as alcohol and barbituates, etc.<sup>6</sup> Any of the following may cause the debilitating organic changes: cerebral arteriosclerosis, cerebral tumor, senile degeneration of brain cells, drug intoxication, cardiac failure, pulmonary diseases, diabetes, hyperthyroidism and syphilis.<sup>7</sup>

A diagnostic triad has been formulated to aid members of the medical profession in diagnosing and treating the organically caused mental disorders prevalent in the aged population. *Amnesia*, defined as an impairment of

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4. *Id.*

5. U.S. PUBLIC HEALTH SERVICE, MENTAL DISORDERS OF THE AGING 6-8 (1963).

6. *Id.*

7. R. Barton, *Mental Disorders in the Elderly*, in SOCIAL AND MEDICAL PROBLEMS OF THE ELDERLY 194 (K. Hazell ed., rev. 2d ed. 1966).

memory, is the first part of the triad. The second part of the triad is *emotional lability*. This is defined as an impairment of one's emotional control; one is too quick to laugh or cry, for example. The third part of the triad is *impairment of consciousness and purposive activity*. This implies that the person fails to attach accustomed significance to objects, situations, and propositions that confront him. He is disoriented and confused. His attention is lessened and his concentration is not easily maintained. Impairment of consciousness and purposive activity that is accompanied by agitation and restlessness is known as *delirium*. Hallucinations and delusions may also be present. Other manifestations of the organic mental syndrome are abnormal suspicions and prejudices, impairment of moral sense (there may perhaps be sexual deviancy), incontinence (lack of control over excretory functioning), and confabulation (the giving of untrue factual details).<sup>8</sup>

The other classification of debilitating mental disorder in the aged is functional. The affective psychoses—depressive and manic—are the functional disorders that are most prevalent in older cross-sections of the population. As is the case with younger persons, the incidence of the depressive form is much higher than the manic form.<sup>9</sup> Among the socio-economic factors in the environment of the elderly are: (1.) the reduction of income, (2.) the independent lives now being led by the aged person's family, (3.) the development of chronic illness, (4.) the passing of the spouse and old friends, (5.) an awareness of one's own impending death, (6.) the mutual withdrawal between the individual and the society of which he had been an integral part.<sup>11</sup> At all times in one's life there are socio-economic factors that place a great deal of stress upon him.<sup>11</sup> The reasons why the elderly succumb to emotional stress and develop mental disorders is stated by Dr. Kutner:

Older people face severe tests of their endurance and adjustive capacities at a time in life when both physical and psychic energies are diminishing. The emotional strains which accompany social and economic change may prove intolerable and result in the unhinging of various normal protective defenses. Since new and sensitive adjustments are required to overcome, with tranquility, the loss of one's spouse, or retirement from gainful employment or the enforced curtailment of activity brought on by illness, those who are unprepared to meet the expected personal catastrophies may yield to physical and mental breakdown.<sup>12</sup>

Depression, clearly the most prevalent form of functional disorder, is characterized by a subjective feeling of sadness, psychometer retardation and loss of interest and initiative. The subjective feeling of sadness may be one of gloom, misery, guilt, unhappiness or dejection. The psychometer retardation

8. *Id.* at 192-93.

9. *Id.* at 188.

10. B. Kutner, *Socio-economic Implications of Illnesses of Aging*, in PROCEEDINGS OF THE FOURTH ANNUAL GOVERNOR'S CONFERENCE ON AGING 57 (1965).

11. K. Stern, *Psychiatric Disorders*, in AGING AND HEALTH 15-16 (J. Boyne ed. 1966).

12. *Supra* note 10.

is manifested by a decrease in the speed at which thinking occurs and the speed at which one performs. Occasionally mental function is so severely limited that the elderly individual is in a state of psychological stupor. Depressive mental disorder may also be evidenced by subjective feelings of restlessness, insomnia, diurnal mood fluctuations, prejudices, delusions and hallucinations.<sup>13</sup>

## II

### PRESENT PROVISIONS FOR SURROGATE MANAGEMENT OF THE PROPERTY OF THE AGED

There is a deep and growing belief that older people may require special legal protection. Specifically, attention is directed to the present state of the law relating to elderly persons who are unable to manage their own affairs because of advanced years, but who are not legally "insane".<sup>14</sup> There is also increasing awareness that older people are not always treated by the law in the same manner as younger people.

First and foremost the elderly are adults with all the rights and privileges that accrue to free adults in our society. As adults, they are entitled to the same independence of action and decision making as other adults. However, upon a sufficient showing of physical and/or mental disability, the state feels justified in curtailing this freedom.

It is our purpose to examine the proceedings which are currently utilized by the various state jurisdictions to deal with the problems of older persons in need of "protection" because of declining physical and/or mental capacity. In this discussion we are concerned only with the statutory provisions which authorize property management of the aged, and not with the peculiarities that may have developed in case law.

There are a considerable number of statutory enactments encompassing old age and senility in connection with proceedings relative to commitment and incompetence. Not less than twenty-six states make specific reference to old age, and five refer to senility in their statutes on these subjects. Most statutes in this area appear in a "probate code"<sup>15</sup> or its equivalent, "decedent's estates" or "wills" laws.<sup>16</sup> Others are found in chapters on

13. *Supra* note 7, at 189. Manic psychoses will not be described in detail because of its infrequent occurrence.

14. Legally insane is defined as dangerous to themselves or others. As the discussion in the previous section indicates, there are a great many disabilities affecting old people which fall short of this standard.

15. ARK. STAT. ANN. tit. 57 (1947), *as amended*, (Supp. 1967); CAL. PROB. CODE div. 5 (West 1959), *as amended*, (Supp. 1968); CONN. GEN. STAT. tit. 45, ch. 779 (1958), *as amended*, (Supp. 1967); ILL. ANN. STAT. ch. 3, art. X (1961); R.I. GEN. LAWS tit. 33, ch. 15 (1957), *as amended*, (Supp. 1967).

16. COLO. REV. STAT. ANN. ch. 153, art. 9 (1963); DEL. CODE ANN. tit. 12, ch. 39 (1953),

“guardianship”,<sup>17</sup> and still others uniquely are placed in the “Proceeding” sections, “In Chancery”,<sup>18</sup> and “Proceedings in County Courts”.<sup>19</sup>

The statutes, as a whole, are concerned with, and are designed to preserve and care for, the property of persons who for some cause are determined to be unable to look after their property themselves. Frequently an individual is found to require assistance in the management of his property and business affairs while being quite capable of taking care of himself.<sup>20</sup>

Historically, the inability to manage one’s affairs sufficient for guardianship has required a finding of unsoundness of mind rather than just incapacity due to aging.<sup>21</sup>

Persons who can be safely trusted with taking care of themselves are seldom, if ever, liable to guardianship. One may be so sick or crippled as to be compelled to leave his affairs in the hands of servants or agents, and is no more incompetent for that reason than a wealthy man is who cannot possibly look after the details of his business. Neither is there any legal standard of business wisdom. Men may be unwisely pennurious, but this is not insanity. A jury of merchants might very easily approve or disapprove where a jury of persons unaccustomed to commercial ventures and expenditure would think the reverse. Every man may spend or save as he chooses, as long as he does not come within the prohibitions of the law. As long as he possesses a mind normally sound, he is entitled to free agency. It is as cruel and unlawful to interfere with the liberty of the old as of anyone else; and the law cannot favor or permit this liberty to be diminished.<sup>22</sup>

As indicated by the above language incompetency leading to guardianship has required something more than a lack of prudence in managing one’s affairs. Also required is evidence of some inability of the mind to function normally, not necessarily amounting to insanity, but being more serious than poor judgment. In many states this has allowed a great gap to develop where there might be “protection” for those who are of sound mind but who are incapable of managing their affairs due to the infirmities of age or physical breakdown.

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*as amended*, (Supp. 1968); ME. REV. STAT. ANN. tit. 18, ch. 501 (1964); MASS. ANN. LAWS ch. 201 (1969); VT. STAT. ANN. tit. 14, ch. 111 (1958), *as amended*, (Supp. 1969).

17. MISS. CODE ANN. tit. 4, ch. 2 (1956), *as amended*, (Supp. 1968); NEB. REV. STAT. ch. 38 (1960); N.H. REV. STAT. ANN. tit. XLIV, ch. 464 (1968); OKLA. STAT. ANN. tit. 58, §§ 890.1-.11 (Supp. 1969); ORE. REV. STAT. tit. 13, ch. 126 (1967); TENN. CODE ANN. tit. 34, ch. 10 (1955), *as amended*, (Supp. 1968); D.C. CODE tit. 21, ch. 5 (1967).

18. MD. ANN. CODE art. 16, § 149 (1966).

19. WIS. STAT. ANN. tit. XXIX, ch. 319 (1958), *as amended*, (Supp. 1969).

20. See ARIZ. REV. STAT. ANN. § 14-871 (1956); DEL. CODE ANN. tit. 12, §§ 4101-03 (1953); FLA. STAT. ANN. §§ 747.01-.04 (1964); GA. CODE ANN. §§ 113-2701-07 (1959); HAWAII REV. LAWS §§ 338-21 to -23 (1955); IND. STAT. §§ 7-2307-09 (1953); KY. REV. STAT. ANN. §§ 384.050-.070 (1962); IOWA PROB. CODE div. XIII, § 633.580 *et seq.* (1964); KAN. GEN. STAT. §§ 60-4001-26 (1959); MICH. STAT. ANN. §§ 27.3178(352)-(354) (1962); N.C. GEN. STAT. § 33-56 (1950); N.H. REV. STAT. ANN. §§ 464.19-.20 (1955); NEV. REV. STAT. §§ 161.010-.030 (1959); OKLA. STAT. ANN. tit. 60, §§ 361-67 (1963); ORE. REV. STAT. §§ 127.310-.350 (1963); R.I. GEN. LAWS tit. 33, §§ 20-8 to -10 (1957); UTAH CODE ANN. §§ 7501-9 to -11 (1953); VA. CODE ANN. § 26-68 to -71 (1964).

21. *In re* Guardianship of Storick, 64 Mich. 685, 31 N.W. 582 (1882).

22. *Id.* at 690, 31 N.W. at 584.

The statutes of some states, although making no specific reference to the aged or infirm, have been construed to include such persons within the general reference to those who for any cause are mentally incompetent,<sup>23</sup> or incompetent from want of understanding<sup>24</sup> to manage their own affairs. Other states have enacted statutes designed to protect the property belonging to persons of impaired mental or physical capacity, (not amounting to incompetency) ranging from a single paragraph in Delaware, Vermont, and Wisconsin through two and three section provisions (Colorado, Maine, Maryland, Minnesota, Nebraska, New Hampshire, and Rhode Island) to statutes consisting of nearly ten sections (Connecticut, Massachusetts, Mississippi, Oklahoma, Oregon, Tennessee and the District of Columbia) and the fully detailed comprehensive statutes of California, Illinois and Iowa.

The essential provision found in almost all statutes is that the individual be incapable of "managing his own affairs" because of the infirmities of age,<sup>25</sup> or mental disability (not amounting to unsoundness of mind,<sup>26</sup> or physical incapacity) so that it is in his "best interest" to appoint someone to manage his property.<sup>27</sup> There is usually included a notice provision (See Chart IV) for a court hearing to the person for whom a conservator or guardian is sought and sometimes to others. Where there is a conservator or guardian to be appointed, it is often stated that he shall have the same rights, powers, and duties, and be subject to the same considerations and liabilities as a guardian of a minor,<sup>28</sup> and he may be discharged and the guardianship or conservatorship terminated when such protection is no longer necessary.<sup>29</sup> In most statutes it is also specifically required that the conservator or guardian post bond. (See Chart IV)

The delineation of the powers of the guardian or conservator is an important provision of the guardian or conservator statutes. The powers may be defined as "control, charge, and management of the estate real and personal of the ward, under court direction,"<sup>30</sup> or it may be stated more simply by cross reference to those powers granted to the guardian of a minor.<sup>31</sup> In the more comprehensive statutes, such as those of California and Iowa, the powers are specified in greater detail. (See Chart III for examples.)

23. *See* OKLA. STAT. ANN. tit. 58, § 851 (1963).

24. N.C. GEN. STAT. § 35-2 (1965).

25. The statutes of Delaware, Maryland, New Hampshire and Vermont use this language.

26. The statutes of Maryland and the District of Columbia make this reference "not amounting to unsoundness of mind."; and the Nebraska statutory language is equivalent: "other than an idiot or lunatic."

27. Rhode Island omits any reference to "physical incapacity". R.I. GEN. LAWS § 33-15-44 (1956).

28. Delaware, Maine, New Hampshire, Oregon, Rhode Island and Vermont.

29. *See, e.g.*, R.I. GEN. LAWS § 33-15-44 (1956).

30. MD. CODE ANN. art. 16, § 150 (1964).

31. MASS. ANN. LAWS ch. 201, § 20 (1955); ORE. REV. STAT. tit. 13, § 126.636 (Repl. Pt. 1967); TENN. CODE ANN. § 34-1012 (Supp. 1964).



A jury trial may be required on the issue of mental incompetency<sup>32</sup> either due to constitutional provisions<sup>33</sup> or as a result of statutory direction<sup>34</sup> or interpretation.<sup>35</sup> The majority view is that such a determination is not included in the constitutional requirements of a jury trial.<sup>36</sup> The individual for whom a conservator or guardian is appointed may retain his legal capacity and is not necessarily deprived of his civil rights. On the other hand the sweeping provisions of some of the protective statutes may be subject to abuse so that the right to a jury trial becomes a necessity. (See Chart IV)

The appointment of a guardian, committee, conservator or curator to care for the property of an individual rests generally upon the finding of inadequate mental ability. Thirteen states provide for voluntary appointment. (See Chart I). This may or may not amount to insanity depending upon the facts of the particular case and the requirements of the controlling statute. But in any event there is implicit in such appointment a lack of mental capacity when the individual is deemed unable to manage his affairs. A person of sound mind may, due to ill health, physical indisposition or old age, or other cause, likewise be unable to care for his property, and yet in some states he is afforded protection while in many other states he is not. The need for assistance to persons weakened but still of sound mind is sufficiently great to warrant careful study.

It is not uncommon to find in older guardianship laws provisions that provide protection for the property of the aged and infirm. A Georgia statute can be traced back as far as 1818.<sup>37</sup> A Wisconsin provision dates back to 1849;<sup>38</sup> one in Nebraska to its Territorial Laws of 1866;<sup>39</sup> and yet another in Michigan to 1857.<sup>40</sup> The elderly were provided for in New York by amendment to the Code of Civil Procedure in 1894.<sup>41</sup> Of crucial significance in many of the early laws was the presence of the requirement of more than a finding of old age and infirmity in order to sustain an appointment of a guardian; a finding of mental incompetency was required as well.

An early Michigan case illustrates this distinction. In *In Re Asa B.*

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32. See *Poole v. Newark Trust Company*, 1 Terry (40 Del.) 163, 8 A.2d 10 (1939); *Thoeming v. District Court*, 379 P.2d 543 (Wyo. 1963).

33. See *Sporza v. German Savings Bank*, 192 N.Y. 8, 84 N.E. 406 (1908); *In re McLaughlin*, 87 N.J. Eq. 138, 102 A. 439 (1917).

34. KY. REV. STAT. § 202.140 (1962).

35. TENN. CONST. art. I, § 6.

36. The courts in a majority of states have held that there is no right to trial by jury in determining mental competence. In other states the courts have found such a right to exist. See *Ward v. Booth*, 197 F.2d 963 (9th Cir. 1952).

37. Act of 1818 (Cobb) page 342.

38. REV. STAT. WIS. ch. 80, § 12 (1849).

39. REV. STAT. TERR. OF NEB. §§ 14, 15 (1866).

40. COMP. LAWS MICH. § 3311 (1857).

41. Laws of 1894, ch. 504.

*Brown*,<sup>42</sup> it was alleged that Brown was incompetent to care for and manage his property since he was old and infirm. The court said: "Age and infirmity are not consistent with vigor of intellect; and, therefore, the averment. . . cannot stand as a substitute for a direct averment of mental incompetency."<sup>43</sup> Many of the states, when providing for guardians and conservators for the aged, were actually speaking of more than physical or mental weakness due to old age; they were looking for something in the nature of insanity.

There is, of course, an unmistakable relationship between unsoundness of mind and mental incompetence. A universally recognized test of "unsoundness of mind" is competence to manage one's property or handle his business affairs. (See Chart II) But competence or incompetence is a general term including the insane along with the sane.<sup>44</sup> The confusion is compounded by the fact that the courts, in providing a guardian or conservator for a person, property or both, measure capacity by the ability of the person to care for himself and his property. The difference, however, lies in the fact, that, with respect to guardianship of the person, mental capacity is the court's primary concern; whereas, with respect to guardianship or conservatorship of the individual's property, mental weakness and even physical incapacity may be the basis for appointment. This is largely borne out by the difference in the statutory language of the various guardianship and conservatorship laws.

Some courts have held that physical incapacity alone is not a sufficient ground upon which to base the appointment of a guardian or conservator.<sup>45</sup> But in no state, with the exception of Ohio,<sup>46</sup> has either a guardianship or conservatorship law been held unconstitutional on that ground. Apparently this is due to the fact that other states have found in their laws some additional factor, which, when taken in conjunction with the physical disability, has formed an adequate basis for the appointment of a guardian. In North Carolina the court found an additional factor of mental incapacity required.<sup>47</sup> In Illinois, the court held incapacity, whether mental or physical,

42. 45 Mich. 326, 7 N.W. 899 (1881).

43. *Id.* at 328, 7 N.W. at 899.

44. The term "incompetent" has been referred to as "vague but all inclusive"; Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341; see also Zenoff, *Civil Incompetency in the District of Columbia*, 32 GEO. WASH. L. REV. 243 (1963); Fridman, *Mental Incompetency*, 79 L.Q. REV. 502 (1963).

45. See *Goodson v. Lehmon*, 224 N.C. 616, 31 S.E.2d 756 (1944); *In re Coburn*, 165 Cal. 202, 131 P. 352 (1913). See also Annot., 30 A.L.R. 1381 (1924).

46. Section 10989 of the OHIO GEN. CODE was repealed in a revision of the law in 1931 which consolidated and codified the probate laws of Ohio. The new provision today is found in OHIO REV. CODE ANN. § 2111.02. The revised statute with respect to the appointment of a guardian in cases of physical disability or infirmity was held constitutional when the consent of the incompetent is obtained.

47. *Supra* note 30. The North Carolina court made its decision based on N.C. GEN. STAT. § 35-2 (1943).

must be such as to render the person incapable of managing or caring for his estate.<sup>48</sup>

However, mental incompetency is not a part of many of the conservatorship statutes and it seems clear today that such statutes contemplated the appointment of a conservator for a person under circumstances in which he is not necessarily mentally incompetent. A man may be sane so as not to require incarceration and yet be incompetent to manage and care for his property and business affairs—sanity and competency to care for an estate are not synonymous terms. The phrase incompetent, mentally incompetent and incapable as used by many states has been construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, rendered incapable, unassisted, to properly care for and manage himself or his property, and by reason thereof needs a guardian or conservator for himself and/or his property.<sup>48.1</sup>

Rendering assistance to individuals in managing their property is not a simple matter. There are many possible hazards in the appointment and the termination of a guardianship or conservatorship. (See Chart II for those who may petition, those who make the determination and for the tests of necessity and release from property management in the various states.)

Some older people may have always been only marginally competent. For many, inability to continue to manage their own finances results from the changes in themselves, their environment or a combination of both. Despite a sincere desire to help older men and women with their affairs, the difficulties encountered in doing so can be overwhelming. Part of the problem lies in the fact that everyone—judges, lawyers, legislators, doctors, psychiatrists, social workers, relatives, and friends—is caught in the conflict between a conviction that all adults are entitled to make their own decisions even if unwise, and an equally strong belief that those who need “protection” should have it.

Many states recognize the fact that there is a marked correlation between advancing age and diminishing capacity to manage financial affairs constructively. However, there is no clear standard for the degree to which an elderly person's capacities must diminish before protection can be extended to him against his will.

Once guardianship proceedings have been initiated it becomes essential to ascertain who started them and for what reasons. Relatives and friends may be anxious to have a guardian appointed in order to further their own personal interests and desires. Or, perhaps, they may find themselves anxious to make help available, yet not be willing to verify that the older person's capacities

48. *MacDonald v. LaSalle Nat'l Bank*, 11 Ill. 2d 122, 125, 142 N.E.2d 58, 60 (1957).

48.1. *See* CAL. PROB. CODE ANN. div. 4 § 1460 (West 1956). *See also* IOWA CODE ANN. § 633.566 (1964).

are diminishing. They may fear what positive action might do to the older person or to their relationship with him.

When an aged person has been found to be incapable of managing his property and a fiduciary is appointed, it becomes the obligation of the guardian or conservator to determine the assets and obligations of the ward. If the guardian or conservator has been placed in charge of all assets, he must take control of them and see that they are properly used, conserved or disposed of. If the fiduciary has not been given either the authority or the responsibility to take charge of all assets, he must still know what they are so that he can manage those under his control in relation to the others. Finding someone who can adequately perform the duties of a guardian or conservator may be a great problem. (There is little statutory guidance—See Chart IV)

The ward's rights and freedoms are of primary importance in the selection of a guardian or conservator and the exact needs and circumstances of each individual ward must be carefully considered. This can best be accomplished by a creative and cautious judge through his close observation and careful selection and control of the appointed fiduciary. The laws in the fifty-one jurisdictions vary from strict control of the fiduciary to almost none at all. (See Chart III) Forty-six states require the guardian or conservator to account to the court on a regular basis, but only twenty-three states make provision for the court to appoint a counsel to represent a ward.

### III

#### THE JUSTICIABILITY OF THE ISSUE:

#### THE TESTS

##### *In General*

Even a cursory reading of case law leads a researcher to the conclusion that it is difficult to establish any general rules concerning the conditions which permit the appointment of a guardian or a conservator for incompetents in general, and aged incompetents in particular. This results from the state statutes which vary widely, and the propensity of the courts to treat the subject on a case by case basis. Nevertheless, statutes in each state articulate certain tests of the mental deficiency which must necessarily be demonstrated before a guardian or conservator may be appointed, and this language has been held by courts to control.<sup>49</sup>

The weaknesses and inconsistencies of the state statutes, resulting from

49. See, e.g., *In re Guardianship of Prince*, 379 P.2d 845 (Okla. 1963); *In re Guardianship of Schmidt*, 221 Ore. 535, 352 P.2d 152 (1960); *Long v. Champion*, 250 Minn. 196, 84 N.W.2d 686 (1957). For a detailed discussion of recent case law in this area see Annot., *Mental Condition Which Will Justify the Appointment of Guardian, Committee, or Conservator of the Estate for an Incompetent or Spendthrift*, 9 A.L.R.3d 774 (1966).

I  
GENERAL STATUTE FOR INCOMPETENTS

state codes and statutes	specifically mentions aged	senility	no specific provision for the aged	aged may voluntarily ask for guard. or conservator
ALA. CODE (1958)			guardians for person of un- sound mind. tit. 21 §9	
ALAS. STAT. (1962)			guardian for insane or in- capable §20-05.080	
ARIZ. REV. STAT. ANN. (1956)			guardian for those "incapable" §14-861	
ARK. STAT. ANN. (1947)		guardian §57-601		
CAL. PROB. CODE (West 1956)	guardian or conservator div. 4, §1460 div. 5, §1701			
COL. REV. STAT. ANN. (1963)	conservator for aged, "mentally ill." §§71-1-1, 71-1-11(2)			§153-19-13

CONN. GEN. STAT. (1958)		guardian for those incapable of managing their affairs. §45-70	
DEL. CODE ANN. (1953)	guardian tit. 12, §3914		tit. 12, §3914
D. C. CODE (1967)	conservator §21-1501		§21-501
FLA. STAT. ANN. (1964)		guardian for incompetent tit. 42, §744.03(5)	
GA. CODE ANN. (1965)		guardian §49-601	
HAWAII REV. LAWS		§338-9.5	
IDAHO CODE (1948)		insane or mentally incompetent §5-1815	
ILL. ANN. STAT. (1961)	conservator Prob. Code Ch. 3, §112		
IND. STAT. ANN. (Repl. Vol. 1953)		guardian tit. 8, §§101(e)(2), 106	
IOWA CODE ANN. (1964)		conservator §633.566	§633.572

state codes and statutes	specifically mentions aged	senility	no specific provision for the aged	aged may voluntarily ask for guard. or conservator
KAN. STAT. ANN. (Supp. 1968)	guardian of the person §59-3002 conservator of property §59-3002			§59-3007
KY. REV. STAT. ANN. (1969)	curator §387.320 §387.060 guardian or committee			§387.320
L.A. STAT. ANN. (1952)			curators for infirm persons Civil Code art. 407	
ME. REV. STAT. ANN. (1964)			guardian tit. 18, §3601	tit. 18, §3701
MD. ANN. CODE (Repl. Vol. 1966)	conservator art. 16, §149			art. 16, §149
MASS. ANN. LAWS (1969)	conservator ch. 202, §§1, 16			

MICH. STAT. ANN. (Repl. Vol. 1962)	guardian §27.3178(201)		
MINN. STAT. ANN. (1969)	guardian §525.54		
MISS. CODE ANN. (Supp. 1968)	conservator §434-01		
MO. ANN. STAT. (1956)	guardian §475.030		
MONT. REV. CODE ANN. (Repl. Vol. 1964)		guardian for insane or mentally incom- petent §§91-4701, 91-4702	
NEB. REV. STAT. (1960)	guardian §38-201		§38-901
NEV. REV. STAT. (1963)	guardian §159.100		
N. H. REV. STAT. ANN. (Repl. Ed. 1968)		guardian for mentally incompetent §464:1	§464:17
N. J. STAT. ANN. (1965)		mentally incompetent §3A:6-35	



state	specifically mentions aged	senility	no specific provision for the aged	aged may voluntarily ask for guard. or conservator
N. M. STAT. ANN. (1953)			guardian or committee §32-2-1	
N. Y. MENTAL HYGIENE LAW (McKinney Supp. 1969)	committee §100			
N. C. GEN. STAT. ANN. (Repl. 1966)	guardian or trustee §33-1			
N. D. CENTURY CODE ANN. (1960)			guardianship for incompetent §30-10-02	
OHIO REV. CODE ANN. (1964)	guardian §2111.01			
OKLA. STAT. ANN. (1965)			incompetent for any reason tit, 58, §851	
ORE. REV. STAT. (Repl. Pt. 1967)	guardian §126.006			§126.621
PA. STAT. ANN. (Supp. 1969)	guardian tit. 50, §3102			

R. I. GEN. LAWS (1956)	conservator §33-15-44	guardian for one who may waste his estate. §33-15-8	
S. C. CODE LAWS (1962)		guardian for incompetents §31-1	
S. D. CODE		guardian for mentally or physically incompetents §35.1802	
TENN. CODE ANN. (Supp. 1968)	conservator §34-1008		§34-1008
TEX. STAT. ANN. (1956)		guardian for person of unsound mind or by prob. code §114	
UTAH CODE ANN. (1953)	guardian §75-13-20		
VT. STAT. ANN. . . (1958)	guardian tit. 14, §2683		tit. 14, §2671

state	specifically mentions aged	senility	no specific provision for the aged	aged may voluntarily ask for guard. or conservator
V.A. CODE (1961)	§37.1-132 guardian or committee			
WASH. REV. CODE ANN. (1967)		guardian §11.88.010		
W. VA. CODE ANN. (1966)			committee for mentally ill §27-11-1	
WIS. STAT. ANN. (1958)			guardian for incompetents tit. 29§319.03	tit. 29 §319.31
WYO. STAT. ANN. (Supp. 1969)	guardian §3-29.1			

II

State Codes and Statutes	Test of Necessity of Management			Test of Release		
	Test	Who Petitions	Who Decides	Test	Who Petitions	Who Decides
ALA. CODE (1958)	declares unsound mind tit. 21, §9	relations or friends tit. 21, §11	sent to jury, tit. 21, §12	return to sanity tit. 21, §16	ward guardian freed, tit. 21, §16	court, 2 Drs. or 2 sound persons tit. 21, §16
ALAS. STAT. (1962)	incapable of conducting affairs & maintaining family §20.05.080	—————	court §20.05.080	guardianship no longer necessary §20.05.220	—————	court §20.05.220
ARIZ. REV. STAT. ANN. (1956)	unable to manage property or themselves. §14-861	relative or friend §14-862	court §14-863	restored to capacity §14-864	ward, guard, or relative w/in 3rd degree §14-864(a)	court §14-864
ARK. STAT. ANN. (1947)	incapable of managing his property §57-601	any person §57-609	court one or more medical witnesses §57-615	capable of managing affairs §57-457	anyone §57-457	court §57-457

State Codes and Statutes	Test of Necessity of Management Test			Test of Release Test	Who Petitions		Who Decides
	Who Petitions	Who Decides	Who Petitions		Who Decides		
CAL. PROB. CODE (West 1956)	incompe- tent to manage property div. 4, §1462	any relative or friend div. 4, §1461	court div. 4, §1461	capable of managing own affairs div. 4, §1472 div. 5, §1755	any friend or relative div. 4, §1472 div. 5, §1755	court div. 4, §1472	
COLO. REV. STAT. ANN. (1963)	an aged compe- tent may ask for a conser- vator §159-9-13 (1)	any person §71-1-5	judges & 2 doctors §71-1-6	no longer mentally ill §71-1-26	any reputable person §71-1-26	court & 2 doctors §71-1-26	
CONN. GEN. STAT. (1958)	mentally ill §71-1-1	select- man of town relative agency §45-70	court §45-70	return to capacity §45-70	—	court §45-70 for temporary 2 doctors §45-72	
DEL. CODE ANN. (1953)	unable to care for property tit. 12, §3914	any person tit. 12, §3914	court tit. 12, §3914	guardianship no longer necessary tit. 12, §3414	any person tit. 12, §3914	court tit. 12, §3914	

D. C. CODE (1967)	unable to care for his property §12-3914	individual one or more relatives any other person §21-1501	court §12-3914	competent to manage property §21-1504	ward §21-1504	court §21-1504
FLA. STAT. ANN. (1964)	Best interest of person tit. 42, §747.06	—————	court tit. 42, §747.06	properly care for himself & for property tit. 42, §746.12		court tit. 42, §746.12
GA. CODE ANN. (1965)	incompetent to manage estate §49-601	any person §49-604	court w/Drs. certificate §49-604	capable of managing estate §49-655	any person §49-605	court & doctors §49-605
HAWAII REV. LAWS	Insane §338-10	relatives or friends §338-10	court §338-10			
IDAHO CODE (1948)	incapable of taking care of self or property §15-1816	relative or friend §15-1818	court §15-1818	capable of taking care of himself §15-1818	ward, guardian, relative, or friend §15-1818	court may have jury §15-1818
ILL. ANN. STAT. (1961)	incapable of managing property ch. 3, §129	reputable citizen ch. 3, §113	court may demand jury ch. 3, §116	capable of managing own affairs ch. 3, §129	ward ch. 3, §129	court jury if demanded ch. 3, §129
IND. STAT. ANN. (Repl.	incapable of acting &	any person tit. 8, §119	court jury if demanded	competent tit. 8, §148	any person tit. 8, §148	court tit. 8, §148

Vol. 1953)	understanding ordinary business affairs tit. 8, §119		tit. 8, §119			
IOWA CODE ANN. (1964)	best interest & capability to manage property §633.566	any person §633.552	court §633.556	capable of managing property §633.675	ward §633.679	court §633. 675
KAN. STAT. ANN. (Supp. 1968)	Incapacitated §59-3009	any person §59-3009	court §59-3010	restored to capacity §59-3027	any person	court
KY. REV. STAT. ANN. (1969)	incapable of managing property §387.010	any interested person §387.010	court & jury §387.220	capable of managing property §387.220	any interested person §387.220	court & jury §387.220
LA. STAT. ANN. (1952)	incapable of taking care of person & admin. estate Civil Code art. 422		court Civil Code art. 422	termination of causes of incompetency Civil Code art. 420		court Civil Code art. 422

State Codes and Statutes	Test of Necessity of Management Test	Who Petitions	Who Decides	Test of Release Test	Who Petitions	Who Decides
ME. REV. STAT. ANN. (1964)	guard. tit. 18, §3601 incapable of managing estate	tit. 18, §3601 friends, relatives, creditors	Judge tit. 18, §3601	guardian no longer necessary tit. 18, §3607	anyone tit. 18, §3603	Judge tit. 18, §3607
MD. ANN. CODE (Repl. Vol. 1966)	unable to care for his property art. 16, §149	any person Rule L70	court art. 16, §149	capacity to care for property Rule L73	Ward Rule L73	court Rule L73
MASS. ANN. LAWS (1969)	unable to care for his property ch. 201, §16	individual or friend Ch. 201, §16	court ch. 201, §16	guardian no longer necessary ch. 201, §13	ward, guard, or friend ch. 201, §13	court ch. 221, §13
MICH. STAT. ANN. (Repl. 1962)	Incompetent to manage estate §27.3178 (201)	any person §27.3178(202)	court §27.3178 (202)	guardian no longer necessary §27.3178 (201)		court §27.3178 (201)
MINN. STAT. ANN. (1969)	likelihood of exposing self or family to want §525.54	any person §525.541	court §525.551	sound mind & capable of managing own affairs §525.61	any person §525.61	court & 2 doctors §525.61
MISS. CODE ANN.	incapable of managing own	person, friend, or	court & 2 doctors	restoration of mind or body	person, friend, or	court hearing



(Supp. 1968)	estate §434-01	relative Ch. 2 §434-01	§434-03	ch. 2 §434-08	relative §434-08	§434-08
Mo. ANN. STAT.	incapacity of managing property §475.075	court §475.080	court, jury if demanded §475.075	guardian no longer necessary	ward or someone else §475.360	court §475.285
MONT. REV. CODE ANN. (Repl. 1964)	incapable of managing his property §91-4702	relative or friend §91-4702	Judge §91-4702	capable of managing his property §91-4704	ward, guardian, relative, of 3rd degree, friend, §91-4704	court-jury §91-4704
NEB. REV. STAT. (1960)	incompetency to manage own property §38-202	relatives or friends §38-201	court §38-202			
NEV. REV. STAT. (1963)	incapable of caring for self or property §159.130	relative or friend §159:100	court §159.100	guardian no longer necessary §159.660	ward or otherwise §159.660	court §159.660
N. H. REV. STAT ANN. (Repl. Ed. 1968)	mentally incompetent §464:2	friend, relative overseer of poor §464:1	court §464:1	guardian no longer necessary §462:30	friend, relative, guardian §462:30	court §462:30

State Codes and Statutes	Test of Necessity of Management Test	Who Petitions	Who Decides	Test of Release Test	Who Petitions	Who Decides
N. J. STAT. ANN. (1953)	mental incompetency §3A:6-35		court & jury if demanded §3A:6-35	capable of managing affairs §3A:6-43		court §3A:6-43
N. M. STAT. ANN. (1953)	capable of caring for self & managing property §32-2-1	any person §32-3-1	court §32-2-2	competency §32-2-2	ward §32-2-2	court §32-2-2
N. Y. MENTAL HYGIENE LAW (McKinney Supp. 1969)	unable to conduct personal or bus. affairs §100, §101	any person §101	court & jury §101	committee no longer needed §111	ward or committee	court §111
N. C. GEN. STAT. ANN. (Repl. 1966)	unable to manage affairs §33-1		clerk of supreme court §33-1	able to manage affairs §33-1		clerk of supreme court §33-1
N. D. CENTURY CODE ANN. (1960)	capacity to manage property §30-10-22	relative or friend or other person §30-10-05	court §30-10-05	capable of caring for property §30-10-20	any incompetent's guard. or relative w/in 3rd degree §30-10-20	court §30-10-20

OHIO REV. CODE ANN. (1964)	incapable of caring for person or property §2111.01	any person §2111.03	court §2111.02	guardianship no longer necessary §2111.47	any person §2111.47	court §2111.47
OKLA. STAT. ANN. (1965)	incompetent to manage property tit. 58, §851	any relative or friend tit. 58, §851	court tit. 58, §852	capable of managing property tit. 58, §854	incompetent, guard., friend or relative w/in 3rd degree tit. 58, §854	court tit. 58, §854
ORE. REV. STAT. (Repl. Pt. 1967)	unable to manage property §126.126	any person §126.126	court §126.126	guardian no longer necessary §126.520		court §126.660
PA. STAT. ANN. (Supp. 1969)	guardian tit. 50, §3102 (3)	any person tit. 50, §3301	court tit. 50, §3301	ward has become competent tit. 50, §3323	any person tit. 50, §3323	court tit. 50, §3323
R. I. GEN. LAWS (1956)	guard wastes his estate §33-15-8 consent §33-15-44	relative or friend §33-15-8	court §33-15-8	conservatorship no longer necessary §33-15-44	anyone §33-15-44	court §33-15-44
S. C. CODE LAWS (1962)	guardian mentally incompetent. §31-1	any person §15-448	court §31-1		any person §15-448	court §31-1

State S. D. CODE	Test of Necessity of Management Test soundness of mind & capability of taking care of property §35.1820	Who Petitions anyone §35.1802	Who Decides court §35.1802	Test of Release Test capability of taking care of property §35.1820	Who Petitions incompetent or guardian or relative §35.1820	Who Decides court §35.1820
TENN. CODE ANN. (Supp. 1968)	incapable of managing estate §34-1008	individual or 1 or more of his friends §34-1008	court exam by Dr. guard ad litem §34-1010	competent to manage his prop. §34-1016		court & 2 physicians §34-1016
TEX. STAT. ANN. (1956)	unsound mind Prob. Code §417	any person Prob. Code §417	Jury Prob. Code §417 guard ad litem	sound mind Prob. Code §429	any person Prob. Code §429	court Prob. Code §429
UTAH CODE ANN. (1953)	unable to manage property or care for self §75-13-20	relative or friend §75-13-19	court §75-13-19	capable of taking care of self & property §75-13-21	ward, guard. relative of 3rd degree or friend §75-13-21	court §75-13-21
Vt. STAT. ANN. (1958)	incapable of caring for self or property tit. 14, §2683	friend or relative tit. 14, §2683	court tit. 14, §2683	guardian no longer necessary tit. 14, §3006	guard. court relative tit. 14, §§3006, 3007	court tit. 14, §3006

VA. CODE (1961)	incapable of care of estate §37.1-132	any person §37.1-132	court §37.1-132	return to competency §37.1-144	any person §37.1-144	court §37.1-144
WASH. REV. CODE ANN. (1967)	incompetent §11.88.040	any person §11.88.030	court §11.88.030	guard no longer necessary §11.88.140		court §11.88.140
W. VA. CODE ANN. (1966)	mentally ill §27-5-4	anyone	2 Drs. & mental hygiene commission §27-5-4		any person §27-5-5	court or hygiene commission §27-5-5
Wis. STAT. ANN. (1958)	inability to properly manage income or property §319.31	anyone §319.07	court §319.08	capability to handle estate §319.26		court §319.26
Wyo. STAT. ANN. (Supp. 1969)	incompetent may ask for a conservator §3-29.13	relative or friend §3-29.10	court §3-29.10	restoration of competency §3-29.14	relative or friend §3-29.14	court §3-29.14

III

POWERS THAT COURT APPOINTMENT SPECIFICALLY TRANSFERS

State Codes and Statutes	Payment and Collection of Debts	Management of Estate	Actual Possession of Subject's Property	Sell, Mortgage or Lease real or personal property	Invest funds in specified categories of securities	Represent in legal action
ALA. CODE (1958)	tit. 21, §43	tit. 21, §42		less than 1 year, tit. 21, §45		
ALAS. STAT. (1962)	§20.05.170	§20.05.180				§20.05.170
ARIZ. REV. STAT. ANN. (1956)	§§14-847, 14-863	§§14-847, 14-863	§§14-847, 14-863	§§14-847, 14-863	§§14-847, 14-863	§§14-863, 14-847
ARK. STAT. ANN. (1947)		§57-624	§57-626	Lease §57-626		§57-627
CAL. PROB. CODE (West 1956)	div. 4, §1501	div. 4, §1500			div. 4, §1513	div. 4, §1501
COLO. REV. STAT. ANN. (1963)	§153-10-13	§153-10-13	§153-10-13			§153-10-27
CONN. GEN. STAT. (1958)	§45-75	§45-75	§45-75	§45-75		§45-75
DEL. CODE ANN. (1953)		tit. 12, §3705			tit. 12, §3707	
	May do what seems necessary.					
D. C. CODE (1967)	§21-1503	§21-1503	§21-1503			§21-1503

PROPERTY OF THE AGED

FLA. STAT. ANN. (1964)	tit. 42, §744.52	tit. 42, §744.52	tit 42, §744.52		tit. 42, §744.51	
GA. CODE ANN. (1965)		§49-201	§49-201		§49-215	
HAWAII REV. LAWS	§338-24	§338-4				§338-24
IDAHO CODE (1948)	§§15-1819, 15-1820	§15-1821	§15-1817			§§15-1817, 15-1820
ILL. ANN. STAT. (1961)	ch. 3, §113	ch. 3, §122			ch. 3, §259	ch. 3, §216
IND. STAT. ANN. (Repl. Vol. 1953)		tit. 8, §130	tit. 8, §130			tit. 8, §130
IOWA CODE ANN. (1964)	§633.640		§633.640	per. §633.647		§633.646
KAN. STAT. ANN. (Supp. 1968)		§59-3019 Subject to court in all things at all times.				
KY. REV. STAT. ANN. (1969)	§387.130	§387.060	§387.060	sell per- prop & lease §387.140		§387.130
LA. STAT. ANN. (1952)	R.S. 9:738	R.S. 9:738	R.S. 9:738		R. S. 9:733	T 8 art. 337
ME. REV. STAT. ANN. (1964)	tit. 18, §3606	tit. 18, §3851				tit. 18, §3606
MD. ANN. CODE (Repl. Vol. 1966)						

State Codes and Statutes	Payment and Collection of Debts	Management of Estate	Actual Possession of Subject's Property	Sell, Mortgage or Lease real or personal property	Invest funds in specified categories of securities	Represent in legal action
MASS. ANN. LAWS (1969)	ch. 201, §20	ch. 201, §20	ch. 201, §20			
MICH. STAT. ANN. (Repl. Vol. 1962)		\$27.3178 (217)				
MINN. STAT. ANN. (1969)				§525.56 Subject to court in all things at all times.		
MISS. CODE ANN. (Supp. 1968)						
MO. ANN. STAT. (1956)	\$475.130		\$475.130			\$475.130
MONT. REV. CODE ANN. (Repl. Vol. 1964)	§91-4518	§91-4703	§91-4518	Does not require court supervision but may hold guardian liable..		
NEB. REV. STAT. (1960)	§38-501	§38-503	§38-203			
NEV. REV. STAT. (1963)	\$159.270	\$159.250	\$159.250		\$159.295	\$159.270
N. H. REV. STAT. ANN. (Repl. Ed. 1968)	§462:4	§462:4	§462:4			§462:4
N. J. STAT. ANN. (1953)		§3A:6-36	§3A:6-36		§3A:6-36	



N. M. STAT. ANN. (1953)		§32-2-3	§32-2-3	§§33-1-13, 33-1-16	§32-2-3
N. Y. MENTAL HYGIENE LAW (McKinney Supp. 1969)	§106			§106	§106
N. C. GEN. STAT. ANN. (Repl. 1966)	§33-6-1	§33-20	§33-20		§33-20
N. D. CENTURY CODE ANN. (1960)	§30-14-05	§30-10-18	§30-10-18		§30-14-2
OHIO REV. CODE ANN. (1964)	§2111.14	§2111.07	§2111.07		§2111.14
OKLA STAT. ANN. (1965)	tit. 58, §853	tit. 58, §853			
ORE. REV. STAT. (Repl. Pt. 1967)	§126.270	§126.210	§126.240		§126.275
PA. STAT. ANN. (Supp. 1969)	tit 50, §3401	tit. 50, §3401	tit. 50, §3401		tit. 50, §3401
R. I. GEN. LAWS (1956)	§33-15-29	§33-15-29			
S. C. CODE LAWS (1962)	§31.1				
S. D. CODE	§35.2001	§35.2001			§35.2001

State Codes and Statutes	Payment and Collection of Debts	Management of Estate	Actual Possession of Subject's Property	Sell, Mortgage or Lease real or personal property	Invest funds in specified categories of securities	Represent in legal action
TENN. CODE ANN. (Supp. 1968)		§§34-401, 34-403	§34-401		§34-309	§34-402
TEX. CODE ANN. (1956)	Prob. Code §230	Prob. Code §230	Prob. Code §230		Prob. Code §389	
UTAH CODE ANN. (1953)	§75-13-32	§75-13-29	§75-13-30		§75-13-43	§75-13-35
VT. STAT. ANN. (1958)	tit. 14, §2759	tit. 14, §2757				tit. 14, §2799
VA. CODE (1961)	§37.1-142	§37.1-142	§37.1-139			§37.1-139
WASH. REV. CODE ANN. (1967)	§11.92.010		Guardian will be under court control at all times.			§11.92.060
W. VA CODE ANN. (1966)	§27-11-4	§27-11-4	§27-11-4			§27-11-4
WIS. STAT. ANN. (1958)			tit. 29, §319.19	May sell tit. 29, §319.19	tit. 29, §319.19	
WYO. STAT. ANN. (Supp. 1969)	§3-23	§3-29.7				§3-24

## III B

## POWERS EXERCISED ONLY ON COURT APPROVAL

State Codes and Statutes	Purchase and sell real estate	Complete contracts	Settle debts	Continue ward's business or farm	Invest Money	Mortgage or lease real estate	Borrow or lend money
ALA. CODE (1958)	tit. 21, §46	tit. 21, §61	tit. 21, §60			tit. 21, §46 more than 1 year	
ALAS. STAT. (1962)	§20.05.180				§20.05.200	§20.05.170	§20.05.170
ARIZ. REV. STAT. ANN. (1956)							
ARK. STAT. ANN. (1947)	§57-635	§57-628	§57-637	§57-629	§57-634		§57-630
CAL. PROB. CODE (West 1956)	div. 4, §1530		div. 4, §1510			div. 4, §1538.5	div. 4, §1538
COLO. REV. STAT. ANN. (1963)	§153-10-38	§153-10-17		§153-10-34		§153-10-20	§153-10-48
CONN. GEN. STAT. (1958)							
DEL. CODE ANN. (1953)	tit 12, §3706						
D. C. CODE (1967)	§21-155		§21-1503			§21-156	
FLA. STAT. ANN. (1964)	tit. 42, §745.06		tit. 42, §744.60	tit. 42, §744.66 & .67	tit. 42, §745.03	tit. 42, §745.01	
GA. CODE ANN. (1965)	§49-203	§49-213		§49-214		§49-203	§49-226

HAWAII REV. LAWS	§338-44				§338-44	§338-44
IDAHO CODE (1948)	§15-1829	§15-1837	§15-1820		§15-1830	§15-1829
ILL. ANN. STAT. (1961)	ch. 3, §224	ch. 3, §123		ch. 3, §213a	ch. 3, §122	ch. 3, §220
IND. STAT. ANN. (Repl. Vol. 1953)	tit. 8, §135	tit. 8, §142	tit. 8, §136	tit. 8, §131	tit. 8, §134	tit. 8, §143
IOWA CODE ANN. (1964)	§633.647				§633.647	§633.647
KAN. STAT. ANN. (Supp. 1968)	§59-3019 et sequa; subject to the court at all times in all things.					
KY. REV. STAT. ANN. (1969)	§387.110		§387.130		§387.110	
LA. STAT. ANN. (1952)	Powers under Tutorship R.S.9:601-842					
ME. REV. STAT. ANN. (1964)	tit. 18-3851	tit. 18-3603	tit. 18-3652			tit. 18-3851
MD. ANN. CODE (Repl. Vol. 1966)	art. 16, §150		art. 16, §150	art. 16, §150	art. 16, §150	art. 16, §150
MASS. ANN. LAWS (1969)	ch. 201, §37		Ch. 201, §37			ch. 201, §37
MICH. STAT ANN. (Repl. Vol. 1962)	§27.317E (217)		§27.3178 (218)		§27.3178 (222)	§27.3178 (217)
MINN. STAT. ANN. (1969)	§525.56		§525.56		§525.56	
	Subject to court at all times for all things.					
MISS. CODE ANN. (Supp. 1968)	tit. 4, §§439 and 440; Subject guardian to control of court in all matters.					

State Codes and Statutes	Purchase and sale real estate	Complete contracts	Settle debts	Continue ward's business or farm	Invest Money	Mortgage or lease real estate	Borrow or lend money
MO. ANN. STAT. (1956)	§475.185	§475.135	§475.205	§475.115	§475.190	§475.175	
MONT. REV. CODE ANN. Repl. Vol. 1964)	§91-4518	§91-4518 does not require court supervision but may hold guardian liable.					
NEB. REV. STAT. (1960)	§§38-601, 38-602					§38-630	
NEV. REV. STAT. (1963)	§159.260		§159.270				§159.290
N. H. REV. STAT. ANN. (Repl. Ed. 1968)	§462:13	§462:27	§462.2			§§462:14, 462:15	
N. J. STAT. ANN. (1953)	§3A:6-36	§3A:6-37		§3A:6-37		§3A:6-37	
N. M. STAT. ANN. (1953)	§32-3-3					§32-3-3	
N. Y. MENTAL HYGIENE LAW (McKinney Supp. 1969)	§106	§106 subject to control of court.					§106
N. C. GEN. STAT. ANN. (Repl. 1966)	§33-25			§33-24		§33-21 & 22	
N. D. CENTURY CODE ANN. (1960)	§30-11-09		§30-14-06		§30-14-17	§30-11-09	§30-14-26
OHIO REV. CODE ANN. (1964)	§2111.20	§2111.19	§2111.14			§2111.25	

OKLA. STAT. ANN. (1965)	tit. 58, §857				tit. 58, §882	tit. 58, §857	
ORE. REV. STAT. (Repl. Pt. 1967)	§126.260	§126.285	§126.270	§126.255	§126.250	§126.250	§126.250
PA. STAT. ANN. (Supp. 1969)	tit. 50, §3441	tit. 50, §3512	tit. 50, §3416	tit. 50, §3405	tit. 50, §3411	tit. 50, §3442	
R. I. GEN. LAWS (1956)	§33-15-32				§33-15-34	§33-15-32	
S. C. CODE LAWS (1967)	Court control	§31-1			§31-11.1		10 §2562
S. D. CODE	§35.2001		§35.2001		§35.2008	§35.2018	
TENN. CODE ANN. (Supp. 1968)	§34.415				§34-408	§34-413	
TEX. STAT. ANN. (1956)	Prob. Code §331	Prob. Code §234	Prob. Code §234	Prob. Code §238		Prob. Code §331	Prob. Code §329
UTAH CODE ANN. (1953)	§75-13-32		§75-13-35		§75-13-43	§75-13-33	
VT. STAT. ANN. (1958)	tit. 14, §2881	tit. 14, §2961	tit. 14, §2800		tit. 14, §2803		
VA. CODE (1961)							
WASH. REV. CODE ANN. (1967)	§11.92.090	§11.92.130	§11.92.053			§11.92.090	
W. VA. CODE ANN. (1966)	§27-11-5					§27-11-5	§27-11-5
WIS. STAT. ANN. (1958)	tit. 29, §319.19			tit. 29, §319.19		tit. 29, §319.19	
WYO. STAT. ANN. (Supp. 1969)	§3-23				§3-38	§4-23	

	Notice before hearing of incompetence required	Bond required of guardian or conservator	Accounting periodically required of guardian or conservator	Court will appoint counsel to represent alleged incompetent	Jury trial	Statute gives guidelines for the appointment of guardian or conservators
State Codes and Statutes						
ALA. CODE (1958)	tit. 21, §15	tit. 21, §27	tit. 21, §58	tit. 21, §11	tit. 21, §13	tit. 21, §23
ALAS. STAT. (1962)	§20.05.090	§20.05.050	§20.05.190		§20.05.090	§20.05.01
ARIZ. REV. STAT. ANN. (1956)	§14-862	§14-863			§14-863	
ARK. STAT. ANN. (1947)	§57-611	§57-617	§57-642		§57-615	§57-607
CAL. PROB. CODE (West 1956)	div. 4, §1461	div. 4, §1480	div. 4, §1515		div. 4, §1462	
COLO. REV. STAT. ANN. (1963)	§71-1-5	§153-10-3	§153-10-31	§71-1-8	§71-1-5	
CONN. GEN. STAT. (1958)	§45-71	§45-70	§45-75			
DEL. CODE ANN. (1953)	tit. 12, §3914	tit. 12, §3914	tit. 12, §3914		tit. 12, §3914	
D. C. CODE (1967)	§21-1502	§21-1503	§21-1503	§21-1502	§21-1502	
FLA. STAT. ANN. (1964)	tit. 42, §744.21	tit. 42, §744.38	tit. 42, §745.24	tit. 42, §744.12	tit. 42, §744.06	tit. 42, §744.35
GA. CODE ANN. (1965)	§49-604	§49-603	§49-202		§49-604	

HAWAII REV. LAWS	§338-10	§338-4	§338-4	§338-4		
IDAHO CODE (1948)	§15-1815	§15-1817	§15-1825		§15-1815	
ILL. ANN. STAT. (1961)	ch. 3, §113	ch. 3, §113	ch. 3, §309	ch. 3, §118	if demanded ch. 3, §117	
IND. STAT. ANN. (Repl. Vol. 1953)	tit. 8, §114	tit. 8, §122	tit. 8, §146	tit. 8, §119	if demanded tit. 8, §119	tit. 8, §§ 109, 110
IOWA CODE ANN. (1964)	§633.568	§633.642	§633.642		if demanded §633.569	§633.571
KAN. STAT. ANN. (Supp. 1968)	may be w/ or w/out notice §59-3012	§59-3008	§59-3029	§59-3011	§59-3011	§59-3004
KY. REV. STAT. ANN. (1969)	§387.025	§387.070	§387.170		§387.220	§387.030
LA. STAT. ANN. (1952)	Civil Code art. 390	Civil Code art. 415	R.S. 9:742	Civil Code art. 391	R.S. 9:602	Civil Code arts. 412, 413
ME. REV. STAT. ANN. (1964)	tit. 18, §3602	tit. 18, §3801	tit. 18, §3901	allowance to defend tit. 18, §§ 3604, 3651 Rule L71		tit. 18, §3601
MD. ANN. CODE (Repl. Vol. 1966)	Rule L71	Rule L72				
MASS. ANN. LAWS (1969)	ch. 201, §17	ch. 201, §19		allowance to defend ch. 201, §22	ch. 201, §16	



State Codes and Statutes	Notice before hearing of incompetence required	Bond required of guardian or conservator	Accounting periodically required of guardian or conservator	Court will appoint counsel to represent alleged incompetent	Jury trial	Statute gives guidelines for the appointment of guardian or conservators
MICH. STAT. ANN. (Repl. Vol. 1962)	§27.3178 (202)		§27.3178 (229)	§27.3178 (212)		
MINN. STAT. ANN. (1969)	§525.55	§525.551	§525.58			
MISS. CODE ANN. (Supp. 1968)	§434.02	§439	§439	§434-03		
MO. ANN. STAT. (1956)	§475.075	§475.100	§475.190	§475.075	§475.075	§§475.050, 475.055
MONT. REV. CODE ANN. (Repl. Vol. 1964)	§91-4701	§91-4703	§91-4608			
NEB. REV. STAT. (1960)	§38-201	§38-203	§38-505			
NEV. REV. STAT. (1963)	§159.100	§159.150	§159.560			§159.120
N. H. REV. STAT. ANN. (Repl. Ed. 1968)	§464:1	§462:3	§462:5	§462:1		
N. J. STAT. ANN. (1953)	§3A:6-35	case law	case law		§3A:6-35	§3A:6-36
N. M. STAT. ANN. (1953)	§32-2-2	§32-2-3	§32-2-5	§32-3-1	if demanded §32-3-1	§32-3-2

N. Y. MENTAL HYGIENE LAW (McKinney Supp. 1969)	§101	§103	§110	§101 (9)	§101	
N. C. GEN. STAT. ANN. (Repl. 1966)	§33-7	§33-12	§33-6		§35-2	§33-1
N. D. CENTURY CODE ANN. (1960)	§30-10-05	§30-11-03	§30-11-03	§30-10-26		§30-10-07
OHIO REV. CODE ANN. (1964)	§2111.04		§2111.14	§2111.05		§§2111.10, 2111.11
OKLA. STAT. ANN. (1965)	tit. 58, §851	tit. 58, §853	tit. 58, §871			
ORE. REV. STAT. (Repl. Pt. 1967)	§126.131	§126.171	§126.220	§126.516		§126.166
PA. STAT. ANN. (Supp. 1969)	tit. 50, §3301	tit. 50, §3311	tit. 50, §3402	tit. 50, §3201		tit. 50, §§ 3302, 3313
R. I. GEN. LAWS (1956)	§§33-15-8, 33-15-44	§33-15-45	§33-15-26	§33-15-9		
S. C. CODE LAWS (1962)	§15-448	§31-4	§31-12	§10-25552		
S. D. CODE	§35-1802		§35.2004			
TENN. CODE ANN. (Supp. 1968)	§34-1009	§34-1013			§33-404	
TEX. STAT. ANN. (1956)	Prob. Code §418	Prob. Code §193	Prob. Code §399		Prob. Code §417	

State Codes and Statutes	Notice before hearing of incompetence required	Bond required of guardian or conservator	Accounting periodically required of guardian or conservator	Court will appoint counsel to represent alleged incompetent	Jury trial	Statute gives guidelines for the appointment of guardian or conservators
UTAH CODE ANN. (1953)	§75-13-19	§75-13-26	§75-13-36			
VT. STAT. ANN. (1958)	tit. 14, §2684	tit. 14, §2751	tit. 14, §2921			
VA. CODE (1961)	§37.1-132	§37.1-135			if demanded 37.1-128	
WASH. REV. CODE ANN. (1967)	§11.88.040	§11.88.100	§11.92.040	§11.88.070		§11.88.020
W. VA. CODE ANN. (1966)	§27-5-4	§27-17-2	§27-11-2			§27-5-4
WIS. STAT. ANN. (1958)	§319.08	§319.13	§319.25	§319.04		§319.12
WYO. STAT. ANN. (Supp. 1969)	§3-29.5	§3-12	§3-29		if demanded §3-29.6	

the fact that they are no more, in most instances, than codifications of prior case law,<sup>50</sup> are that they require conditions such as "insanity", "idiocy", "lunacy", "imbecility", or "unsoundness of mind" as those which will justify guardianship, and fail, in most cases, to specifically define these terms for guardianship purposes.<sup>51</sup> Courts have tended recently to broaden the definition of "insanity", notwithstanding constitutional arguments of vagueness and overbreadth, so that institutional confinement in itself has been held to be sufficient grounds for an adjudication of insanity.<sup>52</sup> This judicial expansion of the meaning of "insanity" has led to the interchangeability of the terms insanity, idiocy, lunacy, imbecility and unsoundness of mind. The courts are now concerned more with the alleged incompetent's conduct of the ordinary affairs of life than whether or not this conduct is, for example, insanity or unsoundness of mind.<sup>53</sup> For this reason many of the more recently enacted statutes simply designate as incompetent any person who from *any* cause is mentally incapable of taking care of himself or his property.<sup>54</sup>

Another widely adopted variation of the traditional statutory test for guardianship reads substantially as follows: "not necessarily insane, but by reason of old age, disease or weakness of the mind, unable to manage his property unassisted and by reason thereof is likely to be deceived by some artful person."<sup>55</sup> Emphasis, as under other tests, is placed on the inability to manage property. There has been considerable difficulty encountered in implementing these more specific tests. The courts have disagreed over the interpretations to be given the property management standard. It has been held to mean anything from rationally,<sup>56</sup> to that of ordinary reasonable care,<sup>57</sup> to a comparative community standard,<sup>58</sup> to an ability to manage it in a rational manner,<sup>59</sup> to an ability to manage it intelligently,<sup>60</sup> to a disposition of mind which *might* lead to the wasting away of an estate.<sup>61</sup>

### *Specific Tests for the Aged*

An increasing number of states have enacted statutes which recognize old

50. *E.g.*, *Anderson v. State*, 54 Ariz. 387, 96 P.2d 281, 126 A.L.R. 501 (1939).

51. Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341, 342 & n.6.

52. *See Riggins v. Riggins*, 139 Cal. App. 2d 712, 294 P.2d 751 (1956).

53. Comment, *supra* note 51, at 343.

54. *Id.* & n.16 *see also In re Earnshaw*, 187 Pa. Super. 124, 144 A.2d 480 (1958).

55. *E.g.*, CAL. PROB. CODE § 1460 (West Suppl. 1969); IND. STAT. ANN. § 3-101(e)(2) (Supp. 1968); MO. REV. STAT. § 475.010(1) (Supp. 1968).

56. *Commonwealth ex rel. Euchenberg v. Schneider*, 59 Pa. 328 (1968).

57. *Muller v. Devries*, 193 Iowa 1337, 188 N.W. 885 (1922).

58. *Lewis v. Lewis*, 199 S.C. 490, 20 S.E.2d 107 (1942).

59. *Olson v. Olson*, 242 Iowa 192, 46 N.W.2d 1 (1951).

60. *In re Johnson's Estate*, 286 Mich. 213, 287 N.W. 597 (1938).

61. Comment, *supra* note 51, at 343 & n. 17; *see also In re Guardianship of Hubbard*, 97 Cal. App. 2d 321, 217 P.2d 744 (1950).

age as a possible factor causing incompetency to manage personal and property matters thus requiring the appointment of a guardian or conservator. The statutes enumerate conditions such as "old age,"<sup>62</sup> "senility,"<sup>63</sup> "extreme old age,"<sup>64</sup> "physical and mental weakness on account of old age,"<sup>65</sup> or "mental infirmities of old age,"<sup>66</sup> as the requirements for appointment of guardians in such cases.

The state legislatures have become increasingly aware that the problems of old age are distinguishable from those of mental illness in the younger population. Therefore:

There should be a method for recognizing that a man who cannot sign a check because he happens to be lying on his back in a hospital, or a man who has lived a good, full life and comes to the point where he can no longer remember whether he had breakfast that morning, is not a lunatic, and he should not be branded as a lunatic.<sup>67</sup>

Similar with incompetents in general, all that is necessary under these statutes as the courts have interpreted them, is an inability properly to manage and take care of one's self or one's property.<sup>68</sup> However, mere advanced age or physical infirmity does not warrant the appointment of a guardian for the estate of a person.<sup>69</sup>

But it is well settled, that weakness of mind resulting from old age or disease may assume such form, and be of such character, as to justify appointment of a guardian or a committee to handle the affairs of the person so affected.<sup>70</sup>

Among those factors taken into account by courts as indicating such infirmity of mind are the following:

1. Mental impairment
  - a. Cannot remember recent events but has vivid memories of the past.
  - b. Has difficulty solving normal everyday problems such as matching colors in attire.
2. Unexplained personality changes
  - a. Irritable and peevish.
  - b. Failure to take interest in surroundings.
  - c. Loss of personal pride.
  - d. Enjoyment of feebleness and disability.

62. *E.g.*, CAL. PROB. CODE § 1460 (West Supp. 1968); IND. STAT. ANN. § 3-101(e)(2) (Supp. 1968); MICH. STAT. ANN. § 27.3178(201) (Supp. 1968).

63. *E.g.*, ARK. STAT. ANN. § 57-601(c)(2) (Supp. 1967); MO. REV. STAT. § 475.010(1) (Supp. 1968).

64. *E.g.*, NEB. REV. STAT. § 33-201 (1967); NEV. REV. STAT. § 159.100.1 (1965).

65. N.C. GEN. STAT. ANN. § 32-2 (Supp. 1968).

66. *E.g.*, PA. STAT. ANN. § 50-3102 (SUPP. 1968).

67. WYNN, *A Vacuum in Our Law—Management of Property of Quasi-Incompetent Persons*, 95 TRUSTS & ESTATES 879, 880 (1956).

68. 10 AM. JUR. PROOF OF FACTS 378, 379. *Incompetency Resulting from Senile Dementia*, Proof 1 (1961).

69. 39 AM. JUR. 2d *Guardian and Ward* § 21 (1968) and footnotes following.

70. 41 AM. JUR. 2d *Incompetent Persons* § 4 (1968).

- e. Resistance of all suggestions and defensiveness.
  - f. Failure to wash hands and face and to generally maintain personal appearance.
3. Unexplained emotional disturbances
- a. Delusions or strong aversions not founded on fact.
  - b. Hallucinations.<sup>71</sup>

## EVIDENTIAL INPUT

### *In General*

Generally, the existence and extent of mental disability can best be determined from direct evidence of the alleged incompetent's words, acts, appearance and physical condition, and from lay and medical opinion either based on close association with and observations of him, or, as to the expert, given of him.<sup>72</sup>

In discussing the value of psychiatric expert testimony in the determination of incompetency, one psychiatrist has commented that the determination must be premised upon an inability to manage property. In minimizing the role of the psychiatrist in making a contribution to such determination as an expert witness at an incompetency proceeding he stated:

The problem of determining the kind of performance which represents good or poor management is . . . easy at the extremes; in the middle ground no amount of scientific evidence will be helpful. It is a question of what kinds of performance 'count' as good management or poor management, and this is a matter of personal taste since the rules of language are flexible enough to allow either judgment in the middle area.<sup>73</sup>

In a three-year study of civil incompetency made recently at the National Law Center of the George Washington University through a grant from the National Institute of Mental Health, interviews were conducted with twenty-five District of Columbia psychiatrists concerning their interpretations of "mental weakness not amounting to unsoundness of mind", a common statutory definition of incompetency. The results were as follows:

. . . [E]ight stated that the phrase is meaningless; two were of the opinion that it meant persons not in need of confinement, two others interpreted the phrase as meaning simply 'mentally ill.' Other specific responses included: 'someone not psychotic,' 'borderline psychosis,' 'insanity,' 'not insane,' 'in-between situation,' 'perfectly clear,' and 'ambiguous as hell.'<sup>74</sup>

Despite the confusion among members of the medical profession as to the nature or even desirability of their opinions in incompetency proceedings, there are statutes in some jurisdictions which make mandatory either oral testimony

71. *Supra* note 60, at 378.

72. Comment, *supra* note 51, at 344-45.

73. Leifer, *The Competence of the Psychiatrist to assist in the Determination of Incompetency—A Skeptical Inquiry into the Courtroom Functions of Psychiatrists*, 14 SYR. L. REV. 564, 567 (1963).

74. Zenoff, *Civil Incompetency in the District of Columbia*, 32 GEO. WASH. L. REV. 243, 255 (1964).

or a sworn certificate from at least one qualified medical witness,<sup>75</sup> and statutes in two jurisdictions now provide for the determination of mental incompetency exclusively by a medical commission.<sup>76</sup> The latter procedure, quite apart from criticism in medical circles, has also received substantial criticism by some legal scholars. Consider the following:

Since mental incompetency is determined by reference to a legal as opposed to a medical standard, there is no reason why a psychiatrist, rather than a court or jury, should be allowed to decide whether in a given case the standard has been satisfied.<sup>77</sup>

One proposed solution to the problem of the justiciability of such matters advocates initiation of a proceeding in which evidence presented by proponent and opponent could be considered by a jury along with the report of an independent medical commission, with the prevalent tests of mental incompetency, phrased in terms of managerial ability applied by the jury.<sup>78</sup> This would thus lessen, while not eliminating completely, the dependence by the court on medical testimony.

#### *Input Concerning the Aged*

The above-mentioned difficulties with respect to exactly what type of proof is actually needed to prove incompetency all apply to the alleged aged incompetent. There are additional difficulties with this group, however, arising primarily from the ambiguity of statutory and case law requirements for adjudging the aged incompetent and the dependence on medical testimony to decide a legal question. As stated by the same psychiatrist cited earlier:

A layman could, of course, testify to the fact of old age . . . . [T]he term 'likely to be deceived' is not a scientific concept [and] the psychiatrist has no more basis for accurately predicting the future gullibility of an individual than attorneys and judges.<sup>79</sup>

Nevertheless, courts have still held and continue to hold that it is not necessary to show that the alleged incompetent has performed acts which have dissipated his estate, but merely that he evidences conduct which would indicate the likelihood of such a result.<sup>80</sup>

A case which is illustrative of the foregoing problems with respect to the evidential input required to adjudge an aged person incompetent is *In Re Guardianship of Tyrrell*.<sup>81</sup> Immediately prior to the hearing Tyrrell was examined for fifteen minutes by two psychiatrists selected, not by Tyrrell

75. Comment, *supra* note 51, at 345 & n. 27.

76. *Id.* & n. 28.

77. *Id.* at 350.

78. *Id.*

79. Leifer, *supra* note 73.

80. *Supra* note 68, at 385.

81. 92 Ohio L. Abs. 253 (P. Ct.) *aff'd* (Ohio App. 1922), *appeal dismissed mem.* for lack of debatable constitutional question, 174 Ohio St. 552, 190 N.E. 2d 687 (1963). The following treatment of *Tyrell* was taken from the comment, *supra* note 51.

himself, but by the applicant for the guardianship. Their opinions, based partly on their brief examination and partly on what they had heard, were that a guardianship was needed because the alleged incompetent was "subject to undue influence." The applicant's other evidence tended to show that during the preceding year the alleged incompetent had spent several thousand dollars for which he had not received proper service or value.

Testimonial evidence to support Tyrrell's competency was offered by his personal physician, the supervisor of the rest home where he had resided for two years, four old friends with whom he had recently conversed on numerous occasions, and several local businessmen with whom he had recently dealt. His recent business transactions had included purchases of a ring, a grave monument for himself and his wife and a contract for a lifetime care in a rest home. In addition, it was shown that he also had a hospitalization insurance policy. Nevertheless, the probate court found that a mental disability existed which prevented Tyrrell from dealing at "arm's length", declared him mentally incompetent and directed that a guardian be appointed for his person and estate. The finding and order were affirmed on appeal, the appellate court being unable to say that the probate court's decision was not in the best interest of the ward.<sup>82</sup>

The judicial treatment of the Tyrrell case is even more distressing since an examination of the substantive and procedural incompetency law among the many jurisdictions renders it difficult to attribute the result reached to purely local factors. It therefore seems likely that similar cases exist in many other states.<sup>83</sup>

## PROCEDURAL ASPECTS

### *In General*

In some states the right to a jury trial on the issue of insanity or mental incompetency is conferred by statute.<sup>84</sup> In practice, however, the decision to grant a trial rests in the sound discretion of the court and it will usually not order one unless it is reasonably satisfied or it presumptively appears that the party is incompetent.<sup>85</sup> Even in those states which require a jury trial, the failure to demand one has been held to constitute a waiver of the right.<sup>86</sup> Therefore, the issue in incompetency proceedings is often decided by a judge without the assistance of a jury.<sup>87</sup>

Considerable debate has arisen regarding the need for a jury trial in

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82. Comment, *supra* note 51, at 346-47.

83. *Id.* & n. 43.

84. *E.g.*, CAL. PROB. CODE § 1461 (West Supp. 1968); KAN. REV. STAT. § 387.220.

85. 44 C.J.S. *Insane Persons* § 19(b) (1945).

86. *E.g.*, *Ward v. Booth*, 197 F.2d 963, 33 A.L.R.2d 1134 (9th Cir. Hawaii 1952).

87. Comment, *supra* note 51, at 346 & n. 32.



incompetency proceedings. It is conceded that a probate judge at a hearing to determine incompetency has a formidable task.

He must pierce the atmosphere of emotional antagonism so often incident to such cases and evaluate the evidence. He must discern the existence and extent of mental disability, a task which may require him to pass judgment as an expert on the alleged incompetent's mental condition. He must interpret and apply a standard of incompetency, taking into account such evidence as he deems relevant, and decide in the best interests of the alleged incompetent whether or not to impose the guardianship.<sup>88</sup>

Consequently, there are those who argue that there is danger in allocating determination of mental incompetency to a judge and that a jury trial should be mandatory as a safeguard in proceedings such as these, where personal and property rights may be divested.<sup>89</sup> It has also been argued that since an incompetency proceeding is a technical inquiry it does not necessitate jury participation, and a hearing conducted by a commission of physicians would be sufficient.<sup>90</sup> Since mental incompetency is determined by a legal as opposed to a medical standard, there is no reason for a psychiatrist, rather than a court or jury, to decide in a given case whether or not the standard has been satisfied.<sup>91</sup>

Apparently, incompetency proceedings in the various jurisdictions differ not only in the application of a uniform standard for determining incompetency, but also on who should properly apply that nebulous standard.

#### *Proceedings for the Aged*

The problem of who should determine whether or not an aged person is in need of personal and estate supervision upon a petition alleging incompetency is essentially the same as that for all classes of incompetents. There are two general features of the aged, however, which distinguish them from other incompetents. First is the hazy line between ability and inability to manage day-to-day affairs which is so common in cases involving people whose faculties are gradually slipping away. This is exemplified by the facts of the *Tyrrell* case.<sup>92</sup> Many alleged incompetents thus fall into the category of "not-quite-incompetent incompetents":

These [old] people . . . cannot be judged to be incompetent. They know what they are doing, they want to do just what they are doing, and want to live the way they are living. Still, from our present sociological way of thinking they need care, some of them their estates, most of them their persons . . .<sup>93</sup>

88. *Id.* at 347.

89. *Id.* at 349.

90. *Id.* See e.g., COLO. REV. STAT. ANN. § 71-1-2, 71-1-6 (1953).

91. Comment, *supra* note 51.

92. *Supra* note 81.

93. McAvinchy, *The Not-Quite-Incompetent Incompetent*. 95 TRUSTS & ESTATES 872-73 (1956).

A second feature peculiar to old-aged incompetency is the prospect that incompetency will occur if one lives long enough.

It doesn't take much 'crystal ball' gazing to foresee the possibility that, before death comes, an individual may be rendered temporarily or permanently unable to take care of his personal business affairs . . . . Those in their declining years must . . . look forward to the possibility of . . . the infirmities of old age and senility . . . [for although] [a]dvances in medical science have prolonged life expectancy . . . advances in preserving the mental health of the aged have not kept pace. . . .<sup>94</sup>

Feasible solutions to the two additional complexities in the adjudication of old age incompetency, namely the closeness of the cases and inevitability of deterioration in the aged, have been in force in California for 12 years and more recently in several other states.<sup>95</sup> California avoids both the nebulous standard of "incompetency" and the accompanying difficulty of who is qualified to make such a determination by providing simply that the court is to appoint a conservator "if satisfied by sufficient evidence of the need therefor."<sup>96</sup> Since a determination of incompetency is not required, it then becomes possible to supervise the affairs of those elderly who are in the "not-quite-incompetent" category without branding them as "incompetents." California has attacked the problem of the inevitability of incompetency in the aged by providing that the conservatee may nominate his own conservator by a written instrument either before or after an incompetency petition is filed. The alleged incompetent's nominee is to be given preference by the court.<sup>97</sup> Thus, California and those states more recently following California's leadership have provided a thoughtful approach to the adjudication of incompetency and the appointment of custodial managers for the aged.

The court's prerogative to use its discretion in the selection of the conservator despite the conservatee's express wishes has caused criticism of the California statute. One writer has suggested an alternative to the California approach, advocating a statute under which one could execute a document, with all the formalities of a will, with which he could say that, if certain doctors and/or lawyers certify to a court that he is incompetent in the sense that he is incapable, temporarily or permanently, of taking care of his business affairs, then from that moment on, the person designated by him should have full authority to take care of his business affairs for him. The document would contain instructions, just as one would put instructions to his executor in his will.<sup>98</sup> The method, it is argued, would avoid judicial interference with the determination of incompetency and the selection of a guardian or conservator.

94. Zillgitt, *Planning for Incompetency and Possibilities and Practices under the Conservatorship Law*, 37 CAL. L. REV. 181 (1964).

95. *E.g.*, IOWA CODE ANN. Probate Code § 633.572 (1964); KAN. STAT. ANN. Probate Code § 59-3007 (Supp. 1968).

96. CAL. PROB. CODE § 1751 (Supp. 1968).

97. *Id.* § 1752, 1753.

98. *Id.* § 1753.

## RELEASE FROM SURROGATE MANAGEMENT

*In General*

The determination of incompetency, as has been seen, is generally left in the discretion of the trial judge, and appellate courts have been reluctant to set it aside except upon a showing of abuse.<sup>99</sup> In general, appellate courts are not highly critical, and have little difficulty finding a preponderance of the evidence which will support the lower court's determination.<sup>100</sup>

The best remedy, then, for the termination of surrogate management is a proceeding for judicial restoration to competency which is regarded not as a new proceeding, but as a continuation of the original guardianship proceeding.<sup>101</sup> The state statutory provisions confer jurisdiction or proceedings for restoration to mental competency on either probate courts or the court in which the original proceedings took place,<sup>102</sup> which in many cases is the probate court.<sup>103</sup>

The general test for restoration to competency is essentially the same as that applied in determining whether one should initially have a guardian appointed, the typical language being: "If it is found that the person be of sound mind and capable of taking care of himself and his property, his restoration to capacity will be adjudged."<sup>104</sup> Thus, management of personal and property affairs is the guide for determining restoration as well as for the original incompetency determination. The above test for the determination of restoration is not significantly altered by the typical conservatorship statute. The California statute reads as follows:

If the petition alleges and if it is determined that the conservatee is able to properly care for himself and for his property, the court shall make such finding and enter such judgment accordingly.<sup>105</sup>

The type of evidence necessary for a finding of competency has generally been held to be within the discretion of the court.<sup>106</sup> Persons who have had such close and intimate relations with the ward as to justify the inference that they have had sufficient opportunity to observe the conduct of the ward may testify as to his mental condition,<sup>107</sup> as may psychiatrists.<sup>108</sup> But in the case of psychiatric testimony a Pennsylvania case<sup>109</sup> indicates that expert testimony

99. Wynn, *supra* note 67, at 882.

100. Comment, *supra* note 51, at 348 & n. 47.

101. 44 C.J.S. *Insane Persons* § 55(a) (1945).

102. *Id.*

103. *E.g.* MO. REV. STAT. § 472.020 (1956); ORE. REV. STAT. § 126.106 (Supp. 1967).

104. OKLA. STAT. ANN. Probate Procedure § 853 (1965).

105. CAL. PROB. CODE § 1755 (West Supp. 1968).

106. 44 C.J.S. *Insane Persons* § 55(f) (1945).

107. *E.g.*, *In re Earnshaw*, *supra* note 54.

108. *E.g.*, *Harriford v. Harriford*, 336 S.W.2d 113 (Mo. App. 1960).

109. *In re Nagle's Estate*, 418 Pa. 170, 210 A.2d 267 (1965).

notwithstanding, the type of discretion used by courts in competency proceedings gives rise to the same reluctance encountered in direct appeals of incompetency adjudications. *In Re Nagle's Estate*,<sup>110</sup> which involved the appeal of a dismissal of a petition for restoration to competency, the Supreme Court of Pennsylvania, per Musmanno, J., in interpreting the Pennsylvania restoration statute which requires "good cause" to be shown in order for a previously adjudged incompetent to be judged competent, affirmed the dismissal. In doing so, the court conceded that:

A reading of the petitioner's testimony could lead one to a conclusion that he is stable, oriented, and able to handle his own affairs and that Dr. Baldwin L. Keyes, a professor of psychiatry and neurology for 25 years and unquestionably a distinguished authority in his field, testified that Nagle was well enough to conduct his own affairs and that he would be beyond the reach of designing persons.<sup>111</sup>

The court felt, however, that the contrary testimony of two other psychiatrists and the opinion of the judge in that proceeding demonstrated that the petitioner had failed to prove his competency under the "fair preponderance of the evidence" standard which the court interpreted the statute as requiring.

It is thus apparent that the discretion used by judges in restoration cases may result in the imposition of standards not envisaged by legislators, and, as in the case of the original incompetency proceedings, not fairly determined by a judge sitting alone.

As to whether or not a jury trial in restoration proceedings is the answer, the same arguments advanced against the use of juries in original proceedings are applicable. Jury trials in restoration cases are even rarer and one court has held that the recognition of the existence of a right to a jury trial in original proceedings does not necessarily require the recognition of the right in a proceeding for restoration.<sup>112</sup> In fact, in some jurisdictions, there is no right to a jury trial in restoration proceedings.<sup>113</sup> In other jurisdictions, however, a jury trial is required in restoration proceedings.<sup>114</sup> A wiser approach seems to be to leave the matter to the petitioner, allowing him to have a jury trial if he demands it.<sup>115</sup>

#### *Restoration Proceedings for the Aged*

The area of restoration proceedings with respect to aged incompetents is not a burgeoning one for the obvious reason that the debilitating nature of the mental disease of the aged does not often permit recovery and a return to competency. A Washington, D.C. survey, in fact, revealed that in that

110. *Id.*

111. *Id.* at 263.

112. *Hilder v. Jochems*, 167 Kan. 83, 204 P.2d 777 (1949).

113. *E.g.*, WYO. STATS. § 3-29-10 (Supp. 1969).

114. *E.g.*, CAL. PROB. CODE § 1755 (West Supp. 1968).

115. CAL. PROB. CODE § 1755 (West Supp. 1968).

jurisdiction at least, an infinitesimal number of old aged incompetents petitioned for restoration.<sup>116</sup>

When aged incompetents do petition for restoration it is often following the healing of a physical disability. An Ohio case demonstrates the difficulty of release from surrogate management of an aged person in such a case. In *Guardianship of Breece*,<sup>117</sup> the petitioner, when 81 and suffering from arteriosclerosis, fell and broke her wrist, and was subsequently found incompetent; the court appointed a guardian for her. Recovering from the wrist injury, she filed an application to terminate the guardianship only six months later. At the termination hearing petitioner summoned four witnesses, including three physicians who were general practitioners. The guardians called only one witness, the trust officer of the corporate guardian of petitioner's sizable estate. The probate court denied the petition for termination and it was affirmed by the court of appeals for the county. The Supreme Court of Ohio, in reversing, interpreted the section of the statute applying to termination proceedings as requiring merely "satisfactory proof" of competency.

The *Breece* case crystalizes the paradox which exists when it is attempted, in an individual's best interest, to deprive him of self-management and property management. Modern approaches such as those of California, Iowa and Kansas have gone far to preserve the personal dignity of those for whom surrogate management is needed.

#### IV. THE SURROGATE MANAGERS

##### GUARDIAN

##### *Powers Over the Person*

All but 6 of the 41 jurisdictions that have guardianship provisions expressly authorize the guardian to assume custody or control over the person of the ward (South Carolina, Iowa, Michigan, New Mexico, North Carolina and Nevada). Only Iowa, Michigan and Nevada have enacted negative statutes; a statute that prevents the appointment of a guardian for the person because he is of advanced age. The remaining jurisdictions provide by statute for the care, custody and control by the guardian of his ward.

The most common power given to the guardian is the power to act as the legal representative of the ward. In this capacity the guardian may sue and be sued on behalf of his ward. Contracts made by the ward prior to the appointment of the guardian are with court approval, valid and binding. After the appointment of a guardian, contracts made by the ward are usually void (not voidable). The guardian is usually also given custody of the ward, including the power to decide where he is to reside. One jurisdiction has gone so far as to say that a guardian bears the same relation to a ward as a "father

116. Zenoff, *supra* note 74, at 246.

117. 173 Ohio St. 542, 184 N.E.2d 386 (1962).

over his child.”<sup>118</sup> The guardian is normally responsible to the court which appointed him.

#### *Powers Over Property*

In all jurisdictions, except Kansas, where there are guardianship statutes, provision is made for the appointment of a guardian for the ward's estate. Here, as in the case of the appointment of a guardian over the person, the guardian of the estate is under the control of the court. In most cases this type of guardian is appointed for an aged person who has been deemed by the court to be unable to manage his property or estate. Consequently, the guardian is usually charged by the court to prudently manage his ward's estate to prevent waste and to care for the ward's needs. Most frequently legal title to property remains in the ward's name, while the possession, use and control of the property is vested in the guardian. The guardian, with court approval, is also given the power to sell, lease and transfer his ward's property. The ward usually is without power to alienate his property. One general exception, however, is that the ward can make a testamentary disposition of his property, where it can be shown that he has the requisite testamentary capacity. Similarly, here, as in the provision for the guardian of the person, the guardian is charged with representing his ward in legal actions, whether he is plaintiff or defendant. Most jurisdictions require a bond from the guardian of the estate.

#### CONSERVATOR

There are presently seventeen jurisdictions, including the District of Columbia, that have conservatorship provisions which are applicable to the aged incompetent. Eight of these seventeen jurisdictions provide the conservator with the power to exercise control over the person of the conservatee, while all seventeen jurisdictions provide that the conservator shall exercise possession and control of the conservatee's property.

An important element of the law of conservatorship is the provision notably in New Hampshire and Nebraska but in some other states as well, which either permit or require that the petition for a conservator be submitted by the prospective conservatee. In both New Hampshire and Nebraska, the then appointed conservator does not exercise control over the person, but only over his property. The remaining states have provisions similar to that of guardianship statutes, i.e., the petition can be brought by almost any interested person, although creditors are frequently precluded from the list of possible petitioners.

Generally speaking, the eight states that have given the conservator power over the person and property of the conservatee have given the conservator the same basic powers as a general guardian: he is under court control; contracts

118. 49 GA. CODE ANN. § 201 (1965).

STATES PROVIDING FOR GUARDIAN OF THE AGED, INCOMPETENTS

State	Applicable Statutes	Power over Person	Property	Other Significant Provisions
ALA. CODE (1958)	21§9	Yes 21 §42	Yes 21 §42	Court approval needed for lease of more than one year 21 § 46. Generally management of both person & property.
ALAS. STAT. (1962)	§20:05:08	Yes §20:05.100	Yes §20:05.100	Represents ward in legal actions. Can lease property without court approval.
ARIZ. REV. STAT. (1956)	§14:863	Yes §14:863	Yes §14:963	Provides for person, property or both. Can sell property without approval. Guardian to appear, represent and sue for ward.
ARK. STAT. (Supp. 1967)	§57.605	Yes §625	Yes §626	Guardian given custody. With court approval can commit ward. Title to property remains in ward. Cannot bind ward or property. Forms contracts with court approval are valid. §628.
CAL. PROBATE CODE (West 1957)	§1460	Yes §1500	Yes §1500	Cannot have both Guardian & Conservator. §1530— Need court approval for sale of property with court approval Guardian can bind. Ward & contract for him. Also represent ward.
DEL. CODE ANN. (1953)	§12:3914	Yes 12 §3921	Yes 12 §3921	May sue in behalf of ward. Ward cannot contract away property.
FLA. STAT. ANN. (1964)	§42.744.03	Yes §744.49	Yes §§744.51, 744.52	Guardian in Florida may mean curator. Conservator or committee §744.03. Cannot bind as to property §744.49. Suits must be maintained against Guardian & ward, both.
GA. CODE ANN. (1965)	§49-601	Yes 49 §201	Yes 49 §201	Guardian same relationship as father to child. Contracts binding by court approval § 49-226.
HAWAII REV. LAWS	§338	Yes §338-4	Yes §338-4	

IDAHO CODE (1968)	§15-1816	Yes §15-1816	Yes §15-1816	If just incompetent to manage estate, then Guardian of estate only. §15-1816. Care & custody if required of ward. §15-1817.
IND. STAT. ANN. (1953)	§§8:106, 8:121	Yes §§8:106, 8:128	Yes §§8:106, 8:126	Guardian has custody but cannot bind. §8:129. Title in ward to property. Guardian has possession §8:130. Guardian represents estate in legal action §8-137. ward contracts are void. §:141.
IOWA CODE ANN. (1964)	32 IOWA CODE ANN. §633.556 (1964)	No	§639 Yes	Title in ward. Possession in Guardian or Conservator. Sale subject to court approval. Ward cannot dispose of property except by will if possesses testamentary capacity §638. Anyone can petition §566.
KAN. STAT. ANN. (1964)	§59.3002	Yes §3002	No	
KY. REV. STAT. (1963)	§387.060	Yes §387.060	Yes §338.060	Guardian and Committee have same powers except for education.
ME. REV. STAT. (1964)	tit. 18, §3601	Yes tit. 18, §3605	Yes tit. 18, §3505	Contracts made by ward after appointment of Guardian are void.
MASS. ANN. LAWS (1969)	201§1 201§6 (insane)	Yes 201 §12	Yes 201 §20	Contracts after appointment are void.
MICH. STAT. ANN. (1962)	§27:3178 (201)	Note: Yes for minor spendthrift or insane	Yes §27:3178 (217)	No control over person if just old age. Provision for special Guardian who has control over persons' property until appointment of General Guardian § 27:3178 (211) After appointment loses contract right 271 MICH. 215.
MINN. STAT. ANN. (1969)	§525.54	Yes §§525.54, 525.56	Yes §§525.54, 525.56	Guardian under control of court at all times. Can have General Guardian or Guardian of just the estate.



State	Applicable Statutes	Power over Person	Property	Other Significant Provisions
MO. STAT. ANN. (1956)	§475.030	Yes §475.120	Yes §475.130	Guardian can confine depending on degree of incompetency. §475.12. As to Real & Personal Property Guardian under court control §475.130. Contracts made by ward are invalid §475.345. But contracts made by ward with approval of Guardian & court can be binding. §475.135. Court can authorize purchase of Real Estate. §475.190.
MONT. REV. CODE (1947)	§§91-4701, 91-4702	Yes §91-4703	Yes §91-4703	
NEB. REV. STAT. (1943)	§38-201	Yes §38-202	Yes §38-202	
NEV. REV. STAT. (1963)	§159.100	No—only if ward is minor §159.250	Yes §159.250	Represent ward in legal actions §159.270.
N. H. REV. STAT. ANN. (1968)	§464.1	Yes §462.4	Yes §462.4	No contract after Guardian by ward is valid. §462.27.
N. J. STAT. ANN. (1953)	§3A:6.25	Yes §3A-6.36 (Care)	Yes §3A-6.36	Need permission of court to sell, trade, exchange, etc., property.
N. M. STAT. ANN. (1958)	§§32-2-3, 32-2-1	No provision as to custody or control.	Yes §32-2-3	Real and personal property.
N. C. GEN. STAT. (1965)	§33-1	No provision (assume no custody.)	Yes §33.20	Legal Representative §33.28

N. D. CENT. CODE ANN. (1960)	§30-10-02	Yes §30-10-14 custody	Yes §30-10-18	Isn't guardian of person or of property or both. All other guardians are special guardians §30-10-04. Provision for different guard of person & property §30-10-09.
OHIO REV. CODE ANN. (1964)	§2111.01	Yes §§2111.06, 2111.07, 2111.13	Yes §§2111.06, 2111.07, 2111.14	Assumed that Guardian will have control of both person and property unless otherwise stated by court. 43 N.E.2d 879.
OKLA. STAT. ANN. (1965)	§58:851	Yes §58:853	Yes §58:853	
ORE. REV. STAT. (1964)	§126.006	Yes §126.210	Yes §126.225	Title to property remains in ward §126.240. Guardian is legal representative §126.275. Prior contracts made by ward with court approval are valid. §126.285.
PA. STAT. ANN. (1954)	title 50 §3301	Yes §§3102(4), 3301(a)	Yes §§3103 3401 3301(A) 3102(4)	Legal title to property remains in Ward §3103. Real and personal. Provide for temporary guardian §3301.
R. I. GEN. LAWS (1957)	§33-15-8	Yes §§33-15-8, 33-15-29	Yes §§33-15-8, 33-15-19	Provider for contingent interest of Guardian vs. ward §33-15-39 (Ward or relative can apply.) Ward cannot make valid contract §33-15-44.
S. C. CODE ANN. (1962)	§§37-1, 10-448, 32-1035		Yes §31-2	Judge of probate court can be the guardian. §31-102.
S. D. CODE	Yes §35.1802	Yes §35.2001	Yes §35.2001	
TEX. PROBATE CODE (1956)	§114	Yes §229	Yes §230(b)	Can be for person and/or estate §34.1012. Contract powers are limited to same extent as power of minor §34.1014.

State	Applicable Statutes	Power over Person	Property	Other Significant Provisions
UTAH CODE ANN. (1953)	§75-13-20	Yes §75-13-31	Yes §75-13-22	Sale of property with court approval. Guardian has power over person and property unless otherwise ordered. §75-13-30.
VT. STAT. ANN. (1959)	title 14 §§2671, 2683	Yes §2691	Yes §2691	Legal representative (a) Custody of person dependent upon the ward §2799. Contracts of ward are void. §2689.
VA. CODE (1950)	§37-1-1.32	Yes §37.1-1.38	Yes §37.1-1.42	Ownership of property is in ward. Legal representative §37.1-1.41.
WASH. REV. CODE ANN. (1967)	§11.88-100	Yes §§11.88.010, 11.92.040,	Yes §§11.88.010, 11.92.040	Both Guardian of person & Estate are under court control §11.92.010
WYO. STAT. (1957)	3-29.1	Yes §§3-29.1, 3-29.7	Yes §§3-25, 3-29.1, 3-29.7.	Legal representative §3-24
WIS. STAT. ANN. (1958)	§§319.295, 319.02, 319.12	Yes §§319.295, 319.03	Yes §§319.295, 319.03, 319.19	Temporary Guardian §319.15

STATES PROVIDING FOR CONSERVATORSHIP OF THE AGED

State	Statute	Person	Property	Other
CAL. PROBATE CODE (West Supp. 1957)	§1701	Yes §1851	Yes §1853	Conservator given care & custody of ward.
COL. REVISED STATS. (1963)	§153	No §153-9-6	Yes §153-9-6	Can ask for Conservator §153-14-13.
CONN. GEN. STAT. (1958)	Chap. 779 §45-70	Yes §45-75	Yes §45-75	Custody of ward except conservator is not the husband and ward is his wife. Temporary conservator §45-72. Need medical certificate. During pendency of issue contract and bank assets are frozen.
D. C. CODE (1967)	Chap. 15 §21:1501	Yes §21:506	Yes §21:1501	Control over person at court discretion and control over real and personal property. All transfers of real and personal property by ward during conservatorship are void §21:1507.
FLA. STAT. ANN. (1964)	42 §744.03	Yes §744.49	Yes §§744.51, 744.52, 747.19.	Curator, Conservator or Committee mean same thing as Guardian.
ILL. ANN. STAT. (1961)	3 §113	yes §121	Yes §122	Custody, while control of property is with court supervision. Conservator of estate and Conservator of person may be two different people §119. Prior contracts of ward enforceable with court permission §123. Conservator legal representative §124. Contracts made by ward void as to him §126, but other person making the contract is bound §126.

IOWA CODE ANN. (1964)	633 §§566, 570	No	Yes §639	Title in ward. Conservator has possession. Sale of property subject to court approval. Real and personal property §640. Anyone can petition for Conservator §566. Ward cannot dispose of property except by will if he has testamentary capacity §637. After appointment of Conservator, presumption of fraud on all contracts made by ward §638.
KAN. STAT. ANN. (1964)	§59-3002	No	Yes §59-3002	
ME. REV. STAT. ANN. (1964)	tit. 18, §3701	Yes §3701	Yes §3701	
MD. ANN. CODE (1957)	16 §149	Yes §151	Yes §150	Court discretion for power over person, court supervision over real and personal property. Conservator may sue and be sued in his legal capacity.
MASS. ANN. LAWS (1969)	201 §§1, 16	No custody	Yes 201 §20	Old age specifically for Conservator. Contracts made after appointment are void.
MISS. CODE ANN. (1942)	§434.01	Yes §430.01	Yes §434.01	Conservator same powers as guardian of minor §434.05. Contract powers of conservatee are same as minor. §434.06.
N. H. REV. STAT. ANN. (1968)	§464.17	No	Yes §464.17	Conservatee must apply for Conservator.
NEB. REV. STAT. (1943)	§38-901	No	Yes §38-903	For a Conservator, Prospective Conservatee must request.
ORE. REV. STAT. (1964)	§126.626	—	Yes §126.621	

State	Provision	Person	Property	Other
R. I. GEN. LAWS (1957)	§33-15-44	No	Yes §33-15-44	Ward loses contract rights §33-15-44.
TENN. CODE ANN. (1955)	§34-1008	No	Yes §34-1008	Powers same as guardian of minor §34-1012, and §1008 says conservator can have custody and charge of person.
HYGIENE LAW		No custody		Same powers as guardian of minor §1012. Contract powers of conservatee limited to same extent as minor.

STATES PROVIDING FOR INCOMPETENTS IN OTHER THAN GUARDIANSHIP OR  
CONSERVATORSHIP; AS COMMITTEE OR CURATOR, ETC.

TITLE				
FLA. STAT. ANN. (1964)	Committee or Curator §42.744.3	Yes §744.49	Yes §§747.19, 744.51, 747.19	Guardian shall mean same as Curator, Conservator or Committee. In addition §747.19 gives Curator specific control of property.
KY. REV. STAT. ANN. (1963)	Committee §387:210 Curator §387.320	Yes §387.230	Yes §387.320	Guardian and Committee have same power except for education of ward. Curator by petition of old age person—only control and management of real and personal property.
LA. REV. STAT. (1965)	Committee title 9:389 Curator §9:404	Yes §337	Yes §337	§406 provides for an under curator where interest of curator and ward may be in conflict. Under curatorship, persons act are null T.9 §401. Previous acts are also null except when conditions are notorious.
N. M. STAT. ANN. (1958)	Committee §32-21	No provision as to custody or control	Yes §32-2-3	Guardian shall include Committee.

N. Y. MENTAL HYGIENE LAW (McKinney Supp. 1969-70)	Committee: Mental Hygiene §100	Yes §100	Yes §100	Committee subject to control of court.
VA. CODE (1950)	Committee §§37.1-127, 37.1-132	Yes §37.1-138	Yes §37.1-132	Legal Representative §37.1-141 §37.1-127 Committee for insane or feebleminded §37.1.1(7) insane: legally incompetent because of mental disease §37.1-1(10) feebleminded—legally incōmpetent because of mental deficiency But committee or guardian under §37.1-132 have same powers as committee under §37.1-127 (insane or feeble- minded).
W. VA. CODE (1966)	Committee §27-11-1	Yes §27-11-4 except if ward in hospital	Yes §27-11-4	Can sell property with court approval §27-11-5.
S. C. CODE OF LAWS (1962)	Committee §32-1038		Yes §32-1035	
WIS. STAT. ANN. (1958)	Committee §319.13	No	Yes §319.31	Ward must apply.
WYO. STAT. (1957)	Committee §3-29.9	§3-29.7	Yes §3-29.7	

made previous to the appointment of a conservator are void; he is to act as the conservatee's legal representative in personal matters and legal actions concerning the conservatee's real and personal property. The conservator must furnish a bond to the court; and for any transfer, lease or alienation of the conservatee's real property, he must first obtain court approval. The powers and duties of the conservator of the estate are almost identical to those of the guardian of the estate. However, unlike a guardianship provision, where there is a stigma of mental illness, disease, deficiency or insanity attached to the ward, the conservator in all jurisdictions except Florida and Illinois<sup>119</sup> is appointed when it is merely shown that the conservatee is incompetent to manage his affairs.

The conservator's power may be as vast as that of a guardian of a minor or limited to the prudent care of the conservatee's estate (New Hampshire).

#### COMMITTEE OR CURATOR

There are 10 states that provide protective service for old persons in the form of committee or curator. The statutory provisions, are substantially similar to guardianship provisions. Wisconsin is the only jurisdiction that does not by statute permit control over the ward by the committee.<sup>120</sup> New Mexico and South Carolina are not definitive on this issue, but the remaining seven states, by statute, delegate power and control over the person to the committee or curatorship. All ten jurisdictions give the committee or curator control and possession of the ward's property, both real and personal. In the seven jurisdictions aforementioned there is very little difference to the ward whether or not a guardian, committee or curator is appointed in terms of the loss of his rights. In fact, several jurisdictions make no distinction between a guardian, committee or curator and state that their powers are the same.

There are sixteen jurisdictions that provide several distinct types of protective services for an old age incompetent:

1. California—Provides custody of person and care of property whether a guardian or conservator is appointed.
2. Florida—Guardian may mean curator, conservator or committee.
3. Iowa—Apparently little difference between conservator and guardian.
4. Kentucky Except for education of the ward, the powers of the guardian and committee are the same.
5. Maine—Both guardian and conservator have custody of the person and control of the property.
6. New Mexico—The guardian provision shall include committee.
7. Virginia—Committee and guardian are to have same powers.
8. Wyoming—Both committee and guardian to have same powers over the person and his property.

119. Florida considers a conservator the same as a guardian. Illinois appoints a conservator on the finding of mental illness, deficiency, feeble-mindedness, or insanity.

120. A ward *must* petition for a committee in Wisconsin.



It is clear that in half of the states in which there are more than one type of protective service for old age incompetents, it makes no difference whether a guardian, conservator, committee or curator is appointed. However, in the remaining eight jurisdictions, the rights lost by those judged incompetent, will depend on the type of protective service employed:

1. Kansas—A guardian has control of person only, conservator has control of the property only.
2. Massachusetts—Conservatorship has control of property only, guardian has control of the person and property.
3. Nebraska—Conservator has control of property only, guardian can have control of both person and property.
4. New Hampshire—Conservator has control of property only, guardian has control of both the person and his property.
5. Oregon—Conservator has control of the property only, guardian has control of both the person and his property.
6. Rhode Island—Conservator has control of the property only, guardian has control of both the person and his property.
7. South Carolina—Committee has control of the property, apparently guardian and possibly even the committee have control of both the person and his property.
8. Wisconsin—Committee has control of the property only, guardian has control of both the person and his property.

Therefore, in only eight out of fifty-one jurisdictions considered will it make a difference as to which type of protective service is employed for an alleged old age incompetent. While the name of the protective service procedure may either be guardianship, conservatorship, committee, or curator, the effects of such service in the great majority of the jurisdictions will be the same.

Because of their prominence and the nature of their legislative programs concerning the aged, two states, California and New York, have been selected for a more detailed analysis.

#### CALIFORNIA—GUARDIANSHIP

The general provision for a guardian in the State of California is Section 1460 of the California Probate Code. The statute specifically provides for the appointment of a guardian for the person or the estate or both, when the court finds, after proper hearing, that the person is insane or incompetent. A person may be designated as incompetent within the meaning of this section upon a determination that he is unable to manage and take care of himself or his property and because of this incapacity is likely to be deceived by artful or designing persons. Once the guardian is appointed he assumes many of the rights of the ward.

#### *Rights and Powers of a Guardian of the Person*

Upon becoming appointed guardian of the person, the guardian may determine and fix the residence of the ward within the borders of the State of

California.<sup>121</sup> Within reason the guardian may also limit the activity of the ward, but such limitation must be for the ward's benefit and should not deny him the freedom that is essential to his welfare.<sup>122</sup> In addition the guardian must pay all just debts of the ward and collect all moneys due him. Thus, the guardian must appear and represent the ward in all legal actions.<sup>123</sup>

In representing his ward, the guardian may have to obtain legal counsel. If the guardian obtains counsel without court approval, then he is subject to personal liability for the contract of employment made with the attorney. Similarly, without court approval, the guardian lacks the power to contractually bind the ward's estate. However, the guardian may be reimbursed from the ward's estate even if the contracts were made without court approval, if the court later deems these to be proper and for the benefit of the ward.<sup>124</sup> The guardian will also be relieved of personal liability if the court finds the hiring of an attorney was in the ward's best interest.

If a legal dispute arises the guardian may, without court approval, compromise, compound or settle any suit, claim or demand by or against the ward or his estate. This may be done by the transfer of specific assets of the estate. Without court approval the guardian may modify, renew or extend any legal obligation of the ward. When necessary, the guardian must submit a verified petition to the court in order to obtain court approval.<sup>125</sup>

All money received for the benefit of the ward may be deposited by the guardian in banks or insured savings and loan associations within the State of California. By depositing the ward's money in these approved institutions, the guardian is relieved from further liability. If the money was not deposited pursuant to an order of the court, it may also be withdrawn without court order.<sup>126</sup> In addition, with court approval the guardian may borrow money for the ward, with or without posting security.<sup>127</sup> In the event of recovery of money in excess of \$10,000, if there is no guardian of the estate, one must be appointed.<sup>128</sup>

#### *Rights and Powers of a Guardian of the Estate*

In exercising his care over the property of the ward, the guardian takes possession and control of the property of the ward, but the title at all times remains in the ward.<sup>129</sup> The guardian must manage the estate prudently and

121. CAL. PROB. CODE, § 1500 (West 1957).

122. *Browne v. Superior Court*, 16 Cal. 2d 593, 107 P.2d 1 (1940).

123. CAL. PROB. CODE, § 1501 (West 1957).

124. CAL. PROB. CODE, § 1509 (West 1957); *Guardianship of Cookingham*, 289 P.2d 16 (1958).

125. CAL. PROB. CODE, § 1530a (West 1957).

126. *Id.* § 1513.

127. *Id.* § 1583.

128. *Id.* § 1500.

129. CAL. PROB. CODE, § 1502 (West 1957).

without waste. He must apply any income derived from the estate to the support of the ward, and, if the income is insufficient, with court approval he may sell or mortgage the property. If the guardian advances his own money to support the ward, then he is entitled to reimbursement from the ward's estate.<sup>130</sup>

In certain cases it may not be necessary to sell the entire estate in order to support the ward. In this situation, it may be in the ward's interest to have his property partitioned. The guardian, with court approval, may accordingly initiate an action for partition. However, partition proceedings can be commenced only after 10 days minimum notice is given to proper relatives.<sup>131</sup>

In addition to the procedure which provides for the partition of real property the guardian may dispose of real property, after proper notice, in the following manner (such a conveyance must be in the best interest of the ward and may be with or without any consideration):

1. [D]edicate or convey any real property of the estate or interest therein to the state or any county or municipal corporation, or the United States of America or any agency or instrumentality thereof, for street or highway purposes;

2. [D]edicate or convey an easement over any real property of the estate to the State or any county, municipal corporation, public district, or any person, firm, association or public or private corporation, or the United States of America or any agency or instrumentality thereof;

3. [C]onvey, release or relinquish to the State or any county or municipal corporation, any access rights to any street, highway or freeway from any real property of the estate, upon order of court based upon the petition of the guardian or of any person interested in the estate, and after notice of the hearing given for the period and in the manner required by Section 1200 of this code.<sup>132</sup>

The guardian may also sell any personal property or mortgage any of the ward's real property.<sup>133</sup> If the guardian decides to sell real or personal property, the sale must be for cash, or cash and deferred payment. However in no case may the credit extended to the purchasers exceed ten years. Credit terms are also subject to court approval.<sup>134</sup>

Whether or not the sale of the ward's property, either real or personal shall be at a private or public sale is left to the discretion of the guardian. Again, in exercising this discretion, the guardian's actions should be designed to benefit the ward. In attempting to ascertain whether a private or public sale would be of the greatest benefit to the ward, the guardian should try to sell as an administrator would. If the object for sale is real estate, the guardian is required to furnish an additional bond.<sup>135</sup> Any contract for sale made by the

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130. *Id.*

131. *Id.* §§ 1506, 1507.

132. *Id.* § 1515.

133. *Id.* § 1530.

134. *Id.* § 1532.

135. *Id.* §§ 1534, 1534a.

ward before appointment of a guardian, or consummated by a previous guardian, may be enforced by the present guardian with court approval.<sup>136</sup>

When the guardian leases real property of the ward for less than \$250 per month, or for a term less than one year, or on a lease which is month to month regardless of the amount of the rent, the guardian does not need court approval. Any other type of lease requires court approval. The lease should set forth the minimum rentals and royalties (if any) that are due. In addition, to be valid, any promissory notes for money borrowed, options to purchase, or leases to mining claims, need approval by the court.<sup>137</sup>

#### *General Provisions*

The guardian of the estate may also vote in person or by proxy, shares in a corporation owned by the ward.<sup>138</sup>

Upon the initiation of a proceeding to determine if a guardian of the estate is needed, the court may appoint a temporary guardian to conserve the ward's estate during the guardianship proceeding.<sup>139</sup> If the court decides that there is justification for the appointment of a guardian of the estate, this appointment terminates the temporary guardianship.<sup>140</sup>

The guardian, within three months of appointment, is required to submit an inventory and appraisal of the ward's estate. Every guardian is allowed to be reimbursed from the ward's estate for his reasonable expenses incurred in the execution of the trust. Termination of the guardianship is made by court order only upon application of the guardian or the ward.<sup>141</sup>

#### CALIFORNIA—CONSERVATORSHIP

In California, if the person is in *need* of a conservator, the court may appoint a conservator of the person and/or property. The need may be created by advanced age, illness, injury or mental weakness . . . thereby making him unable to properly care for himself or his property. It is further provided that a conservator may be appointed for any person for whom a guardian could be appointed, and that the prospective conservatee may request a conservator.<sup>142</sup> The statute further provides that a court may, upon application, issue letters of guardianship or conservatorship. It cannot do both. In determining which type of protective service to employ, the court is charged with employing that process which will be in the best interest of the conservatee.<sup>143</sup> The legislation also provides for a conservator to replace a

136. *Id.* § 1537.

137. *Id.* §§ 1538, 1538.5.

138. *Id.* § 1517.

139. *Id.* § 1640.

140. *Id.* § 1645.

141. *Id.* §§ 1550, 1556, 1590(3).

142. CAL. PROB. CODE, §§1701, 1751, 1754 (West Supp. 1957).

143. *Id.* § 1703.

guardian if the court deems it necessary, or conversely, for a guardian to replace a conservator.<sup>144</sup> The court is directed to be responsive to any preference of the conservatee in the selection of a conservator. If the applicant lacks the requisite mental capacity to make a responsible selection, the court is directed to appoint a person qualified as conservator, in the following order of priority:

1. Spouse, or nominee of the spouse of the conservatee.
2. Adult child of prospective conservatee or his nominee.
3. Parent or his nominee of the prospective conservatee.
4. Brother or sister or his nominee of the prospective conservatee.
5. Any appropriate person, who upon petition could be appointed guardian.

Any person or corporation prohibited by law from serving as a guardian of the estate of an incompetent person shall similarly be prohibited from being appointed a conservator.<sup>145</sup>

In addition to the request for a conservator by the prospective conservatee, any person, relative or friend other than a creditor may petition the court for a conservatorship. If the petition is by one other than the conservatee, then the clerk of the court must issue a citation to the prospective conservatee setting forth the place of the hearing.<sup>146</sup> Following appointment, a conservator continues to perform his duties until termination of the conservatorship which may occur by court order or death of the conservatee. Proceedings to terminate a conservatorship may be initiated on petition, submitted either by the conservator, conservatee or any relative or friend of the conservatee. While appointment of a conservator is in the discretion of the judge, termination, if requested, may be decided by a jury.<sup>147</sup>

If the conservatorship is only of the person, then the court may dispense with the furnishing of a bond. If the conservatorship is for the person and his property, then a bond will usually be required from the conservator. Should there be more than one conservator, a joint bond may be required. The conservator may, upon petition, have his bond reduced by the court.<sup>148</sup>

#### *Powers*

The conservator of the person has the care, custody and control of the conservatee and may, within the State of California, fix the residency of the conservatee. The conservator of the estate has the power granted to the guardian of an estate. In addition, upon application of the conservator of the estate and/or person, the court may grant the following additional powers to the conservator:

1. maintain actions for and against the estate,
2. collect and hold property,

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144. *Id.* §§ 1704, 1705.

145. *Id.* §§ 1752, 1753.

146. *Id.* § 1754.

147. *Id.* § 1755.

148. *Id.* §§ 1802, 1803.

3. contract, perform outstanding contracts, and bind the estate by contract,
4. operate the conservatee's business at the risk of the conservatee,
5. take options,
6. sell real and personal property at either public or private sale,
7. grant easements and servitudes,
8. borrow money,
9. purchase real or personal property and repair it as necessary,
10. lease property, even if the lease is to commence at a future date,
11. loan money,
12. exchange the conservatee property,
13. sell on credit, if there is security on the unpaid amount,
14. vote and sell shares of corporate stock by proxy,
15. exercise stock rights and options,
16. consent to stock consolidations, mergers, etc.,
17. collect insurance,
18. settle claims,
19. even abandon valueless property,
20. employ attorney, etc., and pay their expenses.

These additional powers, if granted, may be exercised with or without notice, hearing, confirmations or approval of the court. They are granted or withheld in the discretion of the court. If in the opinion of the court, upon its own motion or a verified petition, it is to the benefit of the conservatee to have these additional powers withdrawn, it may do so.<sup>149</sup>

The conservator must provide for the maintenance and support of the conservatee and those legally entitled to support and maintenance from the conservatee.<sup>150</sup> If, after providing for the maintenance and support of all parties entitled thereto, there is excess income, the court may authorize distribution of this income to the conservatee's survivors.<sup>151</sup>

The conservator must pay all debts incurred either before or after the institution of the conservatorship, except that such payment shall in no way impair the conservator's duty to provide the conservatee with the necessities of life. If a question arises concerning the proper payment of the conservatee's debts, the conservator may seek the court's advice. In the event the conservator advances his own money, he may be reimbursed out of the estate of the conservatee. The court may order the conservator, after a proper hearing, to pay the legal debts of the conservatorship or provide maintenance and support of the conservatee, where the conservator has refused to provide for the maintenance of, or pay debts of the conservatee. In addition the court may require the conservator to give the conservatee a personal allowance.<sup>152</sup>

Within three months after formation of the conservatorship, the conservator is required to file an inventory and accounting. If he refuses, the

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149. *Id.* § 1853.

150. *Id.* § 1855.

151. *Id.* § 1856.

152. *Id.* §§ 1858, 1859, 1861.

court may revoke his conservatorship and hold him personally liable on his bond for any waste of the conservatee's estate.<sup>153</sup> In performing his duties, the conservator is allowed the amount of his reasonable expense incurred in the execution of the trust.<sup>154</sup>

Finally, if during the conservatorship, the conservatee shall remain or be caused to be employed, the wages the conservatee receives shall not be subject to the provisions of the conservatorship.<sup>155</sup>

#### NEW YORK—COMMITTEE

Upon a finding by a court of competent jurisdiction that a person because of old age, is incompetent to manage his affairs, the court is directed to assume custody over the person and his property. In exercising such custody, the court may appoint a committee for the person or a committee for his property (these may be the same or different individuals).<sup>156</sup> Generally, the committee of the property shall have the duty to prevent waste and destruction of the ward's property,<sup>157</sup> while the committee of the person is to take care of the ward's physical needs.<sup>158</sup>

Any person may bring a special proceeding to declare a person incompetent and to have appointed a committee for the adjudged incompetent. Notice of the hearing must be given the alleged incompetent or his spouse. The issue of incompetency is to be decided by a jury in a judicial hearing or, in the alternative, by creation of a commission which likewise must employ a jury to assist in making the determination.<sup>159</sup> Every committee is required to submit an undertaking to the court.<sup>160</sup>

At all times the committee of the person and/or the estate shall be subject to the control of the court. A committee of the estate has no power to act without the court's prior approval except to make reasonable expenditures to preserve the estate. In addition, the committee of the estate may invest surplus funds in securities that are eligible by law for the investment of trust funds. All other investments require prior court approval.

Any disposition of property, must be preceded by court approval and must follow the procedure specified by the New York Real Property Actions and Proceedings Law. However, if the property is leased for less than five years, court approval is sufficient. The committee is also required to file with

153. *Id.* §§ 1901, 1902.

154. *Id.* § 1908.

155. *Id.* § 1910.

156. N.Y. MENTAL HYGIENE LAW § 100 (McKinney Supp. 1969-70) [hereinafter cited as MENTAL HYGIENE].

157. *In re Matson*, 293 N.Y. 476, 58 N.E.2d 501 (1944).

158. *In re Webber's Will*, 187 Misc. 674, 64 N.Y.S.2d 281 (1946).

159. MENTAL HYGIENE § 101.

160. *Id.* § 103.

the recording officer of the county any real property the incompetent may own.<sup>161</sup>

Remuneration for the committee of the property shall be fixed at the same rate as applies to an executor or administrator, except in those instances where the committee duties are greater; in which case he may receive additional remuneration in an amount that is in the court's opinion just. The amount is fixed by the court and paid by the committee of the estate (if any) out of the ward's funds.<sup>162</sup>

The committee may, upon motion, be removed by the court that appointed it. Grounds for removal are failure to comply with court order, misconduct or any other reason in the discretion of the court. A motion for removal may be made by any interested party. The committee may also be discharged. Discharge may be the result of death of the incompetent, his restoration to competency, release from confinement so that he is now able to manage his affairs, or other just cause in the discretion of the court. In addition a committee may resign or the court may suspend the duties of the committee.<sup>163</sup>

However, if a person is involuntarily incarcerated in either an institution of the department of mental hygiene or an institution for the mentally ill or mental defectives in the Department of Correction, the procedure for appointment of a committee is different. In these cases, a petition for the appointment of a committee may be brought by one of the following persons: 1) a state officer having jurisdiction of the institution; or 2) an officer having special jurisdiction over the institution; or 3) an officer having charge of the institution. The petition should contain the person's name, age, address, etc., plus the value of the patient's income.

While the appointment of a committee for a person not in an institution requires a jury trial, the appointment of a committee for a person in an institution does not. Thus, if the court is satisfied of the truth of the facts stated in the petition, it may appoint a committee or hold the matter for further proceedings. The powers and duties of this committee are similar to any other committee. The committee is discharged by the court that appointed it, upon the release of the person from the institution.<sup>164</sup>

#### GUARDIANSHIP A COMPARISON

The prevailing provisions under guardianship law in most jurisdictions permits guardians of both the person and the estate. This is also the California position. However, the more progressive point of view seems to limit a guardian to control over the person, leaving custody of the estate to the con-

161. *Id.* § 106.

162. *Id.* § 109(1).

163. *Id.* § 112.

164. *Id.* § 102.



servator. Thus, in eight jurisdictions that have both conservator/committee/curator and guardian provisions for protective service, this distinction in powers and duties is found. California, contrary to these eight jurisdictions, does not make this type of distinction.<sup>165</sup>

The guardian of the person in California is permitted to fix the residence of the ward within the state. This is also the generally prevailing law in a majority of jurisdictions. However, some states have gone further and have permitted the guardian to commit the ward. In most states the guardian acts as the ward's legal representative and is responsible for his debts. The California position is in accord with the majority. Many jurisdictions permit the guardian to bind the ward by contract. California also allows binding the ward (and his estate) by the contracts of the guardian, provided there is court approval.

In California, as in most jurisdictions, the guardian of the estate has control and possession of the property, while the legal title remains with the ward. Many jurisdictions charge the guardian of the estate with the duty of managing the ward's property for the benefit of the ward. This is also the position taken by the California statute, but California, in addition, prescribes in detail the procedure that the guardian must follow. Also, specifically delineated in California, are various actions that a guardian can and cannot take with regard to the estate of the ward. Here again, as in most jurisdictions, California requires court supervision of the guardian.

As to contracts made by the ward before a guardianship was instituted, the California position, in accord with the majority of decisions, is with court approval, previous contracts are binding. The guardian in California, as in the majority of jurisdictions, must make an initial and subsequent inventory and accounting and furnish a bond. Most jurisdictions provide that any interested friend or relative of the alleged incompetent may petition the court for appointment of a guardian for the applicant. The California position is in accord.

#### CONSERVATORSHIP—A COMPARISON

Unlike some states, in California there may be a conservator of the person and/or the estate. The California statute permits petition for a conservatorship by either the prospective conservatee or a variety of related and/or interested persons. Most jurisdictions have similar provisions, with the exception of New Hampshire and Nebraska, which require the petition to be presented by the prospective conservatee (It should be noted that these two states only have provisions for a conservator of the estate). California has also provided that the conservatee may, if he has the requisite mental capacity,

165. It should be noted that in California an aged person can have either a guardian or a conservator appointed to care for him and/or his estate, but not both. California's position on exclusive protective service being in the form of guardianship or conservatorship is unique.

nominate his conservator, but unlike many jurisdictions, it establishes guide lines as to the order of preference of a conservator in those cases where the conservatee is without the necessary power to nominate a conservator.

In general, the powers of the conservator are almost identical to those of a guardian. In most states that provide for a conservator of the person, the conservator has custody and control of the conservatee. California has also adopted this position. California and a majority of jurisdictions take the position that the conservator of the estate has the same powers as those granted to the guardian of the estate. In California, the court may, additionally, grant 20 specific powers not available to a guardian.

Debts incurred before the conservatorship is established and ones reasonably incurred during the conservatorship are to be paid by the conservator. This is the practice in California and is in accord with the practice of most jurisdictions having conservatorship provisions. Contracts made prior to the conservatorship with court approval are valid; those made after conservatorship are void. Finally, in California and most other jurisdictions, the conservator is required to furnish an inventory, accounting and bond.

#### THE COMMITTEE A COMPARISON

In New York, the protective service for an elderly person who has been judged incompetent is the appointment of a committee. This committee may have control of both the person and his estate, both real and personal. This position is in accord with most jurisdictions except Wisconsin, where the ward must make petition for protective service in the form of a committee and the committee only obtains custody and control of the estate.

The petition for a committee may come from either the ward or any interested party. This is the general position of other jurisdictions, except Wisconsin. New York, however, is not in accord with the majority of jurisdictions as to the method to be utilized in making a determination of the competency of the prospective ward. Most jurisdictions permit a court, in its discretion, to determine this issue. In New York, if the ward desires, he is guaranteed a trial by jury unless he is in an institution. As in most jurisdictions, New York requires that an undertaking be furnished by the committee.

At all times the committee is under the supervision of the court. This is the majority and the New York position. Any action dealing with the estate of the person requires court approval. Again, this is the New York position as well as the prevailing position in most jurisdictions. As in all jurisdictions, the committee is compensated. New York provides guidelines for the remuneration that an executor is to receive.

A proposed new provision would permit the appointment of a conservator

for the property of a person who required one because of old age, illness or mental infirmity and who had *not been judged incompetent*.<sup>166</sup> The provision is designed to be used primarily in those cases when a person, although competent, is essentially unable to care for his property so as to provide support for himself and those dependent upon him. As in the law for committees, Article 5 § 100 of the Mental Hygiene Law, a petition may be brought by the prospective conservatee, relative or friend.<sup>167</sup>

The proposed provision also incorporates a section concerning the appointment of a conservator modeled on the corresponding law in California. The prospective conservatee may nominate the conservator and the court is charged to appoint him conservator of the estate if it would be in the best interests of the conservatee.<sup>168</sup> Consistent with California law, if the proposed conservatee does not institute the proceedings, he must be given notice.<sup>169</sup> As in the case of committee appointment, a jury trial is required if requested by the prospective conservatee. The right to trial by jury may be waived.<sup>170</sup>

Before the conservator may exercise any powers, the court would usually require an undertaking. Similar provisions are found in both the California statutes on guardianship/conservatorships and the New York provisions for committees.<sup>171</sup> Generally, the conservator would have all the powers granted a committee of the estate, including control of the estate, both real and personal. The court in its discretion might also grant or withdraw additional powers in the conservatee's best interest. To the extent of the estate's capacity, the conservator is charged with providing for the maintenance of those who are supported or dependent upon the conservatee. The court may also authorize the conservator to give the conservatee a reasonable allowance for the conservatee's personal interest.<sup>172</sup>

A new provision in the conservatorship law provides that the conservatee does not lose any of his civil rights and that the appointment of a conservator shall not be evidence of the competency or incompetency of the conservatee. As has been discussed previously, most jurisdictions provide that dispositions of property and contracts made by the conservatee are void. New York has given additional discretionary power to the conservator through the provision that such contracts and conveyances are voidable at his discretion. Again, in accord with the practice in a majority of jurisdictions, the legal title to real property remains in the conservatee, but custody and possession is in the conservator.<sup>173</sup>

166. LEG. DOC. No. 65(G), Law Revision Commission, AMENDMENT TO N.Y. MENTAL HYGIENE LAW § 116 (1966).

167. *Id.* § 116(a).

168. *Id.* § 116(a)(3).

169. *Id.* § 116(c).

170. *Id.* § 116(c)(3).

171. *Id.* § 116(f).

172. *Id.* § 116(i)(j)(k).

173. *Id.* § 116(1).

The remuneration, removal, and discharge provisions concerning a conservator are essentially the same as the provisions found for a committee under existing New York law, the only deviation being the provision for discharge if the conservatee becomes competent. The new law would not repeal or modify the provisions of Article 5a (Committees).<sup>174</sup> Finally, there are provisions for a guardian *ad litem*, similar to the curator in the State of Louisiana, who represents the conservatee when the interests of the conservator are in conflict with those of the conservatee.<sup>175</sup>

## V CONCLUSIONS

The aged may be incapable due to any one or a combination of the innumerable physical and mental disorders that arise for the first time or worsen in old age. The state of incapacity may vary between the extremes of total physical and mental incapacity and partial physical or mental incapacity. The former, under present law, necessitates the appointment of a guardian or conservator of both person and estate. The latter necessitates only the appointment of a guardian or conservator having such powers and rights of the individual as will compensate for the particular incapacity. Provisions should specifically limit the surrogate manager's power, e.g., if the ability to manage investments is lost due to recurrent loss of memory resulting from the deterioration of brain cells but the ability to handle a living allowance remains, the guardian should be granted only those powers and rights necessary to manage the incapable person's investments; if the individual is suffering from crippling arthritis and can no longer attend to his business affairs because travel is required but he is otherwise capable of managing his business and financial affairs, the guardian should be granted only those powers and rights necessary to compensate for that inability.

The usual legal response to multifaceted needs is a provision for the appointment of a conservator of the estate granting an all-encompassing list of the powers and rights formerly exercised by the incapable person which are to be transferred *en toto*. A better legal response to even general incapacity would be a statute that makes a differentiation between powers that are automatically transferred incident to the conservatorship and those that are

174. *Id.* § 116 (p-r).

175. *Id.* § 116(d).

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transferred incident to the conservatorship only upon prior court approval. The powers and rights transferred on open prior court approval might include the power or right to:

1. sell real estate
2. complete the performance of contracts
3. agree to the partition of real estate
4. settle debts
5. continue the ward's business or farm
6. invest money
7. spend the principal of estate
8. mortgage or lease real estate
9. borrow or lend money.

This type of response is proposed on the assumption that judicial discretion will better protect the rights of the incapable aged individual than would the conservator's discretion.

The legal response for those aged persons who are incapable of financial management even if thus limited, is not the most appropriate response, however, when the incapacity is only partial. Since it allows only two choices— incompetence or competence— it has two inherent vices:

1. An aged person who is only partially incapable may not be given a guardian or conservator at all because the probate court, when reviewing his condition, may find that he is, *on the whole*, capable or
2. An aged person only partially incapable may be found incapable of managing all of his financial affairs and be given a guardian or conservator to manage them.

To avoid these pitfalls, legislation should allow the probate court to make a determination not only of the area of incapacity but also of the degree, and require that the powers and rights to be transferred remain discretionary with the court. In this way, the aged individual's personal integrity would be better respected by the law. Of course, court determinations may be inadequate or even wrong—judges and juries are far from infallible— but trusting to a discretionary judicial determination based upon the particular facts of each individual's case is less likely to result in an infringement of his right to make decisions relating to his own affairs by himself.

Recognizing the vagueness of incompetence standards, it seems desirable to treat aged persons as a class distinct from the mentally ill with whom they share the appellation "incompetent" under many statutes. At a minimum, the statutory provisions should expressly identify age related disability as an alternative to mental illness, thus allowing a court to avoid the stigmatizing effect on an insanity finding. Preferably, the guardianship provisions should be replaced or supplemented by conservatorship provisions expressly designed for the aged.

At the same time, scrupulous adherence to due process considerations should attend a deprivation of so basic a right as a person's right to the disposition of his property. Jury trial provisions and provisions for mandatory

#### PROPERTY OF THE AGED 163

periodic reviews of the need for surrogate management seem warranted. Certainly, the standard for restoration of rights ought to be no more rigorous or more difficult than those for initial appointment of a surrogate. Additionally, a provision allowing the prospective designation of a conservator or guardian by a person anticipating later surrogate management of his property seems to preserve at least a medium of his individual autonomy and seems desirable.

Irrespective of how he was designated, the prospect of a surrogate manager's conflict of interests with his ward should be recognized by the appointment of a guardian ad litem for the ward when major decisions affecting the finances of both the conservator/guardian and ward must be made. It is probably not practicable to provide for such appointment in all cases but the appointing court should be charged with identifying transactions requiring it and there should be at least a periodic appointment to represent the ward when the surrogate manager accounts to the court. Of course, the need for an additional appointment would be eliminated entirely if the conservator/guardian had no direct financial interest in the estate.