CARING FOR THE ELDERLY UNDER THE UNIFORM PROBATE CODE

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Until recently, the laws of most states provided no acceptable mechanism for handling the problems elderly people encounter in managing their property and affairs. The declining physical and mental ability that often accompanies advancing years may create special needs for assistance with regard to physical care, the management of property, and the proper expenditure of funds belonging to the elderly person. Yet the typical guardianship laws, relating to both the person and property of incompetents, were not designed to assist the elderly. Instead the laws indiscriminately grouped minors, mental incompetents, and any other disabled persons under a single system.[1] Often, the person had to be adjudicated insane or mentally incompetent in order to invoke the judicial machinery.[2] And the machinery itself was cumbersome. The guardian, even after appointment, was an officer of the court rather than a fiduciary for the ward, and his powers were exercisable only with prior court approval.[3] As a result, guardianship was an expensive device

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1. For a collection of the relevant statutes and analysis of their application to property of elderly persons, see Alexander, Brubaker, Deutsche, Korner, & Levine, *Surrogate Management of the Property of the Aged*, 21 SYRACUSE L. REV. 87 (1969) [hereinafter cited as Alexander]. *See also* Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215 (1975); Regan, *Protective Services for the Elderly: Commitment, Guardianships, and Alternatives*, 13 WM. & MARY L. REV. 565 (1971); Report of ABA Committee on Legal Incapacity, *Guardianship of Property of Incompetents*, 9 REAL PROP., PROB. & TR. J. 535 (1974).

2. *See* Horstman, *supra* note 1, at 226. The prior Arizona statutes are typical. *See* ch. 68, [1913] Ariz. Laws 2d Spec. Sess. (codified at Ariz. Rev. Stat., Civil ¶ 1136 (1913)) (repealed 1973) (defining incompetent); *id.* (codified at Ariz. Rev. Stat., Civil ¶ 1132 (1913)) (repealed 1973) (requiring an allegation that the elderly person is "insane, or is mentally incompetent.")

3. Fratcher, *Powers and Duties of Guardians of Property*, 45 IA. L. REV. 264 (1960); Fratcher, *Persons Under Disability*, in UNIFORM PROBATE CODE PRACTICE MANUAL 195, 199 (Ass'n of Continuing Legal Education Administrators 1966). For a

which lawyers sought to avoid if at all feasible. [4]

With foresight, various arrangements could be made to avoid guardianship, but their utility was limited. Bank accounts could be transferred into joint form so that another member of the family, such as a son or a daughter, could withdraw from the account. A relative could also be given a power of attorney so that some business transactions might be effected, but this was viable only so long as no one questioned the competency of the principal.[5] If the property required active management, a trust could be set up and the property transferred into the trust before the elderly person's capacity became doubtful.[6] Also, various subterfuges could be used to hide a person's mental disability from the business world. The elderly person often remains able to sign his name while not understanding the legal effect of the documents signed. Thus, checks can be endorsed and, with the assistance of a friendly banker,[7] deposited in a trust account. The trustee, perhaps a son or

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chart showing powers exercisable only on court approval, see Alexander, *supra* note 1, at 120-23.

4. "The appointment of a guardian for a minor or a committee for an incompetent had generally been looked upon with horror because of the archaic expensive procedures which the appointment inevitably set in motion." Md. Ann. Code art. 93A, Introductory Note (1969) (repealed 1974) (now an annotation to MD. ANN. CODE, Estates & Trusts, tit. 13, at 211 (1974)). *See also* Report of ABA Committee on Legal Incapacity, *supra* note 1, at 544.

On the costs of conservatorship, see Report of Committee on Problems Relating to Persons Under Disability, *Conservatorship: Present Practice and Uniform Probate Code Compared*, 5 REAL PROP., PROB. & TR. J. 507, 609, 517 (1970). *See also* Regan, *supra* note 1, at 608.

5. *See* Report of Committee on Problems Relating to Persons Under Disability, *supra* note 4, at 508; *Planning for the Protection of Incompetents, Young and Old*, 6 INST. ESTATE PLAN. ¶ 72.1507 (1972).

> Of course, incompetency automatically revokes the power of attorney.
>
> Now the good thing about it is, of course, that it has more practical persuasion than it perhaps has legal persuasion. It will generally be accepted in a standard or normal transaction.

Id. at 15-36 (remarks of J. Thornburg).

> Oh, I think we will have to get into the trust, of course, but actually the power of attorney has some use in view of the fact that the banks are very generous, at least they are in New York, about recognizing them. Until there has actually been a declaration, an official declaration of incompetence by a court, banks kind of close their eyes to the validity of the power.
>
> I suppose from one point of view the minute you are truly incompetent the power is no good, but banks seem to rely on the fact that you aren't incompetent until you are declared so.

Id. (Remarks of R. Wormser). Some judges have recognized the business world's use of powers of attorney.

> Men who enter hospitals for major surgery often execute powers of attorney to enable others to continue their business affairs during their incapacity. Any judicial doctrine which would legally terminate such power as of the inception of the incapacity would be startling indeed—it would disrupt commercial affairs and entirely without reason or purpose.

Foster v. Reiss, 18 N.J. 41, 60, 112 A.2d 553, 565 (1955) (Jacobs, J., dissenting).

6. Corcoran, *The Revocable, Irrevocable Living Trust for the Incompetent Client*, 110 TRUSTS & ES. 96 (1971). For a discussion of the disadvantages and limitations of the joint tenancy, power of attorney, trust, and other arrangements, see W. JOHNSTONE & G. ZILLGITT, CALIFORNIA CONSERVATORSHIPS §§ 1.12-.16 (1968).

7. The Uniform Commercial Code protects the bank unless it acts with knowledge of "an adjudication of incompetence." UNIFORM COMMERCIAL CODE § 4-405; ARIZ. REV. STAT. ANN. § 44-2631 (1956).

daughter, could then draw on the account. Such arrangements were made feasible in many cases because an elderly person may be mentally alert and fully capable on certain days, while at other times he is confused and unable to grasp what is going on.

These devices offered inadequate protection for the interests of the principal and usually had to be arranged before they were actually needed. Also, as the amount of property increased, these informal devices were often unworkable. The only answer was to retain an attorney and petition the court to appoint a guardian for the property.

A number of states attempted to deal with this problem by enactment of statutes creating a new fiduciary concept, called conservatorship, that was intended to fit the special problems of property management for the elderly.[8] These statutes were to become the prototype for conservatorship provisions in the Uniform Probate Code [UPC].[9] The major purpose of this Article is to explore the philosophy behind article V of the UPC and some of the problems and solutions it presents as related to care for the affairs and property of elderly persons.[10] The Code has, as of this writing, been enacted in ten states, including Arizona.[11] The Arizona Probate Code,[12] although based on the UPC,

8. *See* DEL. CODE ANN. tit. 12, § 3914(a) (Supp. 1974); D.C. CODE ANN. § 21-1501 (1973). *See generally* Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983, 996 (1966).

9. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE (1969) [hereinafter cited as UNIFORM PROBATE CODE]. For a bibliography of the Uniform Probate Code [UPC], see Wellman, *Law Teachers and the Uniform Probate Code*, 24 J. LEGAL ED. 180, 192 (1972). The National Conference of Commissioners worked through a special committee which met periodically to review manuscripts prepared by draftsmen recruited largely from the academic ranks. The first complete draft was submitted in 1966. The Code went through five subsequent working drafts before going to the floor of the Conference for a final reading in August, 1969. Throughout the entire process a liaison group from the Real Property, Probate and Trust Law Section of the American Bar Association met with the Special Committee, participated in the policy deliberations, and made valuable suggestions.

10. For earlier articles dealing with Article V of the UPC, see Fingar, *Conservatorship Under Uniform Probate Code*, 4 REAL PROP., PROB. & TR. J. 433 (1969); Fratcher, *supra* note 8; Report of Committee on Problems Relating to Persons Under Disability, *supra* note 4.

11. *See* ALASKA STAT. §§ 13.06.005 to -.36.100 (1962); ARIZ. REV. STAT. ANN. §§ 14-1101 to -7307 (Spec. Pamphlet 1974); COLO. REV. STAT. ANN. §§ 15-10-101 to -17-101 (1974); IDAHO CODE §§ 15-1-101 to -7-307 (1971); MINN. STAT. ANN. §§ 524.1-101 to -.8-103 (Spec. Pamphlet 1974) (enactment exclusive of Article 5); MONT. REV. CODES ANN. §§ 91A-1-101 to -6-104 (Spec. Pamphlet 1974); NEB. REV. STAT. §§ 30-2201 to -2902 (Supp. 1975) (effective Jan. 1, 1977); ch. 257, [1975] N.M. Laws 1109 (effective July 1, 1976); N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (Supp. 1973); ch. 196, [1974] S.D. Sess. Laws 332, *as amended*, ch. 189, [1975] S.D. Sess. Laws 424 (effective Jan. 1, 1976); ch. 150, [1975] Utah Laws 579 (effective July 1, 1977).

In addition, Oregon has adopted a statute that is based on the UPC and is very similar to it. *See* ORE. REV. STAT. §§ 111.005-129.140 (1973). Maryland also has portions of Article V of the UPC, substantially modified, appearing in title 13 of its new Estates and Trusts Code. *See* MD. ANN. CODE tit. 13 (1974).

12. ARIZ. REV. STAT. ANN. §§ 14-1101 to -7610 (Spec. Pamphlet 1974). The Arizona Probate Code, effective Jan. 1, 1974, was enacted as Title 14, of the Arizona Revised Statutes by ch. 75, § 4, [1973] Ariz. Sess. Laws 349. Numbering of the Arizona Probate Code generally parallels the UPC but adds the prefix 14 to show the title. Separate reference to the Arizona Code section will be made only when required by the context. Article V as it appeared in bill form in the 1973 Arizona legislature is analyzed in Comment, *House Bill 2002: The Protection of Persons Under Disability*

contains some variations in the article V provisions, and these will be considered by way of comparison. Because conservatorship is the basic UPC means for protecting the property of an elderly person, this concept will be given primary emphasis. Alternatives to conservatorship will also be explored and recommendations offered. Since relatively few elderly people are gravely disabled as a result of a mental disorder, this Article will not treat the problems of commitment.[13] Most problems attending senility can be adequately handled by conservatorship and in some cases by ordinary guardianship.[14] This is not a how-to-do-it article;[15] nevertheless, it is hoped that the analysis presented will be helpful to attorneys dealing with the property problems of elderly people and to judges faced with administration of conservatorships under the Code.

CODE CHANGES IN THE BASIC THEORY OF SURROGATE MANAGEMENT

Initially, it must be stressed that the Code is a total break with the past. Because of the complete change in Code theory from the prior law, it is important that attorneys and judges dealing with the UPC interpret the new statute afresh. Pre-Code decisions, based on obsolete statutes and obsolete concepts, have no role in interpretation of the new Code. When the UPC sections do not provide a complete answer, the profession and the courts should supply the answer from the overall scheme of the Code. Because lawyers are trained to value precedent, the tendency of the profession is to look backwards. But in this area that is improper. The experience of the last century when new codes of civil procedure were ruled from the grave by the old forms of action should not be repeated. Although there are a few points at which prior law is illuminating, the courts are free to write on a clean slate.

Recognizing that all people are more or less sensitive to the labels put on them by other persons, one of the basic changes made by the Code provisions is largely semantic. The old law often required a person to be characterized either as insane or as incompetent in order for

and the Management of Their Property, 1973 L. & SOC. ORDER 435. For a comparison of the UPC and Arizona probate law as it existed before adoption of the UPC, see O'Connell & Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205 (1972).

13. *See generally* Regan, supra note 1, at 601.

14. The Arizona statutes provide a special form of guardianship for "gravely disabled persons." *See* ARIZ. REV. STAT. ANN. §§ 36-547 to -547.08 (1974). Much of the literature in this field is concerned with mental disability, hospitalization, and criminal responsibility of the mentally ill. *See generally* S. ASCH, MENTAL DISABILITY IN CIVIL PRACTICE (1973); REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL, THE MENTALLY DISABLED AND THE LAW (F. Lindman & D. McIntyre eds. rev. ed. 1971).

15. An excellent practical treatment of Article V may be found in Fratcher, *Persons Under Disability*, *supra* note 3. For a discussion of the Arizona statutes, see R. EFFLAND, ARIZONA PROBATE CODE PRACTICE MANUAL §§ 7.1-8.9 (1973).

protective measures to be implemented. Unfortunately, the term incompetent has come to be equated exclusively with serious mental problems even though everyone is incompetent in some areas. An adjudication of incompetence has also become associated with appointment of a guardian as well as with commitment to a mental institution. Even when a relative is truly mentally incompetent, the family dislikes the judicial adjudication of this fact and the attendant publicity, particularly if the family is locally prominent. Where the relative cannot manage property, but is sufficiently competent to comprehend the guardianship proceedings, the odium of incompetence, and its unfortunate connotations, might be psychologically damaging.[16] Additionally, although a person might not be incompetent, as that term has come to be used, physical disability or a limited mental decline may impede that person's ability to manage his own affairs. The Code avoids these difficulties through changes in terminology.[17] "Advanced age" as well as "physical illness or disability" are now adequate bases to support a finding that a person is incapacitated for purposes of appointing a guardian of his person.[18] These grounds are also sufficient for a finding that a person is unable to manage his property and affairs for purposes of appointing a conservator or issuing a protective order as to the person's property.[19]

Another major change wrought by the Code is to treat the problems of care for the person, guardianship, as distinct from protection of the property, conservatorship,[20] and within that framework to distinguish between minors and other disabled persons.[21] The Code is flexibly designed to fit individual needs—a conservator or a guardian, or both, may be appointed. If both are appointed, different persons may be appointed to serve as guardian and conservator.[22] This flexibility is important since these positions involve different functions and call for different skills. Of course, the same person may serve as both guardian and conservator[23] where, for example, the amount of property is too small to warrant professional care and a member of the family wants to

16. "Inherent in this semantic juggling is the recognition of the often devastating impact of labelling persons insane." Alexander, *The Aged Person's Right to Property*, 21 SYRACUSE L. REV. 163, 164 (1969). *See also* Horstman, *supra* note 1, at 234-35.

17. There is some disadvantage to this change in terminology. The law has traditionally been phrased in terms of legal incompetence. Now if a person is adjudicated as incapacitated and a guardian appointed, the legal effect this has on the person's ability to contract and incur other legal obligations is uncertain. Similarly, if a conservator is appointed, is this equivalent to a determination that the disabled person lacks sufficient capacity to contract? These questions will be considered later in this Article. See text & notes 178-94 *infra*.

18. UNIFORM PROBATE CODE § 5-101.

19. *Id.* § 5-401(2).

20. *Compare id.* § 5-312, *with id.* § 5-424.

21. *See id.* § 5-401.

22. *See id.* §§ 5-425(a)(1), -312(4).

23. *See id.* art. V, General Comment § (b).

act in both capacities to save costs. The court may also issue a limited protective order to authorize a single property transaction, without appointing a conservator.[24]

But the greatest change between prior law and the UPC is that the conservator is now treated as a trustee,[25] with statutory powers[26] to manage the property of the protected person as the trustee of a living trust would. He is no longer an officer of the court, exercising his powers only under court direction and supervision. Although the same fiduciary concept underlies administration of a decedent's estate, there is a difference in conservatorship because the "beneficiary" of this statutory trust is, by definition, not able to look after his own rights and to enforce the duties of the conservator-trustee. Hence some additional safeguards are built into the conservatorship at critical points—bonding,[27] accounting,[28] and judicial control over the exercise of certain major powers affecting distribution.[29]

USE OF GUARDIANSHIP AND CONSERVATORSHIP UNDER THE CODE—SOME PROBLEMS

The UPC conservatorship concept allows people whose abilities have declined to delegate management of their property. Greater disability, however, may require control over the individual's personal affairs as well as property management. For the elderly person who is senile and unable to make responsible decisions concerning his personal care[30] but who has no property of any consequence, the proper procedure would be to petition for appointment of a guardian rather than a conservator. As the guardian has some limited powers over property,[31] this is probably sufficient for most situations.[32]

Seldom will there be a need to appoint a guardian for an elderly person, however, since appointment of a conservator will be adequate in most situations. The conservator's powers are ample to enable him to arrange whatever physical care is necessary,[33] typically nursing home

24. *Id.* § 5-409(b).
25. *Id.* §§ 5-417, -420.
26. *Id.* §§ 5-424 to -425. See text & notes 39-49 *infra.*
27. UNIFORM PROBATE CODE § 5-416(a)(1).
28. *Id.* § 5-419.
29. See text & notes 153-68, 208-10 *infra.*
30. This is the Code definition of "incapacitated" by reason of advanced age. UNIFORM PROBATE CODE § 5-101.
31. *Id.* § 5-312(a)(4).
32. Although the UPC does not require a bond for guardians, under certain circumstances the court may require one under the Arizona Code. *See* ARIZ. REV. STAT. ANN. § 14-5105 (Spec. Pamphlet 1974).
33. UNIFORM PROBATE CODE § 5-425(a) authorizes the conservator to expend funds for the care of the protected person, including advance payment for services to be rendered.

care when physical incapacity becomes such that care at home is no longer feasible. The only real legal need for a guardian might arise when consent to medical treatment is required, but physicians and hospital administrators often are content with the signature of a spouse, or an adult child on behalf of the parent.

Under the Code, an elderly person may petition for appointment of his own conservator.[34] He can even nominate the individual or corporate fiduciary if the court decides that he has "sufficient capacity to make an intelligent choice."[35] Even in borderline cases, where the initiative for a conservator comes from the family, there are psychological benefits for the protected person if he believes the choices are his, with advice from the family. It is in these cases that abolition of the old requirements of allegation of insanity or incompetence becomes especially important. If the elderly person is convinced that he is still master of his fate, even though he can no longer effectively manage his property, he will accept the conservatorship more readily.[36]

The UPC conservatorship provisions avoid another problem traditionally associated with guardianships. Prior to the Code, frequent resort to the court for orders was mandatory, both to enter into major management transactions, such as a sale or investment, and to disburse income or principal for the protected person or his dependents.[37] The result was both delay and increased legal costs.[38] This is no longer true under the Code. The UPC provides that the conservator has legal title to all of the protected person's property,[39] and unless the court limits his powers,[40] he has ample powers to manage the estate efficiently. The conservator has virtually unlimited powers in management of assets; he need obtain neither advance court authorization nor confirmation.[41] His management and investment powers are similar to those conferred on a trustee by a well drafted trust instrument.[42] Of course, he is a fiduciary and held to the fiduciary standard of a trustee.[43]

Distributive powers are likewise ample to fit almost all situations.[44] The conservator, without court authorization or confirmation, may expend either income or principal for the "support, education, care or

34. *Id.* § 5-404(a).
35. *Id.* § 5-410(a)(2).
36. *See generally* Gelt, *Psychological Considerations in Representing the Aged Client*, 17 ARIZ. L. REV. 293 (1975).
37. *See* Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 482, 272 P. 918 (1928); *cf.* Downing v. Skluzacek, 61 Ariz. 322, 149 P.2d 680 (1944).
38. *See* Fratcher, *Persons Under Disability*, *supra* note 3, at 201-02.
39. UNIFORM PROBATE CODE § 5-420.
40. *Id.* § 5-426.
41. *Id.* § 5-424.
42. *Id.* § 5-424(c). *Compare id. with* UNIFORM TRUSTEES' POWERS ACT § 3.
43. UNIFORM PROBATE CODE § 5-417. See text & notes 108-13 *infra*.
44. UNIFORM PROBATE CODE § 5-425.

benefit" of both the protected person and his dependents.[45] Statutory guidelines, however, are provided for the conservator in making such disbursements; he must consider the size of the estate and the probable duration of the conservatorship. In the case of an elderly person, the probable duration of the conservatorship is almost always life expectancy, as the elderly person, unlike a minor or an adult who has suffered a mental breakdown, is unlikely to become able to manage his property in the future. The conservator should also consider the accustomed standard of living of the protected person and members of his household.

What if the income is more than sufficient to provide for the elderly person and his dependents? Can the conservator make gifts of surplus income or must he accumulate it? Or, in appropriate circumstances, can the conservator engage in any estate planning in the form of lifetime gifts of capital to reduce the probate and hopefully the taxable estate? Although this whole matter of lifetime gifts and estate planning will be considered separately,[46] at this point it is sufficient to note that the UPC authorizes the conservator to make gifts of up to 20 percent of income.[47] More substantial gifts can be made with court authorization.[48] These provisions were drastically curtailed in the Arizona Code, however.[49] The Arizona Study Committee concluded that it was dangerous to confer the power to make gifts of capital, even on the court, since a moderate estate could be depleted by a combination of overly enthusiastic estate planning, continuing inflation, and market changes reducing the value of remaining capital.

What protections are afforded in the Code to avoid abuse of the broad powers of management and distribution? Removing the requirement of court supervision increases the possibility of property mismanagement, improper sale of assets, and unwise disbursements. Proponents of the Code point out, however, that these abuses exist even under court supervision—a court by its very nature is not an investigative body and does not question the allegations of pleadings presented to it. Also, ex parte orders give a false sense of protection because an adjudication without proper notice is not constitutionally binding. Nevertheless, the necessity of preparing legal documents for presentation to a court and subjecting those papers to an attorney's scrutiny undoubtedly has some deterrent value. The increased risk under the Code is outweighed by the greater flexibility afforded the conservator in management decisions and the corresponding reduction in legal expenses. The Code, in essence,

45. *Id.* § 5.425(a).
46. See text & notes 182-210 *infra*.
47. *Id.* § 5-425(b). See text following note 209 *infra*.
48. UNIFORM PROBATE CODE § 5-408. See text & note 210 *infra*.
49. *See* ARIZ. REV. STAT. ANN. §§ 14-5408(3)-(4) (Spec. Pamphlet 1974).

opts not to compel all persons needing a conservatorship to be tied to the more cumbersome pre-Code procedures.

Moreover, the Code does have some built-in protections. The court may require a conservator's bond,[50] and under the Arizone Code, a bond is required in all cases except where the conservator is a corporate fiduciary.[51] Therefore, the cost of a bond may be saved by appointment of a bank or other corporate fiduciary. Even under the discretionary UPC provision, a bond would probably be required in most cases. However, in a situation in which a wife is appointed conservator for her elderly husband, she would be the sole heir in most states and not likely to dissipate the husband's estate—her prospective inheritance. This would be a proper case for the court to exercise its discretion not to require a bond. The Code also contains a protective system of mandatory and discretionary accountings and approval of accounts. A number of persons can petition for review of the accounts, thus imposing a check on the conservator. The details of this system will be discussed below in connection with the duties of the conservator.[52] Another protection against conservator mismanagement, also discussed below, is afforded by the UPC provisions on notice.[53] For example, whenever an approval of accounts is sought by a conservator, notice must be sent to those who have filed requests for notice, as well as to other "interested persons."[54] Although the Code does not define the latter term, liberality in interpretation will work to the advantage of both the conservator and the protected individual.[55]

Selection of an appropriate fiduciary is obviously crucial to the proper exercise of these broad powers. Should the conservator be a member of the family or a corporate fiduciary? What if no member of the family is interested but the amount of property is too small to justify management by a corporate fiduciary? The Code does not answer these questions although it does give priority to the spouse or an adult child.[56] Yet, it must be pointed out that members of the family have a potential conflict of interest. In their role as conservator their sole duty is to the welfare of the protected person and his dependents. On the other hand, these individuals are prospective heirs and have a personal interest in preserving as much of the property as possible for future inheritance. Other writers have noted this conflict and urged use of a professional

50. UNIFORM PROBATE CODE § 5-411.
51. ARIZ. REV. STAT. ANN. § 14-5411 (Spec. Pamphlet 1974).
52. See text & notes 116-42 *infra.*
53. See text & notes 121-37 *infra.*
54. UNIFORM PROBATE CODE § 5-405(b).
55. See text & notes 127-37 *infra.*
56. UNIFORM PROBATE CODE § 5-410(a).

manager unrelated to the family.[57] Unlike the mandatory priority for appointing a personal representative[58] or guardian,[59] the Code priority for appointment as a conservator is merely a suggestion.[60] Moreover, the Code changes previously discussed make conservatorship more acceptable to corporate fiduciaries. In the past, these entities were reluctant to serve as guardians since guardianship often entailed responsibility for personal welfare as well as property management.[61] The UPC's clear segregation of these functions means that the corporate fiduciary can be appointed conservator without taking on any, or only minimal, responsibilities of a personal nature. Moreover, under the Code the conservator is a trustee with broad powers, powers that are exercisable without the necessity of obtaining individual court orders. The corporate fiduciary is thus on familiar ground, functioning with the flexibility of a trustee.

What of the elderly person whose funds are too limited to support professional management and who has no family or friends willing to undertake the often thankless task of handling funds and arranging personal affairs? The Legal Research and Services for the Elderly organization[62] suggests creation of the office of Public Guardian to serve this function.[63] The UPC contains no provision for such an officer as creation of a public position involves a governmental decision to underwrite the cost of the operation. Nevertheless, there is nothing in the Code which prevents addition of appropriate sections creating a public office to handle the functions of either guardianship or conservatorship. Indeed, this was done in Arizona by creation of the office of Public Fiduciary.[64] Such an approach provides for competent asset management for elderly individuals who can not afford professional management of their assets. Although this requires an initial outlay of public funds, it may well prevent elderly individuals from eventually becoming public wards.

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57. Alexander, *supra* note 1, at 163; Alexander, *supra* note 16, at 173; Regan, *supra* note 1, at 609.

58. *See* UNIFORM PROBATE CODE § 3-203.

59. *See id.* § 5-311.

60. *See id.* § 5-410(b).

61. National banks, for example, are limited to functions relating to management and are excluded from appointments which require both management and personal care services. *See* 12 C.F.R. § 9.1-.3, .7, .10-.11 (1975).

62. Legal Research and Services for the Elderly, sponsored by the National Council of Senior Citizens and funded by the Office of Economic Opportunity, was one of the first organizations to explore the legal needs of the aged and to experiment with various approaches to meeting those needs. *See Hearing on Legal Problems Affecting Older Americans Before the Senate Special Comm. on Aging*, 91st Cong. 2d Sess. 43 (1970).

63. NATIONAL COUNCIL OF SENIOR CITIZENS INC., LEGISLATIVE APPROACHES TO THE PROBLEMS OF THE ELDERLY: A HANDBOOK OF MODEL STATE STATUTES 153-56 (1971). *See also* Regan, *supra* note 1, at 609.

64. ARIZ. REV. STAT. ANN. §§ 14-5601 to -5604 (Spec. Pamphlet 1974), *as amended*, ch. 149, [1975] Ariz. Acts S. 1272.

PROCEDURAL SAFEGUARDS AGAINST INVOLUNTARY GUARDIANSHIP AND CONSERVATORSHIP

Appointment of a guardian is a serious infringement of the ward's personal freedom. A guardian has the same powers over the ward as a parent has over his unemancipated minor child.[65] The Code specifically provides that the guardian "may establish the ward's place of abode within or without this state."[66] This is a polite way of expressing a power to commit the ward to a private mental institution of the guardian's choice.[67] While there is a continuing drive to upgrade our mental health laws and the institutions which care for incompetent persons,[68] there is always possibility of abuse. Any concept of due process, therefore, requires strong safeguards.[69]

Further, a guardianship infringes on a most vital personal freedom—the freedom of choice over movement. A conservatorship affects a personal liberty that is only slightly less important—the power to control and dispose of one's property. There are strong psychological ties between a person and the property he owns. Appointment of a conservator moves legal title from the disabled person to the conservator,[70] and the protected person no longer has power to manage his property, to sell it, and the like. Obviously, taking away one's power to manage his own property is a deprivation of property which under due process requires both substantive reasonableness and a fair procedure.[71]

What safeguards does the Code provide? Before a guardian is appointed the Code requires: (1) a full judicial hearing before a judge;[72] (2) actual notice to the allegedly incapacitated person, and his spouse, parents, and adult children, or if there is none of these, at least to one of his closest adult relatives, and also to any person serving as his conservator or who is responsible for his care and custody;[73] (3)

65. UNIFORM PROBATE CODE § 5-312(a).
66. *Id.* § 5-312(a)(1).
67. *See id.* § 5-303(b) (directing the visitor to visit the place where it is proposed that the alleged incapacitated person will be detained).
68. *See generally Special Project—The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971).
69. *See* Chaloner v. Sherman, 242 U.S. 455, 461 (1916); *cf.* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Horstman, *supra* note 1, at 231-59, although emphasizing commitment, contains an excellent analysis of the issues at stake in guardianship and conservatorship and the need for constitutional safeguards in proceedings depriving an elderly person of liberty and control of his property, all in the name of "protecting" him. *See also* Alexander, *Foreword: Life, Liberty, and Property Rights for the Elderly*, 17 ARIZ. L. REV. 267 (1975).
70. UNIFORM PROBATE CODE § 5-420.
71. *See* Fuentes v. Shevin, 407 U.S. 67, 86-87 (1972); *cf.* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
72. UNIFORM PROBATE CODE §§ 5-303 to -304.
73. *Id.* § 5-309.

appointment of an official or attorney to represent the person if he does not have his own counsel;[74] (4) examination by a physician appointed by the court;[75] (5) a written report by a visitor,[76] who must interview both the person for whom guardianship is sought and the person seeking appointment, and must also visit the present place of abode and the place where it is proposed the ward will reside if appointment is made;[77] (6) that the allegedly incapacitated person be granted the right to be present at the hearing, to see and hear all evidence presented regarding his condition, to have counsel present, and to present evidence and cross-examine witnesses;[78] (7) that the right to privacy be protected by closing the hearing to the public upon request of the allegedly incapacitated person or his counsel;[79] and (8) a finding by the court that the person is incapacitated, that is, impaired for any reason, such as advanced age, "to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person"[80] and that appointment of a guardian "is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person."[81]

Additional protection is afforded by the ease with which proceedings to remove the particular guardian or terminate the guardianship can be initiated. Such proceedings may be initiated by the ward or "any person interested in his welfare,"[82] at any time,[83] and require only an informal letter to the court or judge.[84] The Code further protects the ward by making any interference with the transmission of such a request punishable as contempt of court.[85] Finally, the Code contains an optional provision, which has been adopted in Arizona, for a right to a jury trial in proceedings to impose guardianship.[86]

There are several minor exceptions to this complex set of safeguards. In the special situation where the spouse of a married incapacitated person dies and leaves a will appointing a guardian for the

74. *Id.* § 5-303(b).
75. *Id.*
76. *See id.* § 5-308.
77. *Id.* § 5-303(b).
78. *Id.*
79. *Id.*
80. *Id.* § 5-101(1).
81. *Id.* § 5-304.
82. *Id.* § 5-307(b). The phrase "person interested in his welfare" should be broadly construed and certainly should not be confined to financial interest. Elsewhere the Code merely uses the phrase "interested person," which is broadly defined in section 1-201(20).
83. The order adjudicating incapacity may bar petitions for restoration for up to 1 year. *Id.* § 5-307(b).
84. *Id.* No formal petition is required.
85. *Id.*
86. *Id.* § 5-303; ARIZ. REV. STAT. ANN. § 14-5303(B) (Spec. Pamphlet 1974).

incapacitated person, there is a limited substitute for court appointment of a guardian.[87] This substitute is designed for the situation where an elderly spouse, unable to make decisions regarding personal care, is cared for by a younger, more alert spouse, and the capable spouse, anticipating the possibility of predeceasing the other, executes a will naming a guardian in the event of the former's death. The person named by the will must give notice of intent to accept appointment to the prospective ward and to the person who has assumed temporary care of the ward. After 7 days, the guardian can file his acceptance in the court where the will has been probated.[88] These testamentary appointments depend on the continued acquiescence of the ward, however. If the ward does not want the particular guardian, or any guardian, he can block or terminate the testamentary appointment simply by filing a written objection with the court.[89] The person named in the will may still formally petition to be appointed as guardian, but the full panoply of safeguards previously outlined would then come into operation, and the person nominated might not even have priority for appointment.[90]

The other situation in which the safeguards may be relaxed is a proceeding to remove a guardian or to have an adjudication that the ward is no longer incapacitated. Here, the court must maintain a balance between abuses of the guardianship process and frivolous attempts by the ward to terminate the guardianship. Ideally, the full range of safeguards required for the initial appointment should be available to the ward seeking to terminate the guardianship or replace a guardian. The pertinent section appears to make "the same procedures" applicable, but leaves the sending of a visitor discretionary with the court.[91] If the judge is in doubt after hearing the report of the court appointed physician and any evidence submitted by the ward, he should, and indeed has, the statutory power to order a report by a visitor.[92]

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87. UNIFORM PROBATE CODE § 5-301(b).

88. *Id.*

89. *Id.* § 5-301(d). Section 5-301 contains no time limit on when the notice can be filed. Compare section 5-203, on testamentary appointment of a guardian of a minor, which requires the objection to be filed before acceptance or within 30 days thereafter. Section 5-301(d) states that on filing the objection "the appointment is terminated." Technically there is no appointment until the 7-day notice period has elapsed, but this should not preclude filing an objection within the 7-day period to block an appointment.

90. Section 5-311(b) of the UPC does not give priority to a guardian nominated by a deceased spouse, although it would give priority to a guardian nominated by the will of a deceased parent. This appears to be an oversight. *Compare* UNIFORM PROBATE CODE § 5-311(d), *with id.* § 5-301(b).

91. *Id.* § 5-307(c).

92. One criticism of the Code has been its failure to provide a mechanism for paying the fees of the various professionals, such as the court appointed physician, attorney, or visitor, whose services are required on behalf of the potential ward. The state, which already supplies defense counsel for indigents charged with crime, would be the logical choice to bear these costs. Although the mechanics of finding a proper account in the

A not uncommon fear of an elderly person, unfortunately sometimes justified, is that beneficiaries of the estate will seek to gain control of the property with the sole purpose of preventing him from spending it or giving it away. The UPC contains a variety of safeguards in the conservatorship provisions to prevent such abuse: (1) personal notice must be given to the person to be protected and his spouse if within the state;[93] (2) waiver of notice by the protected person is not effective unless he attends the hearing, hence he cannot be induced to sign a waiver which he does not understand;[94] in open court the judge can adequately protect his interest; (3) the court can require notice to other interested persons;[95] (4) unless the elderly person has counsel of his own choice, the court must appoint a lawyer, with the powers and duties of a guardian ad litem to represent him;[96] (5) the court has discretionary power to designate a physician to examine the person to be protected, and to send a visitor to interview the person;[97] (6) there must be adequate proof and the court must make findings that the elderly person is unable to manage his property and affairs effectively and that property will be wasted or dissipated unless proper management is provided, or that protection is necessary or desirable to obtain funds for support;[98] (7) if the protected person has sufficient mental capacity to make an intelligent choice, he may nominate the individual or corporate fiduciary he desires as conservator, with priority for appointment;[99] and (8) the protected person may at any time petition the court to terminate the conservatorship.[100] Other safeguards against abuse of power by the conservator will be considered later in the Article, but here we are concerned with preventing the undesired or unwarranted appointment of a conservator. As the foregoing procedure is obviously less strict than the procedure in guardianship,[101] there is some potential for abuse.

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court's regular budget may be annoying, the volume of cases and amount of money needed should not be great. There is provision for charging comparable costs in a conservatorship proceeding against the estate. *Id.* § 5-414. Perhaps there should be a similar statutory provision in the guardianship sections. The statute is curiously silent on the question of recovering the costs of the guardianship proceedings from the ward's available funds or property. Indeed, the statute does not even provide for compensation to the guardian unless a conservator has been appointed and there is an agreement between the guardian and the conservator as to the amount. *Id.* § 5-312(b). The Arizona Code has added a provision for compensation of appointed guardians. ARIZ. REV. STAT. ANN. § 14-5314 (Spec. Pamphlet 1974), *as amended*, ch. 149, § 6, [1975] Ariz. Acts S. 1272.

93. *Id.* § 5-405(a).
94. *Id.*
95. *Id.* § 5-405(b). For example, notice may be sent to all adult children.
96. *Id.* § 5-407(b).
97. *Id.*
98. *Id.* §§ 5-401(2), -407(c).
99. *Id.* § 5-410(a)(2).
100. *Id.* § 5-430. This is a formal proceeding and the ward is entitled to the same rights as in the original appointment proceeding.
101. See text & notes 72-86 *supra*.

Practicing attorneys in Arizona have complained that the UPC conservatorship procedure is unnecessarily complex and costly, rather than that it is insufficiently protective. The requirements of an examination by a physician, interview by a visitor, and a separate interview by an attorney appointed by the court when the elderly person does not have his own attorney[102] do seem to involve unnecessary duplication when the elderly person is patently senile. But protections are designed to curb abuse in borderline cases, not for the cases where the need is obvious; procedural protections always involve cost, but they must apply universally in order to prevent abuse. The need for these protections is evident from the litigation centered around attempts to gain control of the property of the elderly in order to ensure a prospective inheritance.[103] There may be future attempts to amend the Code provisions in this regard. Although a proper balance may be difficult to maintain, the Code's present safeguards should not be cast aside without proper consideration of the consequences. What is at stake is the right of the individual to make his own decisions—the right of self-determination.[104]

FIDUCIARY DUTIES AND LIABILITY

The shift in theory from the view that the guardian of person and property was an officer of the court to the Code concept that the conservator is a trustee of the estate enhances the fiduciary nature of the role. At the same time, however, it increases the potential liability of the person accepting the office. So long as all steps in management and disbursement of funds were court directed and supervised, the guardian of property was subject to liability only if he failed to follow court directives. This has been changed under the Code and now the conservator is free to act without court order.[105] Like any trustee, he may petition the court for instructions,[106] but under the traditional view of equity jurisdiction[107] he is expected to do so only on questions of law. Although in the past probate courts have had to manage property and exercise discretionary powers of distribution, these powers are more properly within the province of the fiduciary; judges are not trained to

102. Where the allegedly incapacitated person is putatively represented by an attorney chosen and paid by the family, there is a danger that the attorney will actually represent the family whose interests may be adverse to those of the elderly person. *See* Blinick, *Mental Disability, Legal Ethics and Professional Responsibility*, 33 ALBANY L. REV. 92 (1968).

103. An excellent source in this area is Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676 (1964).

104. *See* Alexander, *supra* note 1, at 165.

105. UNIFORM PROBATE CODE §§ 5-424(b)-(c).

106. *Id.* § 5-416(b).

107. *See* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 153, at 554 (5th ed. 1973); 3 A. SCOTT, THE LAW OF TRUSTS § 259 (2d ed. 1956).

perform such functions. One purpose of the UPC is to restore the judge to his proper judicial role and relieve him from administrative matters. Hence, under the Code the conservator becomes a true trustee.

The UPC standard of trusteeship to which the conservator is held,[108] differs slightly from the verbal formula announced by the American Law Institute in the *Restatement of Trusts*:

> The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise *in dealing with his own property*; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a reasonable man of ordinary prudence, he is under a duty to exercise such skill.[109]

The Code standard is set forth in section 7-302:

> Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man *dealing with the property of another*, and if the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, he is under a duty to use those skills.[110]

The equity standard reflected in the Restatement is a product of the English law under which the trustee served without compensation,[111] but is inappropriate for a system in which the trustee is paid a reasonable fee for his services. This distinction is based on the same policy which supports a less stringent standard of care for a gratuitous bailee than for a bailee for hire.[112] The UPC standard[113] is generally applicable to all acts of the trustee, but is particularly significant in the exercise of his statutory powers of management.

Inventory, Accounting, and Notice Requirements

The Code imposes several specific statutory duties on the conservator. Within 90 days after the appointment he must prepare and file with the court an inventory of estate assets[114] and provide a copy to the protected person. The conservator is also required to keep "suitable records" of his administration open for inspection on the request of any "interested" person.[115] We then have the problem of determining what

108. UNIFORM PROBATE CODE § 5-417.
109. RESTATEMENT (SECOND) OF TRUSTS § 174 (1959) (emphasis added).
110. UNIFORM PROBATE CODE § 7-302 (emphasis added).
111. 3 A. SCOTT, *supra* note 107, § 242.
112. *See* R. BROWN, THE LAW OF PERSONAL PROPERTY § 80 (2d ed. 1955).
113. At least one court has developed this standard without the Code. Estate of Cook, 20 Del. Ch. 123, 171 A. 730 (Ch. Ct. 1934).
114. UNIFORM PROBATE CODE § 5-418.
115. *Id.*

"interested" means in this context. Here, in order to afford maximum protection, the term should be broadly construed to mean anyone concerned with the welfare of the protected person.

A second and interrelated duty of the conservator relates to accounting. Care must be taken to distinguish accounting to the court from judicial approval of the accounts. The conservator may account to the court by simply filing his accounts and complying with any other court rules, for example, submitting evidence of investments to the clerk or the registrar. However, if the conservator wishes to have approval of his accounts over a period of time, he can petition the court for an order allowing the accounts to date.[116] Judicial approval of an account, whether final or intermediate, is an adjudication and requires proper notice and a formal hearing.[117]

The conservator may account at various times: on resignation or removal; on termination of the conservatorship; and at intermediate times, usually at some periodic intervals. Accounting is mandatory under the Code only on resignation or removal and termination.[118] The court may also require an accounting at other times, presumably either by court rule or as the result of a petition[119] by an interested person. The Arizona Code differs from the UPC in that it requires an annual accounting to the court, although the court, "for good cause shown," may relieve the conservator from this requirement.[120] In a small estate, for example, the expense of preparing the accounts should constitute good cause.

When an approval of accounts is sought, notice must be sent to anyone who has filed a request for notice, to interested persons, and to such other persons as the court may direct.[121] Certainly notice should also be given to the protected person; he is not adjudged incompetent merely because a conservator has been appointed. If a guardian has been appointed, however, the guardian should receive the notice.[122] If no general guardian has been appointed, the question arises whether a

116. *Id.* § 5-419. Section 5-419 does not clearly provide for accounting without approval. It does, however, distinguish between the duty of the conservator to "account to the court," and an "order, made upon notice and hearing, allowing an . . . account."
117. *Id.*
118. *Id.*
119. *Id.* § 5-416.
120. ARIZ. REV. STAT. ANN. § 14-5419(A) (Spec. Pamphlet 1974). Some uncertainty exists under the Arizona statute over whether the annual accounting is a formal proceeding and, if so, to whom notice must be given. However, as the annual accounting to the court is merely an additional protective device added by the legislature, and as the time and expense of an annual adjudicatory approval of the account would far outweigh the benefits derived, it is the author's opinion that annual accounting under the statute does not require approval, and as it is not, therefore, adjudicatory, does not require notice.
121. UNIFORM PROBATE CODE § 5-405(b).
122. *Id.* § 1-403(3).

guardian ad litem should be appointed. The lawyer appointed to represent the protected person at the hearing on the original petition for appointment of a conservator has the powers and duties of a guardian ad litem in that proceeding,[123] but it is unclear whether his status carries over to later proceedings, such as an accounting. Generally, the Code views each formal proceeding as separate, requiring new notice. To eliminate any possible doubt, the order appointing the guardian ad litem at the initial hearing should confer continuing status or a new appointment should be made at the accounting.[124] Alternatively, a spouse or adult child who is not the conservator could be made guardian ad litem for the subsequent proceedings. Should the spouse of the protected person be given notice of the accounting? Although not clearly required by the statute,[125] such notice would be desirable, particularly where the estate includes community property,[126] and probably the court should so direct in all cases.

Liberality in giving notice is to the advantage of both the conservator and the protected person. The conservator is shielded against later attacks by all persons who received notice.[127] Notice is also, of course, to

123. *Id.* § 5-407(b).

124. The court's power to appoint a guardian ad litem is clearly granted. *Id.* § 1-403(4). In Ray v. Superior Court, — Ariz. App. —, 540 P.2d 771 (1975), Division Two of the Court of Appeals of Arizona ordered the trial court to set aside its order appointing a guardian ad litem on an intermediate accounting. The court found the minute entry reciting that representation of the interest of the protected person would be inadequate without the appointment was not in compliance with the requirement of section 14-1403(4) of Arizona Revised Statutes Annotated (Spec. Pamphlet 1974) that the court "set out its reasons for appointing a guardian ad litem . . . ." The court added: "Specific findings, such as a possible conflict of interest, must be set down to justify the appointment." *Id.* at —, 540 P.2d at 773. Hence, appointment in the instant case was held to be an abuse of discretion. In fact, however, the conservator for the protected person was also the latter's guardian, creating an obvious conflict of interest. Further, the trial court's minute entry showing need for the appointment was based on a prior certificate of incompetency. The appellate court also expressly disapproved, because of the cost factor, the trial court's practice of appointing a guardian ad litem attorney in every case of known incompetence. It should be noted, however, that if the protected person is incompetent and not adequately represented at a hearing on approval of accounts, the order approving the account would not be binding and can later be challenged both on statutory grounds, ARIZ. REV. STAT. ANN. § 14-5419 (Spec. Pamphlet 1974) (requiring notice), and for constitutional deficiency. *See* Covey v. Town of Somers, 351 U.S. 141 (1956) (holding general notice of tax lien foreclosure to a known incompetent, without appointment of a guardian, constitutionally inadequate).

125. *Compare id* § 5-405(a) (requirement of notice to the spouse of the hearing on the original appointment) *with id.* § 5-405(b) (no similar requirement for subsequent proceedings).

126. Appointment of a conservator for a spouse owning community property vests title to that spouse's community interest in the conservator, and the Code gives the latter power to manage that interest only. Nothing in the general statutes on community property would enlarge that power in Arizona. However, the Arizona version of the Code permits the court to leave management of the entire community with the unprotected spouse. ARIZ. REV. STAT. ANN. § 14-5426(B) (Spec. Pamphlet 1974). For a general treatment of the effect of incapacity of one spouse on community property, see W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 128 (2d ed. 1971).

127. UNIFORM PROBATE CODE § 5-419. Should a copy of the account be sent with the notice? A common complaint of attorneys is the rising cost of making copies of papers and the natural tendency is to reduce that cost by minimum compliance with the

the advantage of the protected person since the remedies available to interested persons provide an important check on possible abuses by the conservator. Suppose, for example, an adult child is appointed conservator. Another adult child could file a demand for notice,[128] so that he would be apprised of any court hearing to approve accounts or authorize transactions.[129] He can bring an action to force an accounting or to require a bond if none has been required,[130] or he can petition the court to limit the powers of the conservator,[131] including a requirement of court confirmation of any sale of real property under the Arizona Code.[132]

The precise scope of the notice requirement depends, of course, on the meaning of "interested person" in this provision. For example, is an adult child an "interested person"? The UPC uses the phrase "interested person" with varying meanings, depending upon context. Although the definition in section 1-201 seems to emphasize a property interest,[133] it should be clear that the meaning is somewhat broader in the context of conservatorship. Section 5-416 refers to "[a]ny person interested in the welfare of a person for whom a conservator has been appointed." Section 5-405 clearly indicates that a spouse is an interested person because it specifically requires notice to the spouse of a petition for appointment of a conservator. A child has an expectancy of inheritance that should constitute sufficient property interest for some purposes, although it is technically not a present right to property.[134] The child also has a high priority for appointment as a successor conservator,[135] as well as standing to petition for appointment of a conservator in the first instance.[136] Although the adult child is not an interested person to whom notice must be given for all proceedings, he is an interested

statute. The court could, of course, adopt a rule requiring a copy of the account to accompany notice of the hearing. In the administration of a decedent's estate the statute requires that a copy of the account be delivered or mailed to interested persons on either a formal or an informal closing. *Id.* §§ 3-1001 to -1003; ARIZ. REV. STAT. ANN. §§ 14-3931 to -3933 (Spec. Pamphlet 1974). Omission of a similar requirement in the case of conservatorships may reflect some of the old notion that the court is the protector. But the protected person may be mentally competent and only physically disabled and should certainly be given a copy of the account.

128. UNIFORM PROBATE CODE § 5-419.

129. *Id.* § 5-405(b).

130. *Id.* § 5-418.

131. *Id.* § 5-416(a).

132. *Id.* § 5-426. The Arizona Code requires court confirmation for any sale of real estate. ARIZ. REV. STAT. ANN. § 14-5416(A)(5) (Spec. Pamphlet 1974).

133. UNIFORM PROBATE CODE § 1-201(20).

134. *See* R. POWELL, THE LAW OF REAL PROPERTY ¶¶ 382-84 (P. Rohan ed. 1974). The heir's expectancy can be released. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 130 (2d ed. 1953); 1 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 394 (2d ed. 1956). It can also be the subject of an equitable assignment for consideration. T. ATKINSON, *supra*, § 131; 1 L. SIMES & A. SMITH, *supra*, § 395.

135. UNIFORM PROBATE CODE § 5-410.

136. *Id.* § 5-404.

person within the meaning of the statute allowing demand for notice, and certainly one who can petition for an accounting or removal of the conservator. In addition, adult children are within the scope of "other persons" to whom the court may at its discretion, direct notice.[137] It is apparent, therefore, that the concept of "interested person" varies even within the framework of the conservatorship sections of the UPC.

Normally the conservatorship of an elderly person will be terminated by death of that person. In such a case the UPC allows the conservator to make his final account directly to the personal representative appointed for the decedent's estate, instead of to the court.[138] It is then the personal representative's duty to use reasonable care and skill to assure that the accounts are proper.[139] What happens, however, if the same person is both conservator and personal representative? This may occur if the conservator is a member of the family with priority for appointment as personal representative,[140] or when a corporate fiduciary is conservator and is also named as executor in the will, or because the conservator has applied to the court to be granted the powers and duties of a personal representative because no other person has been appointed 40 days after death of the protected person.[141] Clearly there ought to be a court accounting in any such case. An accounting by the conservator to himself as personal representative could be classified as a "transaction . . . affected by a substantial conflict of interest," which is voidable under section 5-422, unless approved by the court. The risk, however, is that no one will detect this conflict of interest and seek to void the extrajudicial accounting. Perhaps this should be resolved by court rule or by amendment to section 5-419. This problem has been avoided in Arizona by modification of the UPC provision to require accounting to the court on termination in all cases.[142]

Recording Requirements

It appears that in most cases the conservator has a duty to record his letters of conservatorship in the recorder's office of each county in which the protected person owns realty. This is not specified as a duty in the Code, the relevant section merely stating that letters "may" be recorded.[143] However, failure to record might result in the protected

137. *Id.* § 5-405(b).
138. *Id.* § 5-419. This provision is omitted in the Arizona Code, making accounting to the court mandatory. See text accompanying note 142 *infra.*
139. This is a consequence of the personal representative's duty to take possession of all the assets in the probate estate. *See* RESTATEMENT (SECOND) OF TRUSTS § 223 (1959).
140. *See* UNIFORM PROBATE CODE § 3-203.
141. *Id.* § 5-425(e).
142. ARIZ. REV. STAT. ANN. § 14-5419(A) (Spec. Pamphlet 1974).
143. UNIFORM PROBATE CODE § 5-421.

person being able to execute a deed to a good faith purchaser who could then rely on the regular recording statutes for protection.[144] If the protected person is mentally competent and conveys away property subsequent to the appointment of a conservator, he would probably be estopped from claiming breach of duty by the conservator. This would serve to protect the conservator, but would not aid the protected person. In most cases where a conservator has been appointed, some mental disability is involved, although perhaps not of the nature to amount to complete incompetency. The elderly person is then particularly vulnerable in any commercial transaction and the failure of a conservator to record his letters may enable someone to take advantage of the recording statutes by purchasing realty from the protected person at a bargain price.[145]

If the failure to record permits a purchaser to claim title under the recording statute, the conservator would have to sue to set aside the transfer. He might succeed on grounds of the grantor's incapacity, although there is authority in some states that a deed is not voidable against a bona fide purchaser for lack of capacity.[146] Of course, the issue of the purchaser's good faith would be crucial, both to the issue of voidability and protection under the recording acts. Irrespective, the conservator might lose. Even if he wins, the estate has been reduced by the cost of an expensive lawsuit which could have been avoided by the simple expedient of recording letters of conservatorship promptly after appointment. Accordingly, the conservator's fidiciary duty to deal with the estate as a prudent person would deal with the property of another requires him to take this precautionary step.

Duty and Powers of Distribution

The distributive powers of the conservator are subject to special standards delineated in section 5-425.[147] These standards are fairly explicit but need interpretation in applying them to each case. If a

144. There may be difficult issues of interpretation of local recording statutes in some states. For example, it appears that ARIZ. REV. STAT. ANN. § 33-412 (1956) might not include transfer of title by appointment of the conservator; that section only embraces "conveyances." Sections 33-411 and 33-416, which refer to "instrument," offer greater possibility of including letters within their coverage. Section 33-414, which requires recording of a "judgment of a court by which title to real property is affected," obviously applies to the appointment decree, but the consequences of failure to record under that section merely preclude introduction into evidence until recorded. Whether subsequent purchasers and creditors are protected in the event letters of conservatorship are not recorded may thus be open to some question.

145. *See generally* Ortelere v. Teacher's Retirement Board, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969).

146. *See generally* 41 AM. JUR. 2d *Incompetent Persons* § 84 (1968).

147. The duty to take into account existing estate plans in selecting assets for distribution, specified in UNIFORM PROBATE CODE § 5-427, is discussed at text & notes 195-207 *infra.*

guardian has been appointed, the conservator must consider his recommendations to determine the proper standard of support for the protected person. He may rely on those recommendations unless they are "clearly not in the best interests" of the protected person, or unless he knows that the guardian is deriving personal financial benefit from the expenditures.[148] Oddly, there is no statutory provision for considering recommendations from the spouse or adult child of an elderly person. However, it would seem reasonable that these persons should be consulted. In addition to the guardian's recommendations, the statute requires a level of expenditure in an amount reasonably necessary for the support, care, or benefit of the protected person.[149] In determining what is reasonably necessary, the statute requires the conservator to give due regard to: (1) the size of the estate; (2) the probable duration of the conservatorship, which in this case will usually be the life expectancy of the protected person; (3) the accustomed standard of living of the protected person and members of his household; and (4) other funds available for support.[150]

Considerations inherent in items (1) and (4), above, are the amount of income available, its sufficiency to meet current needs, and the need to invade principal to supplement income for present and future needs. Obviously, in an inflationary period with rising medical and nursing home costs, the conservator must plan for the future as well as deal with present needs. In this situation, the role of the conservator is like that of a regular trustee who has power to invade principal for the support of a beneficiary.[151] For this reason trust cases should be considered relevant, although not controlling.[152]

Although the conservator's primary concern should be that of his ward, in most situations the welfare of the protected person is inextricably interwined with other members of the household. There is some variation in the statutory language which may be of importance in determining the responsibility of the conservator to provide for these persons. Section 5-425(a)(1) relates only to recommendations of the guardian for support and benefit of the protected person. However, in subsection 3 there is the clear grant of power to expend funds for support of persons legally dependent on the protected person, and for

148. UNIFORM PROBATE CODE § 5-425(a)(1).
149. *Id.* § 5-425(a)(2). The other statutory ingredient of education would not typically be applicable to elderly people.
150. *Id.*
151. *Id.* § 5-425(a).
152. In the trust cases much may depend on language of the trust instrument and the "intent of the settlor." *See* RESTATEMENT (SECOND) OF TRUSTS § 128, comment *i* (1959). This variable is absent in the conservatorship. Moreover, there is only one beneficiary in the case of the conservatorship, while most trusts involve several successive beneficiaries.

support of other members of the household who are unable to support themselves. Also, subsection 2's express inclusion of consideration of the accustomed standard of living of the protected person and members of his household, may provide the statutory sanction for care of those family members not technically dependent. Nevertheless, the primary concern of the conservator should be the welfare of the protected person.

Duty of Loyalty

The fiduciary's duty is one of loyalty to the persons he serves, and he must avoid any conflict of interest.[153] A partial codification of the conservator's fidiciary duty is found in section 5-422. This section deals with the most flagrant violation of the duty of loyalty: sale of estate property to the conservator or his spouse, employee, or attorney. It also proscribes any other "transaction which is affected by a substantial conflict of interest," such as purchase of the conservator's assets.[154] The statute makes all such transactions voidable unless "approved" by the court in a formal hearing on notice. Approval implies advance approval. Court sanction after the fact would be confirmation or ratification, not approval, and would nullify the tendency of the rule to compel a fiduciary to be sensitive to potential conflicts of interest. When court approval is sought, to whom should notice be given and what other conditions should be imposed by the court? Under prior law, many states allowed court approval by ex parte order.[155] This provided minimal protection since such orders were often signed as routine matters. The Code, however, calls for a formal hearing and notice, encouraging wide ranging notice in this situation by providing that the court may direct notice to "interested persons" and "others."[156] The latter term may afford a mechanism which would provide a real safeguard. Obviously notice must be given to the protected person and to any person who has filed a request for notice.[157] If the protected person is mentally disabled, a guardian ad litem should probably be appointed.[158] If the protected person has a competent spouse or an adult child, one of these should also be given notice.[159] Finally, perhaps the court ought to treat a

153. *See* G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543 (2d ed. 1960); 2 A. SCOTT, *supra* note 107, § 170; Report of Committee on Trust Administration and Accounting, *The Trustee's Duty of Loyalty*, 6 REAL PROP., PROB. & TR. J. 528 (1971).

154. UNIFORM PROBATE CODE § 5-422.

155. For example, Arizona formerly provided for notice by posting or publication. *See* ch. 101, § 18, [1951] Ariz. Sess. Laws 243 (repealed 1973). Of course, ex parte proceedings were usually the result.

156. UNIFORM PROBATE CODE § 5-422.

157. *Id.* § 5-406.

158. See text accompanying notes 123-27 *supra.*

159. See text accompanying notes 72-79 *supra.*

specific devisee of property as an interested person to whom notice must be given of a formal hearing to approve a sale. It is in the interest of that person to see that the highest price is obtained, because the Code substitutes a general legacy in the amount of the sale proceeds when specific devises are sold by a conservator.[160]

Voidability under section 5-422 is not an exclusive remedy. The conservator is a trustee[161] and subjected to general fiduciary duties.[162] Thus, general trust law becomes operative. Suppose, for example, the conservator bought property through a firm which paid a personal commission or fee on the transaction. This transaction may call for remedies other than voiding the transfer. The other remedies which are available, as appropriate, include reducing the conservator's compensation as a penalty,[163] charging him the amount of any fees or profits he collects as an offset against his compensation as conservator,[164] and removal for breach of fiduciary duty.[165]

The Code does not flatly prohibit all self-dealing by conservators. A sale of estate realty or a family business to a member of the family serving as conservator is often in accord with the desires of the protected person. But the problem is to assure that the sale is really necessary and that the price is fair. Requiring that there be a public auction to determine whether anyone would be willing to pay more for the property than the price offered by the conservator would tend to assure a fair price. Proceeds maximization, however, may not be the only consideration in effecting a sale. The need to obtain the maximum price can be tempered by the desire to keep property in the family, and the court should approve the sale in these cases, so long as the protected person understands the transaction and consents. The consent of prospective heirs or devisees should also be obtained and the assets of the estate must be adequate to meet the needs of the protected person during his life expectancy. Independent appraisals could also be used to ensure the fairness of a sale to the conservator, particularly if there is evidence of unsuccessful attempts to sell to others at a higher price.

It should be noted that the Code does not carry the conflict of interest rule to an absurd extreme. One provision permits the conserva-

160. *See* UNIFORM PROBATE CODE § 2-608(a).
161. *Id.* § 5-420.
162. *Id.* § 5-417.
163. Although section 5-414 provides that a conservator "is entitled to reasonable compensation," in determining what is reasonable under the circumstances the court can take account of any breach of trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 243 (1959).
164. The fiduciary is not entitled to profit from his position. RESTATEMENT (SECOND) OF TRUSTS § 203 (1959).
165. *Id.* § 199(e).

tor to employ persons with whom he is "associated."[166] Thus, a conservator who is an attorney and a member of the law firm may employ another attorney in the firm to provide him with legal services. Whether he could share under a partnership or association agreement in the normal legal fee paid for such services is another matter, however. The duty of loyalty forbids personal profit,[167] lest the fiduciary select an agent on the basis of personal financial benefit rather than the qualifications of the agent. The simple answer would be to have the conservator account to the estate for any amounts he receives as a result of estate business and reduce his compensation from the estate accordingly. This solution is suggested by an application of general equity concepts rather than statutory interpretation.[168]

Delegation of Conservator Duties

There are also restrictions on the conservator's ability to delegate power, although it is always difficult to theorize about delegation of powers by a fiduciary because the limits of personal function and the need to delegate are essentially practical.[169] Obviously some functions cannot be delegated to others. The conservator alone must make ultimate decisions regarding investments and the distribution of funds. In other areas, however, the conservator may delegate some decisions. As we have already seen, the statute provides for recommendations from the guardian as to standard of support.[170] Additionally, in the process of managing property and in the mechanics of disbursement the conservator must seek the advice of others and use agents as commercial custom requires. He is expressly empowered to:

> employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.[171]

A question related to delegation of authority is the liability of the conservator for acts of his agents. Suppose a tenant is negligently injured in an apartment building to which legal title is in the conservator. Is the conservator personally liable, or is he liable only in a representative

166. UNIFORM PROBATE CODE § 5-424(c)(22).
167. RESTATEMENT (SECOND) OF TRUSTS § 203 (1959).
168. *Id.*
169. *See* Note, *Trustee's Power to Delegate: A Comparative View*, 50 NOTRE DAME LAW. 273 (1974).
170. See text accompanying notes 147-52 *supra.*
171. UNIFORM PROBATE CODE § 5-424(c)(23).

capacity with any judgment collectible out of the estate of the protected person? The Code adopts the theory that a fiduciary should be liable only if he is personally at fault.[172] Therefore, the injured party could sue the conservator in his representative capacity and, assuming liability is found, recover against the estate.[173] The conservator could also be sued individually, but only if he personally has been negligent, or was negligent in selecting or supervising his agents.

Other Duties

All of the other common law duties of a trustee should also apply to the conservator. Although the Code deals with some duties of trustees,[174] it is not comprehensive and, except for the provisions on standard of care,[175] contains little that is applicable to conservators.[176] General equity rules regarding the duty to segregate funds and earmark estate property, to protect and preserve the estate, to make property productive, to diversify investments should all be applicable because of the conservator's status as a trustee under the Code. It is this assimilation of the law of trusts that makes the conservatorship acceptable to corporate fiduciaries by providing a stable and familiar body of rules with which the conservator can confidently administer the trust.

EFFECT OF CONSERVATORSHIP ON CAPACITY

Section 5-408(5) of the UPC provides that an order determining that there is a basis for appointing a conservator has no effect on the capacity of the protected person.[177] This provision undoubtedly reflects the Code availability of conservatorship for persons mentally capable but physically incapacitated. It is also a corollary of the fact that under the Code there is no finding of mental incompetence as a prerequisite for appointing a conservator.[178] The term is carefully avoided in framing the grounds for conservatorship and other protective proceedings. As a result, the competence of the protected person is left unadjudicated. This is both an advantage and a disadvantage, since it leaves all issues of capacity open to future litigation.

Section 5-408(5) was not part of the working drafts of the Code

172. *See id.* § 3-808 (personal representative); *id.* § 7-306 (trustee).
173. *Id.* § 5-429.
174. *Id.* §§ 7-301 to -305.
175. *Id.* § 7-302.
176. The Code provisions on a trustee's duty to account and to provide bond are inapplicable because they are inconsistent with corresponding code sections on conservatorships. *Compare id.* § 7-303 [*and*] *id.* § 7-304, *with id.* § 5-419 [*and*] *id.* § 5-412.
177. *Id.* § 5-408(5).
178. See text & notes accompanying notes 16-19 *supra.*

prepared by the reporters. On the contrary, the early working drafts contained a subsection which provided in part:

> During conservatorship. After appointment of a conservator and until termination of the conservatorship, the protected person is incapable of incurring a debt, transferring or encumbering his property, except by will, or otherwise affecting his business affairs unless the contract or other transaction is authorized or confirmed by the court or by the conservator. The protected person lacks capacity to sue or be sued, to exercise, except by will, or release a power of appointment, to exercise powers as trustee, conservator, personal representative, custodian for a minor or attorney in fact, and to create, modify or terminate a trust, without authorization or confirmation by the court. The existence of a conservatorship has no bearing on the capacity of the protected person to marry, to vote or exercise other civil rights.[179]

The commissioners decided to eliminate this section and substituted the current subsection 5-408(5). Although the Conference disavows any use of drafts in interpreting the final promulgated act,[180] the change in language from the working drafts to the final act is revealing. It represents a deliberate decision to leave the issue of capacity open. The change in the final draft was made without full study of its consequences and creates an area of ambiguity and uncertainty.

UPC section 5-408 confers on the court "all the powers over [the protected person's] estate and affairs which he could exercise if present and not under disability, except the power to make a will." Does this by implication take away those powers from the protected person, leaving only a testamentary capacity? This interpretation would indeed narrow subsection 5.

The sweeping powers expressly granted the court by section 5-408(3) of the UPC were eliminated in the Arizona Code.[181] This creates a possible legal vacuum. The fact that the Arizona courts lack these specific powers may mean that the protected person retains them. It definitely gives the courts greater flexibility in determining the extent

179. Uniform Probate Code § 5-424 (Working Draft No. 5, 1969). The proposed Comment to this section noted: "There is a considerable confusion in the cases over the extent to which an adjudication of disability deprives the disabled person of capacity to bind himself and his property during a lucid interval. It is desirable that the law be definite on this point . . . ."

180. All working drafts carry a warning that:

> The ideas and conclusions herein set forth, including drafts of proposed legislation, if any, have not been passed upon by the Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated law.

181. *Compare* UNIFORM PROBATE CODE § 5-408(3), *with* ARIZ. REV. STAT. ANN. § 14-5408(3) (Spec. Pamphlet 1974).

to which the protected person becomes effectively incapacitated when a conservator is appointed.

Capacity may become an issue in a variety of transactions. Whether the protected person can make a will or change an existing will, enter into contracts, give away property, or amend a revocable trust agreement depends on his capacity. The question of capacity may be answered differently in each of these transactions even though the same person is involved. Conservatorship has the least effect on testamentary capacity. As has been noted, under section 5-408(5), the question of testamentary capacity is expressly left open. Even in non-Code states, where incompetence is the basis for appointing a guardian of person and property, the ward does not automatically lose capacity to make a will.[182] Although appointment of a guardian or conservator may be some evidence of lack of testamentary capacity, the courts recognize that the issues are different. If an elderly person is mentally alert on some days and not on others, he may not be capable of continually managing his property, but on good days he could still make a will.[183] Moreover, the degree of mental capacity required to understand matters such as proper investments in a fluctuating economy or the value of goods or services being touted by a persuasive salesperson, is greater than that needed to know who the members of one's family are and to whom one wants property to go after his death. In addition, gifts by will are not effective until death, and can not jeopardize the elderly person's welfare by decreasing the assets available for future support, as is the case with inter vivos gifts. Hence a lesser degree of capacity is involved.

The question of contractual and gift making capacity must be decided on an individual basis. Suppose, after a conservator has been appointed, the protected person enters into a contract to purchase goods. The protected person could not make payment himself since the conservator manages the funds. The creditor could file a claim against the estate and attempt to compel payment, since the Code obligates the conservator to pay "just claims," including those arising after the conservatorship.[184] When the creditor tried to collect, the conservator could

182. *In re* Estate of Thomas, 105 Ariz. 186, 461 P.2d 484 (1969); T. ATKINSON, *supra* note 134, § 51; W. PAGE, THE LAW OF WILLS § 12.42 (W. Bowe & D. Parker eds. 1962).

183. Courts strain to uphold wills of elderly persons. A recent example is Blackmer v. Blackmer, — Mont. —, 525 P.2d 559 (1974), where the Montana supreme court reversed a finding of lack of capacity by the trial court. The testatrix was an 85-year old woman who had previously been medically diagnosed as having arteriosclerosis generalized, cerebral arterio coronary sclerosis, and senility.

184. UNIFORM PROBATE CODE § 5-428. If the appointment of a conservator merely operates to transfer legal title of the property to the conservator, leaving the protected person with equitable title as a beneficiary, how much protection has been achieved against improvident contracts and purchases?

pay the claim if it was reasonable. Otherwise he could put the creditor to suit and plead the defense of incompetence. Of course, the conservator would bear the burden of proof of this affirmative defense.[185] This is meaningful protection since the conservator is likely to be less vulnerable to creditor pressure than the protected person.

Even with a conservator, the elderly person ought to be free to make gifts if he understands the consequences of his acts and has sufficient assets to meet current and projected needs.[186] Both the UPC and the Arizona Code fail to recognize, however, that a person may need a conservator to handle investments, manage realty, or run a business, but may still retain the capacity to spend his income and surplus capital if done without jeopardy to resources for his own future. The UPC does partially recognize donative capacity by permitting the conservator to respect the wishes of the protected person by making annual gifts totalling up to 20 percent of estate income without judicial approval.[187] For gifts of capital, however, petition to the court would be necessary.[188] Donative capacity for major gifts is recognized only in the negative, therefore, by requiring consent of the protected person if the protected person is capable of consent.[189] But consent is not equivalent to donative power. Under the Arizona version of the Code, however, court permission is needed for any gifts. Gifts by the conservator are further restricted by the provision that the Arizona court can authorize only "gifts to such donees and in such amounts as would continue a program of giving established by the protected person prior to disability."[190] If there is no evidence of a program established prior to the conservatorship, no gifts can be made.

Preservation of the question of capacity by section 5-408(5) leaves one important possibility open. If the protected person has equitable title[191] and in fact has capacity to transfer that title, arguably he can execute an effective gift. Unless the Code is construed to create a spendthrift trust in the protected person's property, the efficacy of the gift will turn on the actual capacity of the protected person.

If the disabled person has sufficient capacity to make a will, or to revoke an existing will, does he also have capacity to revoke or amend a trust created by him before disability? If the trust document contains provisions for disposition of the trust property beyond the trustor's

185. *See* 41 AM. JUR. 2d *Incompetent Persons* § 131 (1968).
186. Note, *supra* note 103, at 29.
187. UNIFORM PROBATE CODE § 5-425(b).
188. *Id.* § 5-408(4).
189. *Id.* § 5-408(4).
190. ARIZ. REV. STAT. ANN. § 14-5408(4) (Spec. Pamphlet 1974).
191. This seems to be a logical consequence of vesting title in the conservator as a trustee. *See* UNIFORM PROBATE CODE § 5-420.

lifetime, as most such instruments do, it is substantially the same as a will. Exercising a power to amend the document or to change beneficiaries is analogous to executing a new will. Thus, if the disabled person has testamentary capacity, he ought to have capacity to exercise a retained power to amend a trust. Under the Code, however, the court has "all the powers over his estate and affairs which [the protected person] could exercise if present and not under disability, except the power to make a will."[192] But what of the power to amend an existing trust? Although the powers enumerated in the Code are expressly not exclusive, none of the specific enumeration relate to existing trusts. The Code does, however, expressly empower the court, acting through the conservator, to elect options and change beneficiaries on life insurance;[193] this is certainly analogous to the power to amend a revocable trust. Accordingly, if the protected person wants to change the beneficiaries of a testamentary trust, it would seem desirable to get a court order authorizing the conservator to join in the trust amendment. The court should be fully satisfied as to the protected person's capacity to understand the nature of the act, who the natural objects of his bounty are, and what it is he wants done.[194] It is not, however, the function of the court to decide the reasonableness or fairness of the change; a testator of sound mind is not required to be reasonable in deciding whom he likes and dislikes, and the same rule should apply to a protected person who wishes to amend a trust agreement, assuming he meets the other criteria for testamentary capacity.

Estate Planning During a Conservatorship

The UPC has a number of novel provisions which should facilitate sound estate planning by a conservator. The conservator faces decisions as to the sale of estate assets and other sources of funds for distribution which may effect an existing estate plan. For example, suppose income is insufficient to support the protected person adequately and the conservator must expend capital funds. Should he withdraw funds from a Totten trust account or a joint account, or liquidate stock which would be part of the residue of the probate estate? If there is unproductive realty which is the subject of a specific devise in the will, should this be sold if the only alternative is to liquidate securities which are highly productive and hold great potential for capital gain but which would fall in the residuary estate?

192. *Id.* § 5-408(3).
193. *Id.*
194. *See* T. Atkinson, *supra* note 134, § 51.

The UPC addresses these problems, providing that: (1) the conservator can and should familiarize himself with the existing estate plan, including the protected person's will, any living trust set up by the protected person, joint tenancy property, and beneficiary designations on life insurance;[195] (2) the conservator has a statutory mandate to "take" this "into account" in investing, withdrawing, and distributing funds;[196] and (3) the sale of specifically devised property will no longer work a complete ademption but the devisee will instead have a right to a general pecuniary devise in the amount of the new sale price.[197]

These provisions, while helpful, do not give adequate guidance. For example, the meaning of "take into account" is far from precise. Moreover, it is difficult if not impossible to preserve any estate plan intact in the face of shrinking assets. Because the desires of the testator should be the central concern of estate planning, if the protected person still has testamentary capacity, he should be consulted when some part of the estate plan must be sacrificed. His wishes should be followed if they are not inconsistent with sound property management. For example, the decisions whether to exhaust certain bank accounts first or to make pro rata withdrawals from all accounts are unrelated to conservation of the total property, but may, in event of death of the protected person, affect beneficiaries or joint tenants of the accounts. On the other hand, the choice of assets to be sold involves business choices and ought to rest more in the judgment of the conservator than on that of the protected person.

On the question of how to allocate depletion of the estate, it is perhaps unfortunate that the Code makes no provision for nonprobate assets comparable to that for nonademption of specifically devised assets. However, the National Conference of Commissioners on Uniform State Laws was properly reluctant to tackle the problem of the relationship between probate assets and nonprobate assets which pass at death under various will substitute arrangements. What is needed for a shrinking estate is statutory authority for the probate court to prorate the shrinkage among the distributees of the probate estate and those receiving assets by survivorship rights or beneficiary designation. But perhaps judicial power to distribute assets on the basis of what the protected person would have wanted had he foreseen the shrinkage seems too sweeping. Yet, in other contexts, probate courts have exercised such a function within limits. In the normal probate estate we follow a traditional statutory order of abatement, but qualify it by granting the court

195. UNIFORM PROBATE CODE § 5-427.
196. *Id.*
197. *Id.* § 2-608(a).

considerable discretion to find intent on the part of the testator from "the testamentary plan or the express or implied purpose of the devise."[198] The elective share of the augmented estate is "equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein,"[199] and shrinkage due to death taxes is equitably apportioned under the Code.[200] Moreover, courts have always dealt with a presumed intent of the testator through a variety of rules of construction designed for unforeseen conditions.[201] The absence of this discretionary power to allocate estate shrinkage to both probate and nonprobate assets limits the conservator's transactions because of the possible effect on the protected person's estate plan.

Allocation of shrinkage is especially valuable as a means of mitigating the potential conflict of interest when a child or other family member is the conservator. If the conservator has to choose between using funds from an account which will pass to him at death and one which will belong to someone else, how is he to decide? If he uses funds designated for him or uses both funds proportionately, he is open to no criticism. Preservation of the fund in which he has an interest, however, may be a "transaction which is affected by a substantial conflict of interest," requiring approval by the court.[202] Obviously, this is not the same as a sale to the conservator or a purchase from him, which must have court approval. Arguably, only transactions in which the conservator's interest conflicts with the interest of the protected person require court approval, since any damage to third parties is secondary to the primary purpose of the Code—protection of the ward. But these considerations are not determinative. The conservator is a fiduciary[203] and thus subject to the general rule that he must avoid any conflict of interest.[204] The requirement that the estate plan be taken into account probably creates a statutory duty requiring the conservator to act in favor of the beneficiaries of the estate plan, analogous to remaindermen under an express trust.

The real issue, of course, is whether use of one fund or the other accords with the intent of the protected person. He might well favor the child who is the conservator over others. If he still has capacity, his consent should be obtained in writing. If not, good family relations

198. *Id.* § 3-902.
199. *Id.* § 2-207(b).
200. *Id.* § 3-916. This section was omitted in the Arizona Code.
201. T. ATKINSON, *supra* note 134, § 146; 1 L. SIMES & A. SMITH, *supra* note 134, § 472.
202. UNIFORM PROBATE CODE § 5-422.
203. *Id.* § 5-417.
204. On the duty of loyalty, see text & note 153 *supra.*

could be maintained and subsequent liability avoided if consent of all affected persons is obtained.

Maintenance of life insurance policies is another estate planning problem facing the conservator. If the estate is ample, the conservator undoubtedly has the power to continue the policies. Although statutory authority to pay premiums is not specifically enumerated, it is reasonably inferred from the broad powers granted in section 5-408—the duty to preserve the estate plan.[205] Similarly, if the beneficiary is the spouse or a dependent child, the power to apply property for the benefit of the protected person's dependents implies the authority to pay insurance premiums.[206] The conservator also has power to surrender the policies for their cash value.[207] Whether this would be a "reasonable" act would depend on the need for funds, the wisdom of maintaining the insurance as an investment, and the alternatives available. The principal value of life insurance is usually the proceeds payable after the death of the insured. Although from the standpoint of the conservator this is simply a form of investment, provision for dependents after the death of the protected person may be of primary concern to the latter. If there is no living spouse and no dependent child, then the interest of the insurance beneficiaries should be considered only with regard to preservation of the total estate plan.

The final estate planning matter, relevant only to large estates, is the making of gifts to reduce income and estate taxes. It should be emphasized that the use of gifts to reduce taxation presupposes an estate sufficient to care for the protected person and members of his household and ample reserves for unexpected contingencies.[208] The Code recognizes that very large estates require planning involving lifetime gifts to aid other family members, reduce income taxes, and, unless considered to be a gift in contemplation of death, to reduce estate taxes.[209] The Code contains two provisions regarding gifts. Section 5-425(b) empowers the

205. UNIFORM PROBATE CODE § 5-427.
206. *Id.* § 5-425(a)(3).
207. *Id.* § 5-408(3).
208. In assessing the adequacy of reserves, the planner must be aware that elderly persons may require very expensive care in later years, sometimes with astronomical medical expenses for which insurance may not even be available. The planner also has to take a conservative outlook on investment returns to be on the safe side; he is not called a "conservator" to be a spendthrift.
209. *See* Report of Committee on Problems Relating to Persons Under Disability, *supra* note 4, at 514. For a discussion of both general and Code law, see Report of ABA Committee on Legal Services for the Elderly and Their Estates, *Substitution of Judgment Doctrine and Making of Gifts from an Incompetent's Estate*, 7 REAL PROP., PROB. & TR. J. 479 (1972). There is an abundance of legal periodical literature on this topic. *See, e.g.*, Walkow, *Estate Planning for the Handicapped, Part II: Saving Taxes by Lifetime Gifts*, 111 TRUSTS & ESTATES 284 (1972); Note, *Making Gifts from an Incompetent's Estate Under the Doctrine of Substituted Judgment to Reduce Federal Estate Taxes*, 14 WM. & MARY L. REV. 186 (1972).

conservator, without court authorization or confirmation, to make gifts out of income "to charity and other objects as the protected person might have been expected to make." Such gifts may not exceed 20 percent of income in any one year. Although this section does not appear to require the consent of the protected person, the conservator certainly should consult him if he has sufficient capacity to consent. Gifts "the protected person might have been expected to make" are gifts which follow a previously established pattern of giving. Income tax returns for recent years would provide guidance for charitable donations. Gifts to family members or friends may not be determined so readily, but if they were large, gift tax returns may be available or cancelled checks or an account book may provide evidence.

The second Code provision relates to gifts of capital or income in excess of the authorized 20 percent of income for gifts. Scetion 5-408 requires a court order for such gifts. There must be a hearing with notice, although the statute is silent as to whom notice must be given. The court must make a finding that the gift "is in the best interests of the protected person" and that the latter either has consented or is incapable of giving consent to the proposed gift.[210] Note that the statutory test is "the best interests of the protected person," not the interests of the donees of the gifts. The word "interests" must, therefore, have a broader meaning than narrow economic interests since gifts, even for tax savings purpose, always result in an economic detriment to the donor. However, people give because of the personal satisfaction derived from giving pleasure to others, out of a strong sense of family obligation, and because of a sensed need to bind family and friends through economic ties. Implicitly, the Code acknowledges the validity of these noneconomic interests of the grantor. If the protected person lacks capacity to consent to the gift, the interest of the protected person test becomes highly artificial. The real criterion ought to be whether the protected person would have made the gift had he retained the capacity to do so. Again, the court or the conservator must consider the estate plan in deciding what property to give and to whom it should be given. Gifts of unneeded property to specific devisees of that property or to the designated beneficiary or joint owner, preserve the plan and merely accelerate the transfer that would take place at death. Gifts of life insurance to the named primary beneficiary are particularly advantageous because the asset is not likely to be used for the benefit of the protected person and estate taxes can be substantially reduced by the gift. Of course, if the primary beneficiary is an elderly spouse who will be amply provided for

210. UNIFORM PROBATE CODE § 5-408(4).

by other resources, then the gift might better be made directly to children, or to a trust for the benefit of the spouse, with the remainder to the children. The necessary planning is perhaps not too different from that done for an ordinary client, except that the protected person cannot be consulted unless he still has testamentary capacity.

RECOMMENDATIONS ON ADVANCE PLANNING TO AVOID CONSERVATORSHIPS

Even though the law relating to conservatorships has been vastly improved, the new Code still has some disadvantages. Protections are never achieved without some expense. At the outset, there is the cost of retaining an attorney and the necessity for a court hearing on the issues of conservatorship. Second is the cost of the bond. Bond is mandatory under the Arizona Code[211] and judges will probably exercise their discretion under the UPC to require a bond as additional protection in most instances with the exception of corporate fidiciaries.[212] Third, there is the fee for the conservator and for any lawyer, physician, or visitor appointed by the court to protect the elderly person at the initial hearing. Fourth is the cost of court accountings. This is an expense borne by the estate and, if a guardian ad litem must be appointed, the expense could be disproportionately large in cases involving small estates. Fifth are the restrictions on the distributive powers of the conservator, some of which require a court order after a hearing, again involving the expense of an attorney. Obviously, it is desirable to avoid these expenses through advance planning.

The UPC offers several substitutes for formal guardianships and conservatorships: the inter vivos trust, the joint account, and the power of attorney. First, the Code strengthens and makes more workable the latter two substitutes. Of course, joint bank accounts have been used in the past and in most instances worked satisfactorily. But legal complications have been encountered in many states[213] as is evidenced by the high incidence of appellate cases concerning joint accounts. The difficulty stems from two features of the joint account. Rights during lifetime may be based on the analogy to the true joint tenancy, so that each party to the account may own an undivided half, and hence the creditors of

211. ARIZ. REV. STAT. ANN. § 14-5411(A) (Spec. Pamphlet 1974).

212. Although UPC section 5-411 reads "may," members of the legal profession generally prefer to have a bond in conservatorships and this has been the usual practice. *See* Report of Committee on Problems Relating to Persons Under Disability, *supra* note 4, at 511. This cost can be eliminated if a corporate conservator is appointed.

213. *See, e.g.*, Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959); Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953); Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629 (1965).

each can reach one half.[214] In some states, the creditors of one party to the account may be able to reach the entire balance on deposit, on the theory that the creditor can reach what his debtor can withdraw—the entire amount.[215] Secondly, the joint account, either presumably[216] or conclusively,[217] belongs beneficially to the survivor. Thus, it is payable to him on the death of the other party. This may not have been the intent of the parties at the time the account was established.

The legal complications of a joint account in a non-Code state can be avoided in the parent-child context by having the latter execute an agreement that his right to withdraw during lifetime is in trust for the parent and that, on death of the parent, the balance will be held by the survivor in trust for the parent's estate or heirs. Unfortunately, lay persons often use the account without knowledge of its legal consequences. The UPC makes possible a joint account with or without a right of survivorship,[218] and the Code makes clear that ownership rights during lifetime depend on net contributions to the account.[219] Thus, where all the deposited funds belong to the parent, there is no risk that creditors of the son or daughter can reach the account so long as the source of the funds can be proven.[220]

The second substitute for a formal conservatorship is the power of attorney. The UPC makes a significant change in this area by authorizing a durable power[221] of attorney, which is effective during any subse-

214. Musker v. Musker, 18 Ariz. App. 104, 500 P.2d 635 (1972) (decided prior to enactment of the Code in Arizona). *But see* O'Hair v. O'Hair, 109 Ariz. 236, 508 P.2d 66 (1973) (sole ownership of spouse-depositor in a joint account upheld in divorce action). In *O'Hair*, Justice Holohan in dissent stated: "The journey of joint tenancy of personal property remains an uncharted course in Arizona law." *Id.* at 242, 508 P.2d at 72.

215. In Park Enterprises, Inc. v. Trach, 233 Minn. 467, 47 N.W.2d 194 (1951), the Supreme Court of Minnesota affirmed a judgment permitting a judgment-creditor to garnish half of a joint bank account and indicated that the creditor could have reached the entire account. Authorities are collected in Annot., 11 A.L.R.3d 1465 (1967).

216. *See* MICH. COMP. LAWS ANN. § 487.703 (1948).

217. *See* NEV. REV. STAT. § 663.015 (1971).

218. Under the Code, any account payable to two or more parties is defined as a joint account "whether or not mention is made of any right of survivorship." UNIFORM PROBATE CODE § 6-101(4). If one party to the account dies, the balance belongs to the survivor "unless there is clear and convincing evidence of a different intention at the time the account is created." *Id.* § 6-104(a). Obviously, there should be some express provision in a joint account if survivorship is not intended, in order to prevent litigation on the issue of intention. The Code presumption is somewhat different from the usual rules, which require some express provision that the account be payable to the survivor but permit a contrary intent to be shown where there has been fraud or mistake. *See* Sheridan v. Kleeman, 75 Ariz. 319, 256 P.2d 558 (1953).

219. UNIFORM PROBATE CODE § 6-103(a).

220. This provision, of course, places a premium on keeping careful records of the sources of funds in a joint account.

221. The Code section was based on a Virginia statute adopted in 1954. Ch. 486, § 1, [1954] Va. Acts 581 (codified at VA. CODE ANN. § 11-9.1 (1973)). A number of of other states have adopted the same or a similar statute. *See* MD. ANN. CODE art. 93A, § 601 (1974); N.J. STAT. ANN. 46:2B-8 (Supp. 1974-75); PA. STAT. ANN. tit. 20, § 5601 (Spec. Pamphlet 1974); TEX. PROB. CODE § 36A (Supp. 1974-75); WASH. CODE ANN. § 11.94.020 (Supp. 1974). One state has a statute making all powers of attorney

quent disability of the principal.[222] The power may expressly provide that it shall not be affected by disability of the principal. Under the durable power, the agent can continue to act even after a conservator is appointed, although the conservator can revoke the power.[223] Moreover, the instrument creating the power may defer the agent's power to act until the principal becomes disabled.[224] Such an instrument should provide for an objective means for determining disability, such as a certification of a doctor. Otherwise, the legal effectiveness of the power with respect to third parties could not be established without a court determination of disability.

When the proposed Arizona Probate Code was introduced in the 1973 legislature, there was some opposition to the power of attorney sections on the grounds that they would facilitate fraud. Of course, no one can claim that family arrangements will never result in the misappropriation of funds by a trusted child;[225] such risks are present in any situation where one person manages the property of another. But such an abuse can occur even when the arrangement is closely supervised by a court. Certain practical realities, however, can ameliorate the risk of infidelity. Other members of the family will be alert for fraud and, if necessary, will bring suit to recover any funds that have been wrongfully spent.[226] Inherent honesty, loyalty to parents,[227] fear of discovery of

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valid, notwithstanding subsequent incompetency of the principal. *See* N.C. GEN. STAT. § 47-115.1 (Supp. 1974). The Model Special Power of Attorney for Small Property Interests Act is similar to the Code, but requires approval of a judge. *See* ARK. STAT. ANN. § 58-501 (1947); OKLA. STAT. ANN. tit. 58, § 1051 (Supp. 1974-75); WYO. STAT. ANN. § 34-111.1 (1957). Florida has recently enacted a unique version of the durable power of attorney which is limited to certain members of the family. *See* FLA. STAT. § 709.08 (Supp. 1975-76).

The Code also strengthens regular powers of attorney. It protects a third party dealing with an agent if the agent executes an affidavit that he did not have knowledge, at the time he performed an act under the power, of the death, disability, or incompetence of the principal. UNIFORM PROBATE CODE § 5-502. Although the section seems to require an affidavit worded in the past tense—"did not have" knowledge—in my opinion it permits an affidavit concurrent with the act. Nevertheless, it would be safest to execute it immediately after the particular legal act, as with an acknowledgment.

222. UNIFORM PROBATE CODE § 5-501.

223. *Id.*

224. In such a case, the instrument would read: "This power of attorney shall become effective upon the disability of the principal." This form of power gives the parent control as long as he wants it by letting the parent manage his affairs as long as practical, at which point the agent takes over under his power of attorney.

225. Kline v. Orebaugh, 214 Kan. 207, 519 P.2d 691 (1974), is a recent example of such a situation.

226. *See id.*

227. *See* O. KNOPF, SUCCESSFUL AGING 147 (1975):

> Parents often have a hard time with their children, and children chafe equally under parental authority. Man's personality is rather complicated in structure, and the sources for conflict intensify the closer the contact between individuals is. Yet when the chips are down, they close ranks and help each other to the best of their ability. The few exceptions need not discourage us from reaffirming the fact that the closest ties a person can have are rooted in the family.

See also Kline v. Orebaugh, 214 Kan. 207, 519 P.2d 691 (1974).

wrongdoing, and even apprehension of possible criminal prosecution operate, in varying degrees, to keep the agent faithful in most cases. Of course, those bent on fraud will find a way under almost any law, but the states which have enacted statutes permitting durable powers of attorney have reported no great increase in fraud.

The durable power of attorney is especially important as a means of making a trust an acceptable alternative to conservatorship. Many elderly persons are acquainted with the advantages of living trusts as a device for managing their property when they become unable to do so. The trust not only provides management when the individual is no longer capable, but also avoids probate. But the same individuals are often reluctant to give up control and active day-to-day decisions on investments. Even when the attorney can establish a revocable living trust with retention of substantial powers of management in the settlor, the client's fears may not be allayed. He *thinks* control is being shifted and is frightened by the transfer of legal title, which is equated by the lay person with "ownership," and is not quite sure that all the verbiage in the elaborate trust document really gives him the same control as when he had legal title. Nevertheless, such a person would desire that a trustee assume responsibility for his assets should he become mentally or physically incapacitated.

The durable power of attorney affords the perfect legal vehicle for this purpose.[228] The client and the trustee execute a formal trust agreement, but no assets are presently transferred to the trust—it is unfunded. The client also executes a durable power of attorney in favor of an agent, a child for example, empowering him to transfer assets into the trust. When the client becomes incapacitated, the agent transfers the assets to the trustee. The client has the assurance that, if he is capable, he can revoke the trust and maintain control of his property. If for any reason the trust proves undesirable, and the trustor is incompetent to revoke, a conservator can be appointed, and he would then exercise the power to revoke for the disabled person.[229]

If such a trust is established, the trust document is likely to become the basic instrument in the estate plan. A will can be drafted to pour over the residue of the client's property into the trust. Suppose the trust is unfunded and the power to transfer assets into the trust is not exercised during the client's lifetime. Can you pour over into an unfunded trust? The simple answer for the estate planner is to fund the trust with a small asset that requires minimum attention from the trustee,

228. *See* Schlesinger, *Drafting the Estate Plan to Cover Disability*, 7 INST. ES. PLAN. ¶¶ 73.200-.214.4 (1973).
229. UNIFORM PROBATE CODE § 5-501.

such as a government bond. Section 2-511 of the UPC expressly authorizes pour-over to a trust "regardless of the existence . . . of the corpus of the trust," although theoretically there is no trust if there is no corpus. Alternatively, the UPC expressly mentions unfunded life insurance trusts so if the client has life insurance, this can be made the subject of the trust and validity of the pour-over would then be assured. Even if there is no funding and no life insurance, the doctrine of incorporation by reference may also be relied on to save the plan.[230]

The perfect estate planning program for an elderly person of some wealth thus involves three documents: (1) a revocable and amendable trust agreement, with life insurance payable to the trustee or perhaps a small asset presently used to fund the trust; (2) a durable power of attorney empowering a son or daughter in whom the client has confidence to transfer assets into the trust as agent for the client, with instructions to do so only when the agent believes the client is no longer able to manage property effectively; and (3) a pour-over will, which will pick up the entire estate if the power of attorney is never exercised, and any assets not transferred pursuant to the power if it is exercised, except, of course, specific and general devises in the will. For the person of more moderate means the durable power of attorney alone may be adequate.[231]

CONCLUSION

Only time and experience will prove whether article V of the Code works out as well in practice as it appears in theory. The success of any device for surrogate management of property ultimately depends upon the integrity and efficiency of the person who becomes the manager, whether it be under a power of attorney, a living trust, or a conservatorship. It is clear, however, that the Code is a vast improvement over prior law. As the ABA Committee on Problems Relating to Persons Under Disability noted in its 1970 Report:[232] "the conservatorship law of most

230. *See id.* § 2-510.

231. Mention should be made of the fact that various government benefits may be paid to substitute or representative payees, usually a relative, regardless of the legal incompetence of the beneficiary. *See* Regan, *supra* note 1, at 612. This obviates the necessity of full guardianship or conservatorship for many elderly persons whose sole income is derived from such sources or whose other income can be handled by the devices already discussed. For example, Social Security benefits may be payable to a spouse or relative or other representative payee, to be spent for the beneficiary's current needs. Any surplus is to be saved and invested in trust for the beneficiary. The payee is accountable for use of funds received and must submit periodic written reports to the Social Security Administration. *See* 42 U.S.C. § 405(j) (1970); 20 C.F.R. §§ 404.1601-.1610 (1974); SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY HANDBOOK §§ 1604-21 (1974).

232. Report of Committee on Problems Relating to Persons Under Disability, *supra* note 4, at 507.

states is a hodge-podge of historical anachronisms which make Article V of the Code seem like a refreshing breath of spring."

Conservatorship under the Code is a viable and flexible procedure for handling property if there has been no advance planning. The concept of the conservator as a trustee with broad statutory powers, yet subject to some controls by the court, has opened the position to professional managers. Guardianship separates the function of care of the person and, if the assets are meager, can also be utilized as a general tool to provide full protective services. The durable power of attorney offers a further simple legal device for handling the property of the elderly. The only major problem under the Code appears to be its failure to deal with the effect of protective proceedings on issues of capacity. Whether this is a defect or an advantage will have to be determined after more definitive study. In any event, criticism of the UPC on this or other grounds, such as the alleged duplication and unnecessary expense of procedures in involuntary proceedings, would seem premature. The Code has made available workable legal concepts and procedures with adequate safeguards. This is all that any law can do.