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CONSERVATORSHIP: A VIABLE ALTERNATIVE TO INCOMPETENCY

Allen Federman*

I. Introduction

Our society is growing old. People age eighty-five or over will be the fastest growing segment of the American population from now until the year 2000.¹ As our society becomes older, long-term care services for the elderly become ever more important. According to the American College of Physicians, "[M]edical and support services are needed to attain an optimum level of physical, social and psychological functioning by persons who are frail and dependent due to chronic physical or mental ailments."² Such services should be adequately coordinated and matched to an individual's needs.³ It has been suggested that only a federally developed comprehensive and coordinated long-term care system can accomplish this goal.⁴

At present, no such system exists. New York State, however, has enacted a statutory scheme by which family members, friends, or social agencies can provide for the maintenance and care of an impaired person's personal well-being.⁵ This statute includes provisions for personal and social protective services and for the pres-

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1. See *American College of Physicians: Long-Term Care for the Elderly Must Change*, AM. C. OF PHYSICIANS OBSERVER, Feb. 1984, at 19, col. 1 [hereinafter cited as *American College*]. The average age of the individual in society is rapidly growing older. Cf. Arnold, *Preparing for a New Kind of Rainy Day: Planning for Aging*, 42 N.Y. ST. B.J. 603 (1970).

2. American College, *supra* note 1, at 1, cols. 3-4. "If current forecasts are accurate, the nursing home population will double between 1980 and 1990, when up to 9 million elderly people will need long-term care." *Id.* at 19, col. 1.

3. Beattie, *Surrogate Management of The Property of The Aged*, 21 SYRACUSE L. REV. 87, 163 (1969) (guardian should be granted only power sufficient to compensate for the disability) [hereinafter cited as Beattie].

4. See *American College*, *supra* note 1, at 19, cols. 1-2. The suggestion is based on the belief that the much-needed system should be uniform to address the nationwide problem and to avoid services that would otherwise be "inadequately coordinated, confusing, fragmented and expensive." *Id.* Such a uniform system could avoid both gaps and duplication in the services provided. *Id.*

5. See N.Y. MENTAL HYG. LAW §§ 77.01-.41 (McKinney 1978 & Supp. 1986).

ervation and management of the elderly person's assets and income.⁶

The method by which these goals are accomplished is conservatorship. Although conservatorship is a relatively recent development in New York law,⁷ this Article maintains that New York's conservatorship system provides the best alternative currently available for the care and maintenance of impaired elderly people.⁸ In addition, the purpose of this Article is to explain, to those in both the health care and legal professions, when conservatorship is an appropriate device⁹ and how it may be effectively applied.¹⁰

This Article first presents a general introduction to the concept of conservatorship¹¹ and continues with an overview of the legislative history leading to the enactment of Article 77 of the New York Mental Hygiene Law.¹² The Article then explores existing alternatives to conservatorship and the benefits or lack thereof that they provide the impaired individual.¹³ Part V of this Article analyzes in detail the process of appointing a conservator.¹⁴ The remainder of the Article deals with the role of guardians *ad litem* in the conservatorship process,¹⁵ the conservator's task of marshaling the conservatee's assets after appointment,¹⁶ termination of the conservatorship,¹⁷ and attorney's fees.¹⁸ The Article ultimately concludes that, although the conservatorship process is not flawless, it is a vast improvement over existing alternatives for the care and maintenance of impaired individuals who have not been adjudicated as incompetent.

II. What is Conservatorship?

Conservatorship is the statutory means by which designated courts¹⁹ are empowered to appoint conservators for a person whom a court

6. See *infra* notes 20-53 and accompanying text.

7. Section 77 of the Mental Hygiene Law was approved on May 9, 1972 and became effective on July 1, 1972. See 1972 N.Y. Laws ch. 251, at 468.

8. See *infra* notes 54-89 and accompanying text for a discussion of available alternatives to conservatorship.

9. See *infra* notes 19-31 and accompanying text for a discussion of circumstances in which a conservatorship is deemed appropriate.

10. See *infra* notes 101-94 and accompanying text for a detailed analysis of the application of the conservatorship process.

11. See *infra* notes 19-63 and accompanying text.

12. See *infra* notes 64-82 and accompanying text.

13. See *infra* notes 83-129 and accompanying text.

14. See *infra* notes 130-233 and accompanying text.

15. See *infra* notes 234-45 and accompanying text.

16. See *infra* notes 246-64 and accompanying text.

17. See *infra* notes 265-84 and accompanying text.

18. See *infra* notes 285-89 and accompanying text.

19. The courts in New York that have the statutory authority to appoint

has not declared incompetent, but who, because of advanced age, illness, mental weakness, drug or alcohol abuse or other causes, has suffered substantial impairment of the ability to care for his property or to provide either for himself or his dependents.²⁰ The conservator is the person or entity that the court appoints to protect and manage the impaired person's assets, and to assure that the personal needs of the impaired person are met.²¹ The impaired person is then referred to as the conservatee.²²

In order to appoint a conservator, one must persuade a court, by clear and convincing evidence, that: (1) there is the need for the appointment of a conservator;²³ and (2) the proposed conservatee

conservators are the supreme court and the county courts outside of New York City (because there are no county courts in the City of New York). See N.Y. MENTAL HYG. LAW § 77.01(1) (McKinney 1978). The surrogate's court may also have the authority in certain circumstances. See *id.* § 77.01(3) (McKinney Supp. 1986). Section 77.01(3) provides that in any proceeding brought in the surrogate's court, the court may appoint a conservator of the property for a person without the need for a separate conservatorship proceeding under the following circumstances: the proposed conservatee must be a resident of the county in which the proceeding is brought; and entitled to money or property from an estate or proceeds in an action pursuant to New York Estates Powers & Trusts Law § 5-4.1 (rights of family members for wrongful death); or to proceeds in a personal injury action to an infant, incompetent, or disabled person. *Id.* Furthermore, the court must be persuaded by clear and convincing proof that the proposed conservatee would otherwise qualify as one for whom a conservator may be appointed pursuant to § 77.01. *In re Condon*, 118 Misc. 2d 544, 545, 461 N.Y.S.2d 181, 182 (Sur. Ct. Bronx County 1983) (stated purpose of section is "to avoid delay from the need to commence proceedings in different courts where a party interested in an estate resides in the county where the estate is pending and requires a conservator").

20. Section 77.01(1) of the New York Mental Hygiene Law provides, in relevant part:

The supreme court, and the county courts outside the city of New York, if satisfied by clear and convincing proof . . . shall have the power to appoint one or more conservators of the property (a) for a resident who has not been judicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs, or other cause, has suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support, or (b) for a nonresident of the state for whom a conservator of his property, by whatever name designated, has been appointed pursuant to the laws of any other state, territory, or country in which he resides. Such person for whom a conservator is appointed is hereinafter designated as the "conservatee."

N.Y. MENTAL HYG. LAW § 77.01(1) (McKinney Supp. 1986). See also Memorandum of Joint Legislative Comm. on Mental and Physical Handicap, reprinted in 1972 N.Y. Laws 3277, 3290 [hereinafter cited as Joint Legislative Memo].

21. See N.Y. MENTAL HYG. LAW § 77.01(1) (McKinney Supp. 1986); *id.* § 77.03(c) (McKinney 1978).

22. *Id.* § 77.01(1) (McKinney Supp. 1986).

23. See *id.* § 77.01(1), (3).

suffers from a particular condition that renders him substantially incapable of managing his property or supporting himself or his dependents.²⁴ The following examples help illustrate situations in which the condition of the proposed conservatee is such that the appointment of a conservator would provide the appropriate remedy to be applied by the court:

1. Ms. M., a widow in her eighties, lives in a single room in a senior citizen hotel. She has become completely blind and refuses to sign withdrawal slips that would enable a close friend to withdraw money from her bank account to meet those expenses not covered by her monthly Social Security check. Before she became blind, Ms. M. regularly signed withdrawal slips for this purpose, but now fears losing her life-long savings. Ms. M. has no relatives and no other close friends. A social agency is working with Ms. M.

2. Q., a permanently retarded and multiply handicapped child²⁵ won a 1.6 million dollar judgment in a medical malpractice action. The child's mother had no experience in handling large sums of money, and thus requested guardianship, or, in the alternative, conservatorship of her child.

3. Mr. Y.,²⁶ an eighty-six-year-old art dealer, became ill, and is now hospitalized in a vegetative state. He has children from a prior marriage and a healthy second wife. Mr. Y.'s wife wishes to care for him and to continue his business.

24. See *id.* § 77.01(1). Such incapacities include advanced age, illness, infirmity, mental illness, alcohol abuse, addiction to drugs or other conditions substantially impairing the individual's ability to care for himself and his property or for those dependent upon him for support. See *id.*; see also *In re Waxman*, 96 A.D.2d 906, 907, 466 N.Y.S.2d 85, 87 (2d Dep't 1983) (petitioner's application failed to meet clear and convincing test); *In re Forward*, 86 A.D.2d 850, 851, 447 N.Y.S.2d 286, 287 (2d Dep't 1982) (despite proposed conservatee's substantial impairment, her prior creation of irrevocable trust was sufficient to care for her property, so that appointment of conservator was unwarranted); *In re Bailey*, 46 A.D.2d 945, 946, 362 N.Y.S.2d 226, 227 (3d Dep't 1974) (evidence that proposed conservatee was 88 years old and likely to need continued hospital care for extended period was not of itself a condition rendering him substantially incapable of managing his property and thus, in need of conservator).

25. See *In re Ramos*, 111 Misc. 2d 1078, 445 N.Y.S.2d 891 (Sup. Ct. Bronx County 1981). In denying the mother's petition to be appointed sole conservator, the court noted the sizeable amount of money involved, the mother's inexperience in financial matters and the overriding importance of protecting the conservatee's interests from improper management. *Id.* at 1079, 445 N.Y.S.2d at 892. Accordingly, the court appointed a co-conservator "having the requisite business or financial acumen." *Id.*

26. See *In re Salz*, 80 A.D.2d 769, 436 N.Y.S.2d 713 (1st Dep't 1981) (although not wholly satisfied with the appointment of the wife as conservator, and not allowing her to continue conservatee's business, court nonetheless appointed her).

4. Ms. A.²⁷ is an elderly woman with approximately \$500,000 in assets. She has no surviving husband or children. Her nearest relatives are a nephew residing in the United States and a cousin residing in the Federal Republic of Germany. Ms. A. currently resides in a nursing home, where she is confined to a bed or a chair. She must be restrained because of her weakness, lack of sense of orientation and incontinence. She will sign checks when they are presented to her, but does not remember for whom she signed the checks, the amounts of the checks or the purpose to which the money was to be put. Ms. A.'s nephew is concerned for her welfare.

5. Ms. F.,²⁸ a sixty-three-year-old widow, was found wandering the streets of New York City. She was suffering from malnutrition and dehydration, and was in need of surgery. Her assets totaled over \$2,000,000, but portions of her real estate holdings were on the verge of being lost through tax foreclosures. Ms. F.'s only known relatives are cousins, one of whom is willing to take care of her.

While the foregoing situations are as diverse as the individuals involved in each, the common element in each case is that the proposed conservatee is either entitled to income, or is in possession of assets that he, because of a physical or mental ailment, can no longer properly manage and protect. Also, in each case, an agency or person, whether or not a family member or friend, is available to take responsibility for caring for the personal well-being of the individual and his property. As discussed below, in all of these examples, conservatorship provides the most appropriate remedy because it most effectively protects the interests of the proposed conservatee.²⁹

A conservator must not only manage the assets the court places under conservatorship, but must also be responsible for implementing a court-approved plan for the conservatee's "personal well-being, including the provision of necessary personal and social protective services to the conservatee."³⁰ Thus, a conservator's obligation is

27. See *In re Alden*, 90 Misc. 2d 278, 394 N.Y.S.2d 338 (Sup. Ct. N.Y. County 1976) (conservator appointed).

28. See *In re Bauer*, 96 Misc. 2d 40, 408 N.Y.S.2d 649 (Sup. Ct. N.Y. County 1978) (size and complexity of proposed conservatee's holdings required appointment of co-conservators).

29. See *infra* notes 19-63 and accompanying text.

30. See N.Y. MENTAL HYG. LAW § 77.19(3) (McKinney 1978). The scope of a conservator's duties was broadened in 1974 when the New York Legislature amended § 77.19 to provide that in the appointment of a conservator, a court-approved plan for the preservation and maintenance of both the conservatee's assets and personal well-being must exist. See *Bauer*, 96 Misc. 2d at 43, 408 N.Y.S.2d at 651.

not only to ensure that someone attends to the conservatee's daily needs.³¹ The court may empower a conservator to do such things as hire a housekeeper, and ensure that the refrigerator is stocked, that the utilities are working, and that medical, nursing and social services are properly delivered. Thus, the conservator performs the vital service of assisting the conservatee in remaining in his home or community, unneglected and unforgotten, and of allowing the conservatee to retain, to the extent possible, his or her sense of importance, dignity and well-being.

An example of the obligations of the conservator, and of the benefits conservatorship can provide, are illustrated by the following hypothetical. Ms. R., an active woman in her seventies, was living in a housing development owned by the New York City Housing Authority when she had a cerebral vascular accident (stroke). The stroke resulted in incontinence, an inability to walk, and a slight loss of memory. Under the auspices of a social welfare agency, Ms. R. entered a hospital. After she no longer required acute care, Ms. R. entered a health-care facility for rehabilitation. Ms. R.'s assets consisted of a monthly income of \$294, and \$63,000 in savings. She had no close relatives. After the court appointed the social welfare agency as conservator, and as soon as she had recovered sufficiently, Ms. R. returned to her home. The conservator made possible her return home by hiring a full-time attendant (twenty-four hours a day, seven days a week) and purchasing a walker, easy chair, color television, clothing and linens for Ms. R.

Although this hypothetical indicates that a conservator may take extensive actions, a court may either limit or extend a conservator's powers as the circumstances dictate.³² To the extent the court order appointing the conservator permits, the contracts, conveyances and dispositions the conservatee makes may be voidable by the conservator.³³ A court may empower a conservator to manage the

31. See N.Y. MENTAL HYG. LAW § 77.19 (McKinney 1978); see also *Bauer*, 96 Misc. 2d at 43, 408 N.Y.S.2d at 651 ("The Legislature broadened the scope of the conservators and provided that the court set forth a court approved plan for the preservation, maintenance and care of conservatee's assets and personal well-being").

32. See N.Y. MENTAL HYG. LAW § 77.19 (McKinney 1978); see also *In re Salz*, 80 A.D.2d 769, 436 N.Y.S.2d 713 (1st Dep't 1981) (conservator's permission to manage art gallery limited). See generally UNIF. PROB. CODE § 5-426 official comment (1968) (conservator's powers may not only be limited but may be expanded by court, so conservator may be given as much discretion as court deems necessary).

33. See N.Y. MENTAL HYG. LAW § 77.25(d) (McKinney Supp. 1986); Rohan, *Caring for Persons Under a Disability: A Critique of the Role of the Conservator and the "Substitution of Judgment Doctrine"*, 52 ST. JOHN'S L. REV. 1, 12 (1977)

conservatee's business, and may also limit the conservator's management powers over the business. For instance, the conservator may manage an art gallery, but have permission only to sell, not to purchase, works of art.³⁴ If the conservatee is the beneficiary of another's will, a court may empower the conservator to renounce the legacy, unless the renunciation would be to the detriment of the conservatee, such as when a renunciation could result in a termination of Medicaid benefits under the state's transfer of assets legislation.³⁵

A conservator is a fiduciary, whose responsibility is "to function as agent of the court in the exercise of the latter's jurisdiction over the . . . [conservatee] and his property."³⁶ As a fiduciary, the conservator owes a duty of loyalty to the conservatee.³⁷ Thus, a conflict of interest between the conservator and conservatee may prevent the fiduciary from responsibly and loyally exercising his or her duty to the conservatee.³⁸ Consequently, when the court is con-

[hereinafter cited as Rohan]. This rule should be contrasted with the law governing adjudicated incompetents, which, unlike conservatorship, renders any instruments executed by an adjudicated incompetent void *ab initio*. See *Gramatan Nat'l Bank & Trust Co. v. Lavine*, 99 N.Y.S.2d 868 (Syracuse Mun. Ct. 1950). "The law is well settled that a lunatic whose lunacy has been judicially determined, and for whom a committee has been appointed, is incapable of entering into any contract, and that any contract which he may assume to make while in that situation is absolutely void." *Id.* at 870-71 (quoting *Carter v. Beckwith*, 128 N.Y. 312, 316, 28 N.E. 582, 582 (1891)).

34. See *In re Salz*, 80 A.D.2d 769, 436 N.Y.S.2d 713 (1st Dep't 1981). The court appointed the proposed conservatee's wife as conservator but denied her request to continue managing her husband's art gallery, noting the "volatile" nature of the business and her lack of expertise. See *id.* at 769, 436 N.Y.S.2d at 714. Accordingly, the court directed an orderly disposition of the business assets. *Id.*

35. See *In re Scrivani*, 116 Misc. 2d 204, 210, 455 N.Y.S.2d 505, 510 (Sup. Ct. N.Y. County 1982) (while lawful to allow competent beneficiary to renounce an inheritance and suffer loss of Medicaid eligibility, it is not lawful for conservator to so act on behalf of incompetent conservatee without court approval). This doctrine in no way mitigates the rights of a conservatee to create a valid will if he possesses the requisite testamentary capacity. See N.Y. MENTAL HYG. LAW § 77.25(c) (McKinney 1978).

36. See *Scrivani*, 116 Misc. 2d at 210, 455 N.Y.S.2d at 510, (quoting *In re Aho*, 39 N.Y.2d 241, 246, 347 N.E.2d 647, 650, 383 N.Y.S.2d 285, 288 (1975)).

37. See generally N.Y. EST. POWERS & TRUSTS LAW § 11-1.7 (McKinney 1967 & Supp. 1986) (section entitled "Fiduciaries: Powers, Duties and Limitations").

38. See *In re Brownell*, 112 Misc. 2d 719, 447 N.Y.S.2d 591 (Delaware County Ct. 1981).

The standard of care required of a fiduciary is pronounced in the prudent man rule. The issue is whether under the circumstances the fiduciary acted with such diligence and circumspection as prudent men of discretion and intelligence in such matters generally employ in their own like affairs to seek a reasonable income and preservation of their capital.

Id. at 721, 447 N.Y.S.2d at 594.

sidering the appointment of a person as conservator, that person "should scrupulously disclose any potential conflict."³⁹

Conservators are personal fiduciaries and, therefore, close relatives or friends of the conservatee are often chosen for the position.⁴⁰ Because of this relationship, the conservator is often a distributee or legatee of the conservatee, "and thus may have pecuniary interest in the results [of this decision]."⁴¹ In this situation, a court may appoint co-conservators,⁴² one of whom is a close relative or friend but who has a potential conflict of interest, and the other of whom is without the potential conflict.⁴³ Since the appointment of co-conservators subjects the conservatee's estate to double fees,⁴⁴ courts may impose this option only when one or both of the proposed conservators waives the fee, or when the estate is large.⁴⁵ Courts usually will not appoint a stranger to the family of the conservatee unless it is impossible to find a qualified conservator within the family or its nominees.⁴⁶

As a fiduciary, a conservator may not fix his or her own compensation.⁴⁷

39. *Scrivani*, 116 Misc. 2d at 211, 455 N.Y.S.2d at 511.

40. *In re Chitty*, 65 A.D.2d 795, 410 N.Y.S.2d 311 (2d Dep't 1978) (normally preferable to appoint family member as conservator).

41. *Scrivani*, 116 Misc. 2d at 211, 455 N.Y.S.2d at 511; *Chitty*, 65 A.D.2d at 795, 410 N.Y.S.2d at 311 (courts will prefer to appoint family members as conservators).

42. See N.Y. MENTAL HYG. LAW § 77.01(1) (McKinney Supp. 1986) (courts "shall have the power to appoint one or more conservators").

43. *In re Gorman*, 77 Misc. 2d 564, 354 N.Y.S.2d 578 (Sup. Ct. Onondaga County 1974) (courts must deny appointment of conservator who has adverse interest to proposed conservatee, and must afford no weight to familial relation).

44. *In re Fein*, 72 A.D.2d 683, 421 N.Y.S.2d 222 (1st Dep't 1979) (when potential conflict of interest exists between proposed conservatee and conservator, proper to appoint co-conservator).

45. See, e.g., *In re Ramos*, 111 Misc. 2d 1078, 445 N.Y.S.2d 891 (Sup. Ct. Bronx County 1981) (\$1.6 million award to mentally retarded boy; conservator appointed).

46. See, e.g., *In re Fein*, 72 A.D.2d 683, 684, 421 N.Y.S.2d 222, 223 (1st Dep't 1979) (no violation of court's discretion to appoint stranger when no qualified member or friend was eligible to serve); *In re Chitty*, 65 A.D.2d 795, 797, 410 N.Y.S.2d 311, 313 (2d Dep't 1978) (although preferable to appoint family member as conservator, court could appoint stranger); *In re Kaufman*, 114 Misc. 2d 1078, 1079-80, 453 N.Y.S.2d 304, 305 (Sup. Ct. Bronx County 1982) (not contrary to public policy for court to appoint a stranger as conservator when no family member or friend available to serve as such).

47. See *In re Brownell*, 112 Misc. 2d 719, 721, 447 N.Y.S.2d 591, 593-94 (Delaware County Ct. 1981). In *Brownell*, fees paid to the conservator for taking care of the conservatee's dog were not set by the court but, rather, by the conservator himself. *Id.* at 721, 447 N.Y.S.2d at 594. The court stated that the setting of compensation or fees to be received, if done by the conservator himself, constitutes

That sum is to be fixed by the court.⁴⁸ If the conservator does overcompensate himself, the court may impose a surcharge for that amount.⁴⁹ An absolute rule prohibits self-dealing by fiduciaries and, even if no fraud was committed, the court may impose a surcharge for self-dealing.⁵⁰ The courts impose the surcharge to avoid any possibility of conflict of interest or fraud.⁵¹

In addition to the common law obligations placed on fiduciaries in general, the conservatorship statute has requirements protecting the conservatee from potential self-dealing by the conservator. First, a conservator must post a bond to protect the conservatee's assets,⁵² although a conservator may request that the court waive this requirement.⁵³ In addition, the conservator must file an annual inventory and account with the court, detailing the income, assets, disbursements and status of the conservatorship.⁵⁴ This reporting requirement further mandates that the conservator include an indication of the conservatee's personal well-being; the conservator's plan for maintaining the conservatee's well-being; and a statement of the need for the continuance or discontinuance of the conservatorship or for any alteration in the powers of the conservator.⁵⁵

Conservatorship alone cannot deprive, modify or vary a conservatee's civil rights.⁵⁶ A conservator may not interfere with a con-

self-dealing. *Id.* The court held that, "prohibition against self-dealing does not depend upon any question of fraud, but is an absolute rule made to avoid the possibility of fraud and self-interest." *Id.* 112 Misc. 2d at 721, 447 N.Y.S.2d at 594 (citing *In re Ryan*, 291 N.Y. 376, 405-06, 52 N.E.2d 909, 922-23 (1943)).

48. See N.Y. MENTAL HYG. LAW § 77.27 (McKinney 1978). The court should fix the conservator's compensation at the time it appoints the conservator. See *id.*; see also *Brownell*, 112 Misc. 2d at 720, 447 N.Y.S.2d at 593.

49. See *Brownell*, 112 Misc. 2d at 721, 447 N.Y.S.2d at 594. In *Brownell*, in which the conservator had set her own compensation for the care of the conservatee's dog, the court surcharged the conservator for the amount in excess of the amount the court set as the reasonable fee. See *id.* The amount of the surcharge will vary with the circumstances. See *id.* If the breach of duty is willful or done in bad faith, the highest rate of interest should be charged, but if done in good faith or by honest mistake, it will be in the court's discretion as to the proper surcharge. See *id.*

50. See *supra* note 49 and accompanying text.

51. *Id.*

52. N.Y. MENTAL HYG. LAW § 77.13 (McKinney 1978). Before a conservator undertakes to perform, he must post a bond as security that he will faithfully discharge his responsibilities. *Id.*; see *infra* notes 227-28 and accompanying text.

53. N.Y. MENTAL HYG. LAW § 77.13 (McKinney 1978).

54. See *id.* § 77.29; see also *infra* notes 258-64 and accompanying text.

55. See N.Y. MENTAL HYG. LAW § 77.29 (McKinney 1978).

56. See N.Y. MENTAL HYG. LAW § 77.25(a) (McKinney 1978). The mere appointment of conservatorship does not deprive the conservatee of any civil right, nor may it be used as evidence in an incompetency hearing. See *Rohan, supra* note 33, at 12.

servatee's freedom of movement.⁵⁷ Since a conservatee retains title to his property, a conservator may not sell or otherwise dispose of the property without court approval.⁵⁸ Neither does conservatorship limit the conservatee's powers to dispose of his property by will, if the conservatee has the requisite testamentary capacity.⁵⁹

Thus, the doctrine of conservatorship provides a comprehensive device to serve the interests of impaired, but not yet judicially declared incompetent, individuals.⁶⁰ Equally important to this comprehensive scope of conservatorship, however, are the flexible built-in protections against abuse that the statutes provide. These protections include the court's ability to limit the authority of the conservator to act,⁶¹ the fiduciary nature of the conservator-conservatee relationship⁶² and the retention of fundamental rights by the conservatee.⁶³

III. Legislative History of Conservatorship in New York

While the concept of conservatorship described above⁶⁴ has in some form existed in the United States since the late 1800's,⁶⁵ New York did not enact a conservatorship statute until 1972.⁶⁶ The mo-

57. See N.Y. MENTAL HYG. LAW § 77.25(a); Rohan, *supra* note 33, at 12. *But see* Gibbs v. Berger, 59 A.D.2d 282, 286, 399 N.Y.S.2d 304, 307 (3d Dep't 1977) ("a conservator, who is a close and appropriate relative with natural instincts of acting in the best behalf of . . . [his comatose daughter] may, without court order, change the . . . domicile [of the conservatee], if done in good faith and in the best interests of the conservatee").

58. N.Y. MENTAL HYG. LAW § 77.25(e) (McKinney Supp. 1986).

59. See *id.* § 77.25(c) (McKinney 1978); see also *In re Niner*, 126 Misc. 2d 1097, 484 N.Y.S.2d 997 (Sur. Ct. N.Y. County 1984). "There are very substantial differences in law as well as in fact between adjudicated incompetents and conservatees . . . Conservatees will more often be found to have the mental capacity to make a will." *Id.* at 1100, 484 N.Y.S.2d at 999-1000; Rohan, *supra* note 33, at 12; see *supra* note 35.

60. N.Y. MENTAL HYG. LAW § 77.01(1) (McKinney Supp. 1986).

61. See *id.* § 77.19 (McKinney 1978).

62. See *supra* note 38 and accompanying text.

63. N.Y. MENTAL HYG. LAW § 77.25(a) (McKinney 1978).

64. See *supra* notes 19-63 and accompanying text.

65. See Rohan, *supra* note 33, at 4-5. Several states in the 1890's passed legislation known as "weak-minded persons acts," which commonly provided that guardians be appointed for persons who had become incapable of managing their own property even though there had been no adjudication of incompetency. *Id.*; see, e.g., 1898 Mass. Acts ch. 527 (old age was only ground necessary for appointment of a conservator); 1899 N.H. Laws ch. 35 (only proposed conservatee could petition for appointment of conservator); 1895 Pa. Laws 220 ("an act for the protection of persons unable to care for their own property").

66. See 1972 N.Y. Laws ch. 251, at 554-59 (codified at N.Y. MENTAL HYG. LAW art. 77 (McKinney 1978 & Sup. 1986)).

tivating force behind passage of this statute, Article 77 of New York's recodified Mental Hygiene Law,⁶⁷ was the growing national recognition of the need for a simple and informal legal device to protect those of the elderly who, because of mental and physical deterioration, had lost the capacity to manage their assets, but who with some assistance were capable of functioning in the community.⁶⁸

As early as 1962, the Association of the Bar of the City of New York, in cooperation with Cornell Law School, proposed the enactment of conservatorship legislation.⁶⁹ The suggested procedure was to be both simple and flexible, providing for the appointment of a conservator for a person who had not been found incompetent, but who nevertheless was unable to manage his property or to provide for himself or his dependents.⁷⁰ The procedure was to contain safeguards to insure that conservatorship would not be imposed in violation of due process.⁷¹ It was also suggested that the court be empowered to limit or empanel the conservator's powers "to allow for continuous adjustments designed to parallel changes in the . . . [conservatee's] condition and needs."⁷² In 1966, the Law Revision Commission of the State of New York thoroughly studied this proposal.⁷³ The Commission recommended the enactment of a statute

67. N.Y. MENTAL HYG. LAW § 77.01 -.41 (McKinney 1978 & Supp. 1986).

68. See *In re Emerson*, 73 Misc. 2d 322, 325, 341 N.Y.S.2d 390, 393 (Sup. Ct. N.Y. County 1973). "[T]his development in New York reflected the general movement nationally to provide for the protective needs of the elderly and the aged through use of a conservator." *Id.*

69. See Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York, Report and Recommendations on Admissions to Mental Hospitals under New York Law, in MENTAL ILLNESS AND DUE PROCESS 212-19 (1962) [hereinafter cited as MENTAL ILLNESS AND DUE PROCESS]. The Committee recommended that provision be made for the management of the property of individuals whose mental illness was not serious enough to require hospitalization but nevertheless were incapable of effectively managing their property. *Id.* at 218-19.

70. *Id.*; See Joint Legislative Memo, *supra* note 20, at 3290. The legislature's intent in providing a simple procedure for the appointment of a conservator was to help insure that conservatorship would be readily available to those in need of it. See *In re Bauer*, 96 Misc. 2d 40, 41, 408 N.Y.S.2d 649, 650 (Sup. Ct. N.Y. County 1978).

71. See *infra* notes 173-87 and accompanying text for a discussion of notice requirements in satisfaction of due process.

72. See MENTAL ILLNESS AND DUE PROCESS, *supra* note 69, at 216; see also *supra* note 19 and accompanying text (discussing court's power to limit or extend conservator's powers as circumstances dictate).

73. See *In re Seronde*, 99 Misc. 2d 485, 490-91, 416 N.Y.S.2d 716, 720-21 (Sup. Ct. Westchester County 1979) (court discussed "Conservators of the Property of Persons Unable to Manage Their Affairs", 1966 LAW REVISION COMMISSION REPORT

similar to the suggested procedure.⁷⁴ Although a bill was introduced in a number of legislative sessions incorporating the provisions suggested by both the Association and the Commission, it failed to pass.⁷⁵ In 1972, however, a conservatorship bill became law, as part of the recodification of the New York State Mental Hygiene Law.⁷⁶ According to the Memorandum of the Joint Legislative Committee on Mental and Physical Handicap, the legislature passed the bill because:

The need [exists] for a procedure to preserve the property of persons who are unable to manage their own affairs either because of debilitating factors which create a condition falling short of incompetency or, if actual incompetency exists, where there is a disinclination to initiate a proceeding to declare such incompetency because of the stigma attached thereto⁷⁷

In 1974, the legislature amended the statute to insure that the conservator would be able to maintain the personal well-being of the conservatee, to prevent premature placement in a healthcare facility and to enable the conservatee to retain his dignity.⁷⁸ With the passage of the amendments, the conservator became more than just the conservatee's bookkeeper and investor.⁷⁹ In addition, the 1974 amendments permitted corporate bodies or public agencies to

283-340); see also *In re Emerson*, 73 Misc. 2d 322, 325, 341 N.Y.S.2d 390, 393 (Sup. Ct. N.Y. County 1973). In *Emerson*, the court acting *sua sponte* converted a competency proceeding into a conservatorship proceeding and, in so doing, set forth an analysis of the legislative history and studies that preceded conservatorship. 73 Misc. 2d at 325, 341 N.Y.S.2d at 392-93.

74. See *Seronde*, 99 Misc. 2d at 492, 416 N.Y.S.2d at 720-21; *Emerson*, 73 Misc. 2d at 325, 341 N.Y.S.2d at 392-93.

75. See *Emerson*, 73 Misc. 2d at 325, 341 N.Y.S.2d at 393.

76. *Id.*; see Joint Legislative Memo, *supra* note 20, at 3290; see also *supra* note 67 and accompanying text.

77. Joint Legislative Memo, *supra* note 20, at 3290.

78. See N.Y. MENTAL HYG. LAW § 77.19 (McKinney 1978) (powers and duties of conservators); *id.* § 77.21 (McKinney 1978) (maintenance of conservatee and persons dependent upon conservatee); *id.* § 77.23 (McKinney 1978) (allowance to conservatee); § 77.25 (McKinney 1978 & Supp. 1986) (effect of appointment on civil rights); § 77.27 (McKinney 1978) (compensation of conservators); *id.* § 77.29 (McKinney 1978) (inventory and accounting); *id.* § 77.35 (McKinney 1978) (discharge of conservator). Each of the amendments to the statute, whether expanding the powers and duties of the conservator (§ 77.19), or increasing the record keeping requirements of the conservator (§ 77.29), helped to develop the statute so that it could more readily meet the objectives of conservatorship—*i.e.*, to protect and conserve the financial and personal well-being of the substantially impaired conservatee and his dependents. See *supra* notes 64-76 and accompanying text.

79. See 1974 N.Y. Laws chs. 623-24, at 921-26.

petition the court for conservatorship and to act as conservator.⁸⁰ The conservatorship statute thus provides a less restrictive alternative⁸¹ to a judicial declaration of incompetency and the appointment of a committee, since the latter procedure strips a person of control over his property and his person while simultaneously impugning his status as an individual.⁸²

IV. Possible Alternatives to Conservatorship

While alternatives to conservatorship proceedings are available, many perceive these as inadequate.⁸³ In particular, many believe that these measures fail to meet the needs of the elderly person with a small or moderate estate who has become unable to manage his or her own affairs, whether they be personal or economic. The alternatives either provide too little support to the impaired person or authorize control over the person that is too sweeping.⁸⁴ These measures are "poorly suited to [meet the needs that arise because of] the gradual changes in capacity which occur between the full

80. See N.Y. MENTAL HYG. LAW § 77.03(e) (McKinney 1978); see also *infra* note 134 and accompanying text.

81. See Memorandum of State Executive Department on Conservators—Appointment, reprinted in 1974 N.Y. Laws 1984 [hereinafter cited as State Exec. Dep't Memo]; Governor's Annual Message, reprinted in 1974 N.Y. Laws 2063, 2074-75; see also *infra* notes 91-100 and accompanying text analyzing incompetency proceedings as an alternative to conservatorship.

82. *Emerson*, 73 Misc. 2d at 326, 341 N.Y.S.2d at 394; See Memorandum of State Exec. Dep't, *supra* note 81, at 2074-75. See *infra* notes 94-100 and accompanying text for a comparison of incompetency and conservatorship proceedings.

83. See *In re Huffard*, 85 Misc. 2d 399, 401-02, 381 N.Y.S.2d 195, 197 (Sup. Ct. N.Y. County 1976) (conservatorship statute enacted to protect ever-increasing number of elderly persons unable to manage their own personal and economic affairs). Alternatives do exist, yet none is as effective as conservatorship in meeting the needs of the proposed conservatee. See *id.* See *infra* notes 83-129 and accompanying text for an in-depth analysis of the various alternatives to conservatorship and their shortcomings.

84. None of the alternatives is as comprehensive and yet as flexible as conservatorship. Prior to enactment of section 77 of the Mental Hygiene Law, commentators stressed the need for a more flexible procedure for assisting the impaired individual. See Beattie, *Surrogate Management of the Property of the Aged*, 21 SYRACUSE L. REV. 87, 161-62 (1969) (advocating flexible system of conservatorship which takes into account conservatee's degree of incapacity) [hereinafter cited as Beattie]; see also Alexander, *The Aged Person's Right to Property*, 21 SYRACUSE L. REV. 163, 166 (1969) (calling for less intrusive means of surrogate property management) [hereinafter cited as Alexander]; cf. *In re Berman*, 61 A.D.2d 902, 902, 402 N.Y.S.2d 834, 835 (1st Dep't 1978) (court must determine appropriateness of conservatorship before appointing committee because of serious invasion of rights that results from appointment of committee); N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney Supp. 1986) (power of attorney fails to provide authority to holder in the event grantor becomes seriously impaired).

vigor of middle life and the stage we call second childhood."⁸⁵ Among the legal devices most frequently used to protect persons who are incapable of handling their personal or financial responsibilities are: (1) incompetency proceedings;⁸⁶ (2) power of attorney;⁸⁷ (3) trusts;⁸⁸ (4) guardianship;⁸⁹ and (5) substitute payee.⁹⁰

A. Incompetency Proceedings

Incompetency proceedings may be commenced when a person "is incompetent to manage himself or his affairs . . . or is a patient . . . who has been lawfully committed or admitted to any facility for the mentally ill or mentally retarded"⁹¹ A court must find the person to be incompetent before it may exercise custody over the proposed incompetent's person or property.⁹² The court's exercise of custody occurs through the appointment of a committee.⁹³ The committee's protective power is usually much more extensive than that of a conservator, extending to both the person and the property of the incompetent.⁹⁴ This type of proceeding is often inappropriate for the person who retains some independence and is only partially or sporadically impaired.⁹⁵ In contrast, conservatorship provides a procedure that can be tailored to an impaired person's individual

85. Regan, *Protective Services for the Elderly: Commitment, Guardianship and Alternatives*, 13 WM. & MARY L. REV. 569, 608 (1972) [hereinafter cited as Regan]; see also Beattie, *supra* note 84, at 92 (requiring incompetence as prerequisite to guardianship fails to protect those of reasonably sound mind but who cannot manage their own affairs due to old age or physical infirmity); Alexander, *supra* note 84, at 166 (many older people suffer merely from memory loss and lack of familiarity with legal system without actual loss of their mental faculties).

86. N.Y. MENTAL HYG. LAW art. 78 (McKinney 1978 & Supp. 1986) (committee of incompetent or patient).

87. N.Y. GEN. OBLIG. LAW § 5-1501-1601 (McKinney 1978 & Supp. 1986) (power of attorney).

88. N.Y. EST. POWERS & TRUSTS LAW § 7-2.1 (McKinney Supp. 1986) (creation of trusts).

89. N.Y. Surr. Ct. Proc. Act § 1701 (McKinney Supp. 1986) (guardianship).

90. See, e.g., 42 U.S.C. § 405(j) (1982) (substitute payment of federal old-age, survivors and disability insurance); 38 U.S.C. §§ 3202-03 (1982) (substitute payment of Veteran's Administration benefits). For a discussion of each of these alternatives, see *infra* notes 91-129 and accompanying text.

91. N.Y. MENTAL HYG. LAW § 78.01 (McKinney Supp. 1986).

92. *Id.*

93. See *id.* (in exercising such control, court may appoint committee of person or property of incompetent).

94. See *id.* The court may appoint both a committee of the person and a committee of the property of the incompetent, composed of either the same or different individuals. *Id.*

95. For examples of situations where the remedy of conservatorship is the most appropriate, see *supra* notes 25-29 and accompanying text.

capacities while still allowing the person to retain control over those decisions that he is capable of making.⁹⁶ Furthermore, conservatorship provides a flexible and uncomplicated procedure for those other than the elderly who suffer from mental or physical disabilities that partially but significantly impair their ability to manage their assets or to support themselves or their dependents.⁹⁷ In fact, New York State requires that before a court makes a finding of incompetency and appoints a committee, it must first determine if the interests of the person would be better served by a finding of substantial impairment and the appointment of a conservator.⁹⁸ While it is true that the "designation of a conservator is [itself viewed as] a serious invasion of a fundamental right to use and enjoy property as one sees fit,"⁹⁹ the State prefers the more limited proceeding of conservatorship to an incompetency proceeding because the latter has more of a tendency to "strip a person of control over both his person and his property, and is more subject to abuse."¹⁰⁰

B. Power of Attorney

The power of attorney¹⁰¹ is the simplest, cheapest and quickest legal device for the management of another's affairs.¹⁰² The power

96. See Regan, *supra* note 85 and accompanying text. For a general discussion of the doctrine of conservatorship, see *supra* notes 5-39.

97. See Regan, *supra* note 85; see also *In re Emerson*, 73 Misc. 2d at 325, 341 N.Y.S.2d at 393. The simple and informal procedure of appointing a conservator provides a chance to retain some usefulness in the community for those individuals who cannot fully handle their affairs but whose condition is not serious enough to warrant institutionalization. *Id.* at 324, 341 N.Y.S.2d at 392.

98. See N.Y. MENTAL HYG. LAW § 78.02 (McKinney 1978) ("[p]rior to the appointment of a committee under this article it shall be the duty of the court to consider whether the interests sought to be protected could best be served by the appointment of a conservator"); see *In re Seronde*, 99 Misc. 2d 485, 490, 416 N.Y.S.2d 716, 723 (Sup. Ct. Westchester County 1979); *Whiting v. Marine Midland Bank*, 80 Misc. 2d 871, 885, 365 N.Y.S.2d 628, 642 (Sup. Ct. Chataaugus County 1975) (discussing 1974 legislative amendments creating requirement of preference for conservatorship).

99. *In re Berman*, 61 A.D.2d 902, 902, 402 N.Y.S.2d 834, 835 (1st Dept. 1978). See also *Seronde*, 99 Misc. 2d at 491, 416 N.Y.S.2d at 723 (preference for conservatorship because less intrusive than commitment); *Whiting*, 80 Misc. 2d at 885, 365 N.Y.S.2d at 642 (declaration of incompetence strips person of control of both his person and property, conservatorship is less intrusive and does not carry stigma of incompetency).

100. State Exec. Dep't Memo, *supra* note 81, at 1984; see also *supra* notes 97-99 and accompanying text.

101. See N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney Supp. 1986) (creating statutory device of "power of attorney").

102. "Because of its simplicity and the availability of several standard versions,

of attorney is a written agreement by which one person (the principal) authorizes another to sign documents and conduct transactions on his behalf as agent.¹⁰³ The principal may authorize the other to do as much or as little as the agreement provides, and may terminate the power when he chooses.¹⁰⁴ In order for the power of attorney to survive the disability of the principal, however, the agreement must expressly include such a provision.¹⁰⁵

When the principal includes such a provision in the agreement, the power of attorney is said to be "durable."¹⁰⁶ A nondurable power of attorney is revoked by the subsequent disability of the principal and hence is of little use to impaired persons.¹⁰⁷ While the durable power of attorney is exercisable after disability overtakes the principal, a person who already lacks mental competency cannot create the power of attorney.¹⁰⁸ Thus, if mental competence has begun to fade, a power of attorney is an inappropriate alternative to conservatorship, especially since a court may nullify the agent's transactions if it finds that the principal lacked the capacity to contract at the time he created the power of attorney.¹⁰⁹ Moreover, the existence of a valid and effective durable power of attorney does not preclude the possibility that the court will need to appoint a conservator or a committee.¹¹⁰

the power of attorney will also cost little to prepare." Callahan, *The Use of a Convertible Trust in Planning for Disability*, 53 N.Y. ST. B.J. 422, 424 (1981) [hereinafter cited as Callahan].

103. See, e.g., N.Y. GEN. OBLIG. LAW §§ 5-1501 to -03 (McKinney 1978 & Supp. 1986).

104. *Zaubler v. Picone*, 100 A.D.2d 620, 473 N.Y.S.2d 580 (2d Dep't 1984) (authority of attorney in fact may be revoked at any time by principal either expressly or impliedly through words or actions inconsistent with continuation of authority).

105. See N.Y. GEN. OBLIG. LAW § 5-1601 (McKinney 1978) (powers of attorney which survive disability or incompetence).

106. See *id.*

107. See *id.*; see also Callahan, *supra* note 102, at 422-24. Once a person becomes impaired, any previously delegated authority is automatically revoked. *Id.* A clear definition of what constitutes disability should be written into the instrument when drafted. *Id.* at 425.

108. N.Y. GEN. OBLIG. LAW § 5-1601 (McKinney Supp. 1986); see also Wittkugel v. State, 5 Misc. 2d 886, 889, 160 N.Y.S.2d 242, 245 (Ct. Cl. 1957), *aff'd mem.*, 5 A.D.2d 958, 172 N.Y.S.2d 576 (4th Dep't 1958) (person lacking in mental capacity cannot create any power of attorney, durable or not).

109. N.Y. GEN. OBLIG. LAW § 5-1601 (McKinney Supp. 1986).

110. N.Y. GEN. OBLIG. LAW § 5-1601(2) (McKinney 1978). The existence of both a power of attorney and a conservatorship over an individual may be concurrent. *Id.*; see also Callahan, *supra* note 102, at 425. The legal devices of power of attorney and conservatorship are not necessarily mutually exclusive. *Id.*

C. *Inter Vivos* Trust

A third alternative to conservatorship is the *inter vivos* trust.¹¹¹ This alternative allows a person who wishes to guard against future disability to create a fund to be administered by a trustee.¹¹² The trustee also has a legal title to the fund,¹¹³ for the benefit of the creator and any other persons whom the creator desires to be protected.¹¹⁴ A trustee is subject to strict fiduciary duties and limitations by statute.¹¹⁵ The drafting and tax considerations make the procedure for creating such a trust fairly complicated, expensive and time-consuming.¹¹⁶ As a result, affluent persons use this alternative most often, and usually set it up before disability strikes. The applicability of this procedure is thus severely limited. When such a trust has been created, however, it has been held to obviate the need for conservatorship.¹¹⁷

D. Guardianship

Guardianship is another device by which a court may appoint an individual to take control of the person or property of one who is legally incapacitated.¹¹⁸ In New York State, however, this measure is confined to the protection of infants (those under eighteen)¹¹⁹ and the

111. See, e.g., *In re Forward*, 86 A.D.2d 850, 851, 447 N.Y.S.2d 286, 287 (2d Dep't 1982) (when *inter vivos* irrevocable trust had been created, no need for the appointment of conservator); Callahan, *supra* note 102, at 426-28 (suggesting that creator set up revocable trust that would automatically convert to irrevocable trust upon disability, and thus could operate to creditor's benefit, eliminating need for conservator).

112. N.Y. EST. POWERS & TRUSTS LAW § 7-2.1(b) (McKinney 1978) ("an express trust vests in the trustee the legal estate, subject only to the execution of the trust").

113. See *id.*

114. See *id.* ("[t]his section does not prevent the creator of a trust from providing to whom the property shall belong").

115. See *id.* § 11-2.1(a). Article II of the New York Estates Powers & Trusts Law sets forth the duties and powers of a trustee and defines the nature of the trust relationship. *Id.*

116. See generally N.Y. EST. POWERS & TRUSTS LAW §§ 11-1.1 to -4.6 (McKinney 1967 & Supp. 1986).

117. See *Forward*, 86 A.D.2d at 851, 447 N.Y.S.2d at 827 (no need for appointment of conservator for 88-year-old woman who had executed irrevocable trust).

118. See N.Y. Surr. Ct. Proc. Act §§ 1701-55 (McKinney 1967 & Supp. 1986).

119. See *id.* § 1701 (McKinney Supp. 1986) (power of court to appoint guardian for infant).

mentally retarded.¹²⁰ Thus, while guardianship may in some ways be analogous to conservatorship, in that it may be tailored to suit the needs and abilities of certain protected individuals,¹²¹ it is dissimilar to conservatorship, as its protective effects are directed at a narrower group of people.

E. Guardian Ad Litem

This type of guardian is appointed by a court to safeguard the rights of another during particular litigation. The appointment of the guardian *ad litem* terminates at the end of the litigation for which the guardian was appointed.¹²² Thus, a guardian *ad litem* is also an inappropriate remedy for long-term comprehensive assistance to an impaired person.

F. Substitute Payee

The substitute payee is a fairly simple device by which third parties may receive funds disbursed by certain governmental agencies which the impaired individual would normally receive.¹²³ Utility companies, banks and insurance companies may also have procedures for third-party payments, special deposit accounts and signature cards.¹²⁴ Evidence of mental incompetence on the part of the person for whom they are made may invalidate these latter arrangements.¹²⁵

120. See *id.* § 1750 (McKinney Supp. 1986). In the case of the mentally retarded, guardianship may be imposed when the person is a minor or an adult. *Id.* If it is imposed on a minor, it may be extended into the person's majority in either "limited" or "full" form. *Id.* §§ 1750-52. A limited guardian is appointed for a mentally retarded adult who is substantially self-supporting but who has certain property which needs to be managed. *Id.* § 1751. The limited guardian's authority is "limited" to managing only the specified property. *Id.*

Full guardianship may be imposed upon a mentally retarded adult and may only be continued in those instances in which the retarded person is completely unable to manage himself or his affairs or both. See *id.* §§ 1750, 1752. One New York court, however, refused to grant full guardianship to the mother of a mentally retarded infant who won a \$1.6 million judgment in a medical malpractice case, stating that the personal and financial well-being of the child was better served by conservatorship. *In re Ramos*, 111 Misc. 2d 1078, 445 N.Y.S.2d 891 (Sup. Ct. Bronx County 1981).

121. See *supra* note 120.

122. N.Y. CIV. PRAC. LAW & RULES § 1202 (McKinney 1976 & Supp. 1986).

123. See, e.g., 42 U.S.C. § 405(j) (1982) (veteran's benefits); 38 U.S.C. §§ 3202-03 (1982) (social security benefits). See generally Regan, *supra* note 85, at 612 (discussing protective services for elderly).

124. See N.Y. BANKING LAW § 134 (McKinney 1971 & Supp. 1986) (third party payments by banks, etc. permitted but invalidated by incompetence of principal).

125. See *id.*

Such incapacity is, however, the basis for the appointment of substitute payees by government agencies.¹²⁶ This type of arrangement is only a piecemeal solution for those persons who need "[a]n effective long-term care system,"¹²⁷ which may require nursing services, in-home assistance and supplemental community-based services such as the provision of meals and other assistance for personal care and mobility¹²⁸ as well as the management of assets.

Thus, while some alternatives purport to achieve the same objectives as conservatorship, none is as effective, comprehensive and flexible.¹²⁹ Consequently, none of these alternatives is better suited than conservatorship to provide the badly needed long-term care services and protection required by individuals who have become incapable of handling their own personal or financial responsibilities.

V. The Process of Appointing Conservators

A. Who Can Petition for Conservatorship?

New York's conservatorship statute provides that a special proceeding for the appointment of a conservator may be initiated by: (1) the proposed conservatee; (2) a relative or a friend concerned about the financial and personal well-being of the proposed conservatee; or (3) the officer in charge of a hospital or school in which the proposed conservatee is a patient or from which he receives services.¹³⁰ The statute defines "friend" to include: (1) a corporate body; (2) a public agency; or (3) a social services official where the conservatee resides, regardless of whether the proposed conservatee receives public assistance.¹³¹

Physicians, hospitals, social workers, landlords, family attorneys and neighbors have all brought petitions.¹³² Thus, almost anyone who comes in contact with a person who needs the benefit of this

126. See Regan, *supra* note 85, at 612-13 for a discussion of substitute payees.

127. See *supra* notes 1-4 and accompanying text.

128. See American College, *supra* note 1, at 19, col. 2.

129. See *supra* notes 83-90 and accompanying text for a discussion of the flexibility of conservatorship.

130. N.Y. MENTAL HYG. LAW § 77.03(a) (McKinney 1978).

131. See *id.*

132. See, e.g., *In re Lyon*, 52 A.D.2d 847, 382 N.Y.S.2d 833 (2d Dep't 1976), *aff'd*, 41 N.Y.2d 1056, 364 N.E.2d 847, 396 N.Y.S.2d 183 (1977) (friends); *In re Bauer*, 96 Misc. 2d 40, 408 N.Y.S.2d 649 (Sup. Ct. N.Y. County 1978) (social agency); *In re Powers*, 84 Misc. 2d 1044, 376 N.Y.S.2d 404 (Sup. Ct. Monroe County 1975) (family attorney).

legislation may petition for the appointment of a conservator. Most cases under the conservatorship statute have been brought by relatives, friends and social agencies who have found elderly persons in disparate situations needing vital services which they could afford but could not secure for themselves.¹³³ Very few cases have been brought directly by proposed conservatees requesting the court to appoint a conservator for them. This is probably a result of the fact that most people rarely admit, even to themselves, that they have reached a point at which they need help to manage their everyday chores or to prevent others from taking advantage of them.

B. Who May Be Appointed a Conservator?

The statute provides that "[a]ny relative or friend of the proposed conservatee, including a corporate body, social services official, or public agency authorized to act in such capacity which has a concern for the financial and personal well-being of the proposed conservatee, may be appointed as conservator."¹³⁴

While the courts clearly prefer to appoint family members or the nominee of the family of the proposed conservatee as conservator,¹³⁵ appointment will often be denied to a nominated conservator who has a conflict of interest with the conservatee, and the amount of

133. See *supra* note 132.

134. N.Y. MENTAL HYG. LAW § 77.03(e) (McKinney 1978). See, e.g., *In re Salz*, 80 A.D.2d 769, 436 N.Y.S.2d 713 (1st Dep't 1981) (relative); *In re Kaufman*, 114 Misc. 2d 1078, 453 N.Y.S.2d 304 (Sup. Ct. Bronx County 1982) (city department of social services not prohibited from serving as conservator).

New York courts have split on the issue of whether a bank may serve as conservator. While at least one case has held that the legislature never intended banks to be eligible to serve as conservators, *In re Huffard*, 85 Misc. 2d 399, 400, 381 N.Y.S.2d 195, 197 (Sup. Ct. N.Y. County 1976), the overwhelming majority of decisions have held otherwise. See, e.g., *In re Bailey*, 46 A.D.2d 945, 946, 362 N.Y.S.2d 226, 227 (3d Dep't 1974) (while it was held that no conservator was warranted, status of bank as conservator was not questioned); *In re Gorman*, 77 Misc. 2d 564, 565, 354 N.Y.S.2d 578, 579-80 (sup. Ct. Onondaga County 1974) (bank appointed as conservator when son disqualified due to conflict of interest); see also *In re Seronde*, 99 Misc. 2d 485, 496, 416 N.Y.S.2d 716, 724 (Sup. Ct. Westchester County 1979) (court concluded that bank could serve as conservator based upon either the fact that bank is "corporate body" as provided in § 77.03(a) or that bank is "statutorily recognized fiduciary"). "The propriety of [the] appointment [of a bank as conservator] has been sustained or not questioned in the overwhelming majority of cases that have been reported." *Seronde*, 99 Misc. 2d at 496, 416 N.Y.S.2d at 724 (citations omitted).

135. See, e.g., *In re Chitty*, 65 A.D.2d 795, 795, 410 N.Y.S.2d 311, 311 (2d Dep't 1978) (court appointed stranger as conservator but noted that always preferable to appoint family member); *Pierson v. Nachwalter*, 53 A.D.2d 846, 846, 385 N.Y.S.2d 787, 788 (1st Dep't 1976) (strangers should not be appointed unless it is impossible to find friend or relative qualified to serve).

family devotion or friendship will not outweigh this judgment.¹³⁶ When this conflict can be ameliorated by the appointment of co-conservators, courts may opt for this alternative, but often only if one or both of the nominees waives fees. Courts do not look kindly on appointments that will subject the conservatee's estate to the burden of extra fees.¹³⁷ It should be noted, however, that "rancor between family members often begets the appointment of strangers"¹³⁸ as conservators. The court's foremost duty is to appoint a conservator who will best serve the interests of the conservatee.¹³⁹

It is important to remember that the person petitioning the court for the appointment of a conservator need not make himself available to act as conservator.¹⁴⁰ The petitioner and the conservator are independent of one another.¹⁴¹ The petitioner may nominate himself or another as conservator.¹⁴² The court will appoint whoever will best serve the interests of the conservatee.¹⁴³ Professionals working with impaired people, especially the elderly, should understand that while they may petition for conservatorship, they do not also have to serve as conservator. When the petitioner has failed to nominate anyone to serve as conservator, and the court finds that conservatorship should be imposed, the court will appoint a volunteer.¹⁴⁴ The

136. See, e.g., *Gorman*, 77 Misc. 2d at 565, 354 N.Y.S.2d at 579 (son disqualified because of adverse interest to conservatee created by son's status as remainderman of trust).

137. See *Pierson*, 53 A.D.2d at 846, 385 N.Y.S.2d at 788 (1st Dep't 1976) (court will not appoint strangers as conservators unless it is impossible to find qualified individual within the family or their nominees to serve).

138. *In re Noel*, 92 A.D.2d 1053, 1054, 461 N.Y.S.2d 536, 537 (3d Dep't 1983) (court, noting dissension between beneficiaries under the proposed conservatee's will, appointed the proposed conservatee's sister who had considerable investment experience as conservator, rather than a stranger).

139. See *Scrivani*, 116 Misc. 2d 204, 206, 455 N.Y.S.2d 505, 508 (Sup. Ct. N.Y. County 1982). In appointing a conservator, the court must ensure that the ward's best interests are being protected due to the loss of freedom that comes along with appointing a representative. See *id.*; see also *Ramos*, 111 Misc. 2d 1078, 1079, 445 N.Y.S.2d 891, 892 (Sup. Ct. Bronx County 1981) (holding that it was not in best interests of retarded infant to appoint mother as conservator when infant had recovered \$1.6 million in medical malpractice action and mother had no experience in handling large sums of money).

140. See *infra* notes 173-87 and accompanying text.

141. See N.Y. MENTAL HYG. LAW § 77.03 (McKinney 1978).

142. See *id.*

143. N.Y. MENTAL HYG. LAW § 77.03(a) (McKinney 1978); see also *supra* note 139 and accompanying text.

144. See, e.g., *In re Kaufman*, 114 Misc. 2d at 1080, 453 N.Y.S.2d at 306 (when no family member or friend eligible to serve as conservator and appointee gave consent to appointment, appointment valid because in best interests of conservatee); *Chitty*, 65 A.D.2d at 795, 410 N.Y.S.2d at 311 (no abuse of discretion merely because court appointed stranger to act as conservator); see also Rohan, *supra* note

volunteer may be an individual or a social agency, public or private.¹⁴⁵

C. Recent Developments

The appointment of conservators has recently generated much publicity.¹⁴⁶ Traditionally, the appointment of conservators was at the sole discretion of the judge.¹⁴⁷ The arbitrary nature of such a designation process left the procedure vulnerable to a myriad of public accusations including nepotism, violations of the fiduciary obligation after the conservator was appointed and the "mere appearance of impropriety."¹⁴⁸

The issue came to a head during the summer of 1984, when a court removed John A. Zaccaro, the husband of then vice-presidential candidate Geraldine Ferraro, as conservator.¹⁴⁹ This removal took place when a court referee questioned loans that Mr. Zaccaro had made from the conservatee's estate to a real estate business that was at least partially owned by Mr. Zaccaro.¹⁵⁰

In response to the public outcry for relief from the potential and alleged abuses against the traditional conservator appointment process, several respected judges made proposals in the form of judicial guidelines which judges were to follow in the appointment of conservators.¹⁵¹ The judges intended these guidelines to eliminate both the actual and alleged abuses which had existed in the past, as well as even the "mere appearance of impropriety" which might exist in the future.¹⁵²

33, at 9 (courts generally appoint relatives but may choose another whose interests are not adverse to those of the conservatee).

145. See *supra* note 134 and accompanying text.

146. See, e.g., N.Y. Times, Oct. 8, 1985 at B1, cols. 5-6 (new proposal of guidelines for appointment of conservators); N.Y. Times, July 2, 1985 at A1, cols. 4-6 (proposed rules regulating appointment of conservators were rejected).

147. See *Chitty*, 65 A.D.2d 795, 410 N.Y.S.2d 311 (2d Dep't 1978). Although it is preferable for the court to appoint a family member as conservator, the court found no abuse of discretion in appointing a stranger. See *id.*; *In re Kaufman*, 114 Misc. 2d 1078, 453 N.Y.S.2d 304 (1982) (no prohibition against Department of Social Services serving as conservator); Rohan, *supra* note 33, at 9 (not only New York's, but most conservatorship statutes have left selection of conservator to discretion of court).

148. See, N.Y. Times, Oct. 8, 1985 at B1, cols. 5-6; N.Y. Times, July 2, 1985 at A1, cols. 4-6.

149. See *id.*

150. See *id.* As a fiduciary, a conservator must avoid conflicts of interest and should not engage in self-dealing. See *supra* notes 36-54 and accompanying text.

151. See N.Y. Times, Oct. 8, 1985, at B1, cols. 5-6 (discussing Chief Judge Wachtler's proposal); N.Y. Times, July 2, 1985, at A1, cols. 4-6 (discussing rejection of Chief Judge Cooke's proposal).

152. See *id.*

The New York Court of Appeals rejected the first proposal, set forth by Chief Judge Cooke before he retired in 1984.¹⁵³ After this initial rejection, however, the Court of Appeals accepted a proposal submitted by Judge Cooke's successor as the Chief Judge of the Court of Appeals, Sol Wachtler.¹⁵⁴ The essence of Chief Judge Wachtler's guidelines, which went into effect April 1, 1986, is limiting judicial discretion in making conservator appointments without completely abolishing such discretion.¹⁵⁵ Under these guidelines, judges will retain the ability to appoint conservators, but no such conservator may be "a relative of, or related by marriage to, a judge of the Unified Court System of the State of New York."¹⁵⁶

In addition, unless unusual circumstances exist, the guidelines prohibit a judge from granting an individual more than one appointment in a year for which compensation from the appointment is expected to exceed \$5,000.¹⁵⁷ While the Chief Administrator of the Courts will make available to the appointing judge a list of conservator applicants and their qualifications, the appointing judge

153. See N.Y. Times, July 2, 1985, at D19, col. 1. Under Chief Judge Cooke's proposal, a computer would randomly compose lists of applicants from which a judge could make appointments. See *id.* Also, a conservator could not accept more than one appointment in a year in which the compensation of the conservator was more than \$2,500.00. *Id.*

The primary objection to Chief Judge Cooke's plan was that, although the broad discretion traditionally granted to judges in making conservator appointments is subject to abuse, this discretion is a necessary part of determining the particular needs of an individual, and should not be abolished by an arbitrary decision of a computer. See *id.*

154. See N.Y. ADMIN. CODE tit. xxii, §§ 36.1-.5, which provides in pertinent part:

All appointments of . . . conservators . . . shall be made by the judge [based] upon evaluation by that judge of the qualifications of candidates for appointment. The appointing judge may select the appointee from the list of applicants established by the Chief Administrator of the Courts Should the appointing judge decide that [an excluded] person or institution . . . is better qualified . . . the judge may appoint that [party] and . . . shall place the reasons . . . on the record. The appointing judge shall be solely responsible for determining the qualifications of any appointee.

(b) No person shall be appointed who is a relative of, or related by marriage to, a judge of the Unified Court System of the State of New York

(c) No person or institution shall be eligible to receive more than one appointment within a 12-month period for which the compensation anticipated to be awarded . . . exceeds \$5,000.00

Id. § 36.1 (1986).

155. See *id.* § 36.

156. *Id.* § 36.1(b).

157. See *id.* § 36.1(c).

will not be limited to the prospective appointees on such a list.¹⁵⁸ He may select a person or institution omitted from the list, if he decides that the person or institution is better qualified for a particular matter.¹⁵⁹

The controversy surrounding the "political appointment" of conservators, and the guidelines implemented to curb the abuses of this designation process, do not in any way apply to the appointment of a conservator who is a relative of the conservatee.¹⁶⁰ Nor do they apply to a person who has a legally recognized duty or interest with respect to the affairs of the conservatee.¹⁶¹ Similarly, the guidelines apply neither to the appointment of a conservator who waives his right to compensation,¹⁶² nor to a non-profit institution performing social services.¹⁶³ Thus, it is suggested that in most instances, the guidelines do not even become applicable because the circumstances are such that it is a family member or friend who is petitioning to have themselves appointed as conservator. In these cases, the motivating factor is not compensation; rather it is love or genuine concern for the welfare of the proposed conservatee.

D. Where Does One Petition for Conservatorship?

In New York State, the supreme court, the county courts and, in specified instances, the surrogate's court, have jurisdiction to appoint a conservator.¹⁶⁴ A surrogate's court may appoint a conservator when the proposed conservatee is a resident of the county in which a proceeding in the surrogate's court is pending and is

158. *Id.* § 36.1(a) (judge may select person or institution not on list if he feels they are better qualified for particular matters).

159. *Id.* (judge must place reasons for such appointments on record as well as qualification of appointee).

160. N.Y. ADMIN. CODE tit. xxii, § 36.1(e) (1986) provides, in relevant part: The provisions of this section shall not apply to:

- (1) appointments of law guardians pursuant to . . . the Family Court Act or guardians ad litem pursuant to the Surrogate's Court Procedure Act;
- (2) the appointment of a fiduciary without compensation; and
- (3) the appointment of any of the following:
 - (i) a relative of, or person having a legally recognized duty or interest with respect to . . . the conservatee . . .
 - (iii) a non-profit institution performing social services;
 - (iv) a bank or trust company

Id.

161. *See id.* § 36.1(e)(3)(i).

162. *See id.* § 36.1(e)(2).

163. *See id.* § 36.1(e)(3)(iii).

164. N.Y. MENTAL HYG. LAW § 77.01(1), (3) (McKinney Supp. 1986).

entitled to money or property from the proceeding.¹⁶⁵ The proposed conservatee may be entitled: (1) to the money or property as the beneficiary of an estate; (2) to proceeds from a wrongful death action; or (3) to proceeds under a settlement of a personal injury cause of action brought on behalf of an infant and payable to the infant, incompetent or person under disability.¹⁶⁶ One court has held, however, that a surrogate's court is not limited to entertaining an application to appoint a conservator only when an estate proceeding is already pending.¹⁶⁷ This court held that a surrogate's court may appoint a conservator so that the conservatee can assert his right as distributee to commence administration of an estate.¹⁶⁸

Under New York's venue requirements, one must bring the conservatorship proceeding in either: (1) the supreme court of the judicial district in which the proposed conservatee resides; (2) the county court of the county in which the proposed conservatee resides; or (3) in the surrogate's court under the circumstances stated above.¹⁶⁹ If the proposed conservatee is receiving care in a health care facility, one may bring the proceeding in the county where the facility is located.¹⁷⁰ In this situation, a court may grant a request for a change of venue for "the convenience of the parties or the witnesses, or [because of] the condition of the conservatee."¹⁷¹ When the proposed conservatee is an out-of-state resident or is being cared for in an out-of-state health care facility, or the residence of the person cannot be ascertained, the proposed conservatee's residence is deemed to be the county within the state in which at least part of the proposed conservatee's property is located.¹⁷²

E. How Does One Petition for Conservatorship?

Conservatorship is a special proceeding.¹⁷³ The petitioner usually commences a conservatorship proceeding by service of notice upon the proposed conservatee, unless he is also the petitioner,¹⁷⁴ together

165. *See id.* § 77.01(3).

166. *See id.*

167. *See In re Condon*, 118 Misc. 2d 544, 545-46, 461 N.Y.S.2d 181, 182 (Sup. Ct. Bronx County 1983). The intent of the legislature was to prevent delay from the need to commence different proceedings in different courts. *See id.*

168. *See id.* at 545-46, 461 N.Y.S.2d at 182.

169. N.Y. MENTAL HYG. LAW § 77.05 (McKinney Supp. 1986).

170. *See id.*

171. *Id.*

172. *See id.*

173. *See* N.Y. MENTAL HYG. LAW § 77.03(a) (McKinney 1978).

174. *See* N.Y. MENTAL HYG. LAW § 77.07(a) (McKinney 1978).

with a verified petition and any supporting papers such as medical affirmations.¹⁷⁵ In addition, one must also serve the proposed conservatee's spouse and children if their identities are known.¹⁷⁶ If they are unknown, then one must notify the distributees of the proposed conservatee.¹⁷⁷ If the distributees are also unknown, one must notify the person with whom the proposed conservatee resides.¹⁷⁸ Moreover, if the proposed conservatee is a patient at a hospital or resides at a school facility, one must serve the person in charge of that hospital or school, as well as the mental health information service in the judicial district where the facility is situated.¹⁷⁹

A conservatorship proceeding may also be commenced by an order to show cause.¹⁸⁰ An order to show cause is a preliminary *ex parte* order, directing specified parties to demonstrate at a given time and place why the court should not grant the requested relief.¹⁸¹ The order to show cause permits an acceleration of the return or hearing date,¹⁸² and thus, of the entire proceeding.¹⁸³ The petitioner's attorney drafts the order to show cause and submits it along with the verified petition and supporting evidence.¹⁸⁴ It is the judge, if he signs the order, who specifies the return date, names the parties to be served, determines by what method service will be made and appoints a guardian *ad litem*.¹⁸⁵

Those people who receive notice of the petition are given until the return date to answer. Thus, these people have an opportunity to make any objections to the imposition of conservatorship, or, if they agree that conservatorship is required, they may object to the

175. See N.Y. MENTAL HYG. LAW § 77.03(b) (McKinney 1978).

176. See N.Y. MENTAL HYG. LAW § 77.07(a) (McKinney 1978).

177. See *id.*

178. See *id.*

179. See *id.* The term "hospital" as used in the statute, has been interpreted to mean an institution for the treatment of the mentally ill that operates under the authority of a certificate issued by the Commissioner of Mental Health. See N.Y. MENTAL HYG. LAW § 1.03(10) (McKinney 1978); see also *In re Forst*, 53 A.D.2d 842, 843, 385 N.Y.S.2d 558, 559 (1st Dep't 1976) (fact that proposed conservatee was patient in hospital with pneumonia did not mandate service on officer of hospital since it was not the type of hospital intended by statute).

180. See N.Y. MENTAL HYG. LAW § 77.08(a) (McKinney Supp. 1986); see also *Forst*, 53 A.D.2d at 842, 385 N.Y.S.2d at 558-59 (service of petition and order to show cause was valid).

181. See D. SIEGEL, HANDBOOK ON NEW YORK PRACTICE § 69 (West Supp. 1985) [hereinafter cited as SIEGEL].

182. While the return date is usually the date of the hearing, this may not always be true.

183. See SIEGEL, *supra* note 181, § 69.

184. See N.Y. MENTAL HYG. LAW § 77.03(b) (McKinney 1978).

185. N.Y. MENTAL HYG. LAW § 77.03 (McKinney 1978).

nominated conservator and nominate another.¹⁸⁶ In addition, they may raise objections to, among other things, the duration of the conservatorship, the assets and income that the court will place under conservatorship and the nature of the proposed plan for the personal well-being of the proposed conservatee.¹⁸⁷

F. Contents of the Petition

The petition requesting the appointment of a conservator must be verified and must include the following: (1) facts identifying the petitioner as someone qualified to commence the proceeding under the statute; (2) the reasons for the petitioner's concern about the financial and personal well-being of the proposed conservatee (unless the petitioner is also the proposed conservatee); (3) facts showing the necessity for the appointment of a conservator; (4) the names and addresses of both the proposed conservatee and proposed conservator (if one is nominated); and (5) the age of the proposed conservatee.¹⁸⁸ Moreover, the petition should include, to the extent the information is ascertainable with reasonable diligence, the names and addresses of the proposed conservatee's distributees; the person, if any, having custody of his person; and the nature and value of the proposed conservatee's property and income.¹⁸⁹

The petitioner must also state the anticipated duration of conservatorship, and, if the petitioner requests that conservatorship be imposed for an indefinite period, he must explain to the court why "a fixed period is not more appropriate."¹⁹⁰ The petitioner must state how much of the proposed conservatee's income and assets are to be placed under conservatorship, and why this must be done.¹⁹¹ Finally, the petitioner must set forth the proposed plan for the future care and maintenance of the proposed conservatee's personal and financial well-being.¹⁹²

G. Provisional Remedies

In 1982, New York State added a number of provisional remedies to the conservatorship statute, to protect the proposed conservatee

186. See N.Y. MENTAL HYG. LAW § 77.07(c) (McKinney 1978).

187. See *id.* § 77.03(c)(1-3) (McKinney 1978).

188. See *id.* § 77.03(b) (McKinney 1978).

189. See *id.* § 77.03(b).

190. See *id.* § 77.03(c)(1).

191. See *id.* § 77.03(c)(2).

192. See *id.* § 77.03(c)(3).

during pendency of the conservatorship proceeding.¹⁹³ At the commencement, or during the pendency, of a conservatorship proceeding, a court may now take measures to protect the proposed conservatee's assets by maintaining the status quo.¹⁹⁴ When the petitioner commences a conservatorship proceeding by an order to show cause, and the petition seeks an injunction prohibiting specified persons from altering the status of the proposed conservatee's property or endangering his welfare, and is supported by an affidavit based upon personal knowledge and other proofs, the court may grant a temporary restraining order (TRO).¹⁹⁵ The petitioner, however, may not obtain a TRO against the proposed conservatee.¹⁹⁶ The TRO is thus *ex parte*, although notice of it must "be given to any person restrained and to any person having custody or control over the person or property of the proposed conservatee."¹⁹⁷ A court cannot vacate or modify the TRO without prior notice to the petitioner and those who must receive notice of the petition.¹⁹⁸ In the TRO, the court may include a restraining notice and an information subpoena power, exercisable by the petitioner's attorney.¹⁹⁹ The court will determine upon whom the petitioner must serve the restraining notice.²⁰⁰ Those who are served with the notice are "forbidden to make or suffer any sale, assignment, transfer or interference with any property of the proposed conservatee except pursuant to an order of the court."²⁰¹ An information subpoena power allows the petitioner's attorney to require the person(s) subpoenaed to provide the "attorney with any information concerning the financial affairs of the proposed conservatee."²⁰²

In addition, the court may grant a motion made on notice for a temporary injunction, to last during the pendency of the conservatorship proceeding and up to ten days thereafter.²⁰³ The court may impose the injunction at any stage during the proceeding, and if the court finds it necessary, it may impose the injunction on its own initiative.²⁰⁴ Once the conservatorship proceeding has com-

193. N.Y. MENTAL HYG. LAW § 77.08 (McKinney Supp. 1986).

194. *See id.* § 77.08(e).

195. *See id.* § 77.08(a)(1-2).

196. *See id.* § 77.08(a)(3).

197. *See id.* § 77.08(b).

198. *See id.*

199. *See id.* § 77.08(f).

200. *See id.*

201. *Id.* § 77.08(g).

202. *Id.* § 77.08(h).

203. *See id.* § 77.08(c).

204. *See id.*

menced, the court may even appoint a temporary receiver to preserve the proposed conservatee's property during the litigation.²⁰⁵ Thus, a number of measures are available to insure that the personal and financial well-being of the proposed conservatee is preserved during the pendency of the conservatorship proceeding.

H. Court Proceeding for the Appointment of a Conservator

Usually, a hearing is held on or soon after the return date specified in the order to show cause or notice of petition.²⁰⁶ Prior to the hearing, the petitioner may withdraw the petition and the parties may stipulate to a discontinuance, at least when only the rights of a petitioner-wife and proposed conservatee-husband are involved.²⁰⁷ When the proceeding is not discontinued, and a party to the proceeding raises issues of fact on the need for the appointment of a conservator, and demands a jury trial on these issues on or before the return date, a jury trial must be held.²⁰⁸

When the evidence on the need for the appointment of a conservator is taken, it may be necessary to have a physician's testimony, even in a noncontested proceeding.²⁰⁹ If either the jury or the court determines that a conservator must be appointed, the court then decides who among those available to serve will best serve the interests of the conservatee.²¹⁰ When conflicts of interest or rancor among

205. See *id.* § 77.08(e).

206. See *id.* § 77.07(c).

207. See *Rau v. Rau*, 78 A.D.2d 617, 618, 434 N.Y.S.2d 336, 336 (1st Dep't 1980). In *Rau*, the court referred to the application as a "private proceeding," and stated that there was no basis for refusing to recognize the request for discontinuance. *Id.* The court did not state what the outcome would be if it were not only the husband and wife involved, nor did it define "private proceeding." See *id.*

208. See N.Y. MENTAL HYG. LAW § 77.07(c) (McKinney 1978); see also *In re Forst*, 53 A.D.2d 842, 843, 385 N.Y.S.2d 558, 559 (1st Dep't 1976) (mere fact that proposed conservatee falls within provisions of § 77.01(a) does not in and of itself mandate that conservatee must be appointed, there must also be need for appointment, and such determination is proper issue for jury).

209. See N.Y. MENTAL HYG. LAW § 77.01 (McKinney 1978). The court must be satisfied by clear and convincing proof that a conservator is needed, regardless of whether the application is contested. See *id.*; see, e.g., *In re Forward*, 86 A.D.2d 850, 850, 447 N.Y.S.2d 286, 287 (2d Dep't 1982) (petitioner must show by clear and convincing proof both substantial impairment and need for appointment); *In re Kraft*, 60 A.D.2d 548, 548, 400 N.Y.S.2d 92, 93 (1st Dep't 1977) (mere allegation of improvident business transactions insufficient proof of "need" for appointment of conservator); *In re Forst*, 53 A.D.2d 842, 843, 385 N.Y.S.2d 558, 559 (1st Dep't 1976) (must also be need for appointment).

210. See *supra* notes 139, 153-59.

family members exists, the court need not choose any of the nominees,²¹¹ but courts rarely find that no one nominated as conservator is an appropriate choice.²¹²

When the judge grants the petition, he makes an order, upon which judgment is later entered.²¹³ In this order, the judge appoints a specified conservator, details the extent of the conservator's duties and powers and sets the amount of the conservator's bond²¹⁴ and compensation.²¹⁵ The amount of compensation is set at the court's discretion and may be waived by the conservator.²¹⁶ The court may decide to make the award in a future order and, if so, will state as much. A court will often postpone making the award when it cannot determine the value of the conservatee's assets until after the conservator has been appointed and has had time to marshal the assets.²¹⁷ The amount of the compensation varies with the size of the estate and the services performed.²¹⁸ Many courts look to the amounts awarded to the committee of an incompetent when determining a conservator's compensation.²¹⁹ If requested, the court may award fees to the petitioner's attorney and an allowance to the guardian *ad litem*, if it had appointed one for the litigation.²²⁰

Finally, the court will specify its plan for the maintenance and care of the conservatee's personal and financial well-being, as well as stating the duration of the conservatorship and the extent of the property placed under conservatorship.²²¹

211. See *supra* notes 134-39 and accompanying text.

212. See *Pierson v. Nachwalter*, 53 A.D.2d at 846, 385 N.Y.S.2d at 788. The court compared conservatorship and incompetency proceedings, and stated, "[i]t is the rare exception where a committee unanimously nominated by the next of kin should not be appointed." *Id.*

213. N.Y. MENTAL HYG. LAW § 77.07(e) (McKinney Supp. 1986).

214. See *id.* § 77.13 (McKinney 1978); see *infra* notes 227-28 and accompanying text.

215. See N.Y. MENTAL HYG. LAW § 77.27 (McKinney 1978). The court, not the conservator, sets the conservator's compensation. See *supra* notes 47-51 and accompanying text.

216. See N.Y. MENTAL HYG. LAW § 77.27 (McKinney Supp. 1986). The courts look favorably upon, and thus place fewer restrictions on, the appointment of a conservator who has waived his right to compensation. See NEW YORK ADMIN. CODE tit. xxii, § 36(e)(2) (1986) (newly enacted regulations for appointing conservators do not apply where the conservator has waived his right to compensation).

217. See N.Y. MENTAL HYG. LAW § 77.19 (McKinney 1978).

218. See N.Y. MENTAL HYG. LAW § 77.27 (McKinney Supp. 1986). The fixing of compensation is at the total discretion of the court. See *id.*

219. See *id.*

220. See *id.* § 77.07(d) (McKinney Supp. 1986).

221. *Id.* § 77.19 (McKinney 1978); see also *supra* note 20 and accompanying text.

I. Qualification of a Conservator

Once a conservator is appointed, he or she must qualify before commencing to marshal and manage the conservatee's property. Qualification of a conservator signals the conservator's consent to the appointment²²² and usually requires the filing of an undertaking,²²³ as well as the designation of the court clerk as the conservator's agent to receive process.²²⁴

The court, in its discretion, may dispense with the first requirement, but the statute does not provide that it may similarly dispense with the second requirement.²²⁵ It has been held, however, that when a conservator filed an undertaking, but failed to file the designation for service of process, the appointment retained its effectiveness, and the conservator had qualified.²²⁶

Article 77 provides that when the court has required an undertaking, the amount will be determined as required by section 78.09 of the Mental Hygiene Law for committees of incompetents.²²⁷ The usual amount is the value of the conservatee's personal property and the probable value of the rents, profits and income from any real or personal property for two years.²²⁸ As part of the undertaking, the conservator promises:

[T]hat he will faithfully discharge the trust imposed upon him, obey all the directions of the court in regard to the trust, and make and render a true account of all properties received by him and the application thereof and of his acts in the administration of his trust, whenever so required to do [so] by the court.²²⁹

After filing of the undertaking, if required, and the designation, the court will issue a form entitled either "Commission to the

222. See, e.g., *In re Kaufman*, 114 Misc. 2d 1078, 1080, 453 N.Y.S.2d 304, 306 (Sup. Ct. Bronx County 1982) (petitioner gave consent to appointment by qualifying as conservator).

223. N.Y. MENTAL HYG. LAW § 77.13 (McKinney 1978). The court may, but does not necessarily require the posting of a bond as security by the conservator upon appointment. *Id.*

224. See *id.* § 77.17 (McKinney 1978).

225. *Id.* In practice, however, the filing of designation for service is not a prerequisite to the effectiveness of the appointment of a conservator. See *In re Romano*, 114 Misc. 2d 692, 694, 452 N.Y.S.2d 312, 313-14 (Sup. Ct. Nassau County 1982).

226. *Romano*, 114 Misc. 2d at 694, 452 N.Y.S.2d at 313-14.

227. N.Y. MENTAL HYG. LAW § 77.13 (McKinney 1978).

228. See N.Y. MENTAL HYG. LAW § 78.09 (McKinney 1978).

229. *Id.*; see also *Romano*, 114 Misc. 2d at 692-93, 452 N.Y.S.2d at 313 (by undertaking to file bond, conservator obligated himself to discharge duties faithfully, and render just and true account of his conservatorship).

Conservator," or "Certification of the Appointment of a Conservator," which is signed by the judge, the clerk of the judge and the clerk of the court.²³⁰ The commission or certification is evidence to third parties of the conservator's appointment, and it commands the third party to turn over to the conservator any assets held for the conservatee.²³¹ The statute does not expressly require the issuance of the commission or certification, but it is accepted procedure.²³² In practice, a conservator is deemed qualified when the commission or certification is issued.²³³

VI. Guardian *Ad Litem*: Duties

A court may appoint a guardian *ad litem* at any time during a conservatorship proceeding.²³⁴ Usually a court must appoint a guardian *ad litem* when the proposed conservatee is unable to attend the hearing.²³⁵ If, however, the court finds that the proposed conservatee's attorney or the local mental health information service can adequately protect the proposed conservatee's interests, the court need not appoint a guardian *ad litem*.²³⁶ Most courts exercise extreme caution and almost always appoint a guardian *ad litem* to safeguard the rights and interests of the proposed conservatee.²³⁷ The court usually appoints a guardian *ad litem* in order to show cause or, in the few instances in which an order to show cause is not used, after the petition has been filed and served.²³⁸ Appointing the

230. N.Y. MENTAL HYG. LAW § 77.13 (McKinney 1978).

231. *Romano*, 114 Misc. 2d at 693, 452 N.Y.S.2d at 313.

232. *See id.* (to extent conservator would be expected to file consent before issuance of commission, this is matter of practice and not prescribed by statute).

233. *See id.*

234. N.Y. MENTAL HYG. LAW § 77.09 (McKinney 1978). The guardian *ad litem* is chosen from a list of attorneys who have agreed to serve in this position. *See id.* If appointed, the guardian *ad litem* receives notification from the clerk of the court. He must then obtain the petition and supporting papers from the petitioner's attorney. *See id.* Usually, the court will have required service of these papers to the guardian *ad litem* in the order to show cause. *See id.*; *see also* Rohan, *supra* note 33, at 8.

235. *See* N.Y. MENTAL HYG. LAW § 77.07(b) (McKinney 1978). It is in the court's discretion to appoint a guardian *ad litem*, even when the conservatee cannot attend. *See id.*

236. *See* N.Y. MENTAL HYG. LAW § 77.07(b) (McKinney 1978) (if proposed conservatee unable to attend hearing, court may dispense with guardian *ad litem* if court in its discretion determines that conservatee's interests are adequately protected by Mental Hygiene Legal Services or independent counsel).

237. *See id.* The test used is whether the court believes "in its discretion whether the interests of the proposed conservatee are adequately protected." *Id.*

238. N.Y. MENTAL HYG. LAW § 77.09 (McKinney 1978).

guardian *ad litem* at this point enables the court to receive the guardian's report by the return date.

At this point, in order to serve, the guardian *ad litem* must qualify, usually by filing a qualifying "affidavit stating facts showing his ability to answer for any damage sustained by his negligence or misconduct" and a written consent.²³⁹ The person the court names as guardian *ad litem* is not required to serve, and may decline by notifying the court and refraining from taking the necessary steps for qualification.²⁴⁰

Once appointed and qualified, the guardian *ad litem's* main duty is to investigate and report on the status, both personal and financial, of the proposed conservatee.²⁴¹ In order to fulfill his duty properly, the guardian *ad litem* should investigate the truth of the statements in the petition, request banks and other holders of assets for verification of statements in the petition, examine the medical report and verify it by contacting the doctor who signed it.²⁴² A guardian *ad litem's* responsibilities do not, however, include the management or control of the proposed conservatee's property during the pendency of the proceeding.²⁴³

A court may also appoint a guardian *ad litem* during conservatorship.²⁴⁴ A need for a guardian *ad litem* may arise when the

239. N.Y. CIV. PRAC. LAW § 1202(c) (McKinney 1976). See also SIEGEL, *supra* note 181, § 197, at 234-35. Designation of the guardian *ad litem* will not take effect until the appointed guardian *ad litem* files such consent with the court. See *id.*

240. N.Y. MENTAL HYG. LAW at § 77.09 (McKinney 1978).

241. See *In re Young*, 79 Misc. 2d 208, 209, 359 N.Y.S. 2d 854, 856 (Dutchess County Ct. 1974). The appointed guardian *ad litem* is not given general management authority over the assets of the proposed conservatee. See *id.*

242. See *id.* at 210, 359 N.Y.S. 2d at 856. Among the guardian *ad litem's* duties as protector of the interests of the proposed conservatee are the thorough investigation and reporting of that status. See *id.* He must also interview the proposed conservatee as thoroughly as possible and find out if the proposed conservatee is able to understand the nature of the proceeding, and if so, if the conservatee wants a conservator appointed or if he has objections to the particular person serving as conservator. See *id.* The guardian *ad litem* should also interview the nominees for conservator, inquiring as to prior business experience, relationship to the proposed conservatee, and the amount of time the nominee will have available to devote to the conservatorship. See *id.* The guardian *ad litem* should be cognizant of any possible conflicts of interest and should state his opinion on the waiving of the proposed conservatee's presence at the hearing. See *id.* If the conservator seeks to have the bond dispensed with, the guardian *ad litem* should forcefully argue against it. See *id.* When the final order appointing a conservator is submitted to the court for signature, the guardian, *ad litem* should examine it for conformance to the statute and court determinations. See *id.*; see also Rohan, *supra* note 33, at 8-9.

243. See *supra* note 241 and accompanying text.

244. See *supra* note 234.

conservatee has a valid cause of action but is unable to prosecute it; when a motion is made to remove one conservator and substitute another; or when the conservatee wishes to dispose of conservatorship assets, by gift or otherwise.²⁴⁵

VII. Marshaling the Assets, Annual Inventory

Once the conservator is appointed and has qualified, his first duty is to marshal the assets so that he may obtain the means to maintain the conservatee.²⁴⁶ The usual method of obtaining assets is service of the commission or certification upon third parties who either hold assets of the conservatee, such as a bank, or provide income to the conservatee, such as the Department of Health and Human Services (Social Security checks) or a former employer (retirement checks).²⁴⁷

The commission or certification commands the third party to turn over to the conservator any assets held for the conservatee.²⁴⁸ To open a safe deposit box, the conservator needs a court order.²⁴⁹ Usually the court knows of the existence of the vault during the conservatorship proceeding and will provide in the order appointing the conservator that the box be opened in the presence of the conservator or the conservator's attorney, the guardian *ad litem* and an officer of the bank. The guardian *ad litem* must usually make a supplemental report to the court that provides an inventory of the contents of the box.²⁵⁰ If substantial assets are found, the court may require a supplemental bond.²⁵¹ In addition, fees for the guardian *ad litem* and compensation for the conservator may be adjusted, or, if the court postponed setting compensation until all assets were

245. *See id.*; *see also In re Stane*, 86 Misc. 2d 416, 417, 382 N.Y.S.2d 607, 608 (Sup. Ct. N.Y. County 1976) (guardian *ad litem* may be appointed even though conservator has already been appointed).

246. N.Y. MENTAL HYG. LAW § 77.19 (McKinney 1978). The court order appointing the conservator shall set forth the assets to be marshaled. *Id.*

247. *See supra* notes 232-33 and accompanying text.

248. *See id.*

249. *See* N.Y. MENTAL HYG. LAW § 78.17 (McKinney 1978). Section 77.19 grants the conservator the same powers as those granted under article 78. *Id.* § 77.19. Thus, article 78, the controlling statute on the access to the conservatee's safe deposit box, requires a court order. *See id.* § 78.17.

250. *See supra* notes 234-45 and accompanying text. It is the duty of the guardian *ad litem* to investigate and report the status of matters dealing with the interests of the person for whom he is appointed. *See id.*; *see also In re Young*, 79 Misc. 2d 208, 210, 359 N.Y.S.2d 854, 856 (Sup. Ct. Dutchess County 1974).

251. N.Y. MENTAL HYG. LAW §§ 77.13, 78.09 (McKinney 1978). If the conservator receives after-acquired property, he must inform the court so that his bond can be adjusted accordingly. *See id.*

marshaled, fees and compensation will be set at this point. In order to marshal assets such as bank accounts or certificates of deposit, it is not necessary to remove the assets physically but only to change title. For example, a checking account will now be in the name of X, as conservator for Y. The conservator does not place his own name on the conservatee's deed for real property,²⁵² but he should file an affidavit with the county clerk stating that a conservator has been appointed.

If a person served with a commission or certification refuses to turn over property, the conservator may commence a special proceeding by order to show cause against that person.²⁵³ In extreme cases, it may be possible to have the Special Victims Bureau or Commercial Crimes Bureau of the local district attorney's office launch a criminal investigation.²⁵⁴

After marshaling the assets, the conservator would be well-advised to make up a budget for six months to a year, and keep enough money on hand to meet the budget. The remainder of the conservatee's assets should be kept in short-term, high-yield insured accounts.²⁵⁵ Depending on the circumstances, the conservator may seek to dispose of real property, although he must obtain a court order for the purposes of administration, sale or other disposition of real property.²⁵⁶ With respect to investments, the conservator must act "with such diligence and circumspection as prudent men of discretion and intelligence in such matters generally employ in their own like affairs to seek a reasonable income and preservation of their capital."²⁵⁷

The conservator's record of the conservatee's assets, income and disbursements made on the conservatee's behalf must be accurate and clear. Accuracy and clarity are necessary because the conservator must make and file an annual inventory, account and affidavit.²⁵⁸ These papers must conform to the requirements for those papers

252. See N.Y. MENTAL HYG. LAW § 77.25(e) (McKinney Supp. 1986). Title to all property remains in the conservatee. See *id.* It is the conservatee's right to control and dispose of this property that is subject to the possession of the conservator and the control of the court. See *id.*

253. N.Y. MENTAL HYG. LAW § 78.19 (McKinney 1978). The conservator has the same authority, subject to article 77 of the Mental Hygiene Law that a committee has under article 78. See N.Y. MENTAL HYG. LAW § 77.19 (McKinney 1978).

254. See *In re Brownell*, 112 Misc. 2d 719, 721-22, 447 N.Y.S.2d 591, 594 (Delaware County Ct. 1981).

255. See *id.*

256. N.Y. MENTAL HYG. LAW § 77.25(e) (McKinney Supp. 1986).

257. *Brownell*, 112 Misc. 2d at 721, 447 N.Y.S.2d at 594.

258. N.Y. MENTAL HYG. LAW § 77.29 (McKinney 1978).

filed by a general guardian of an infant's property under the Surrogate's Court Procedure Act.²⁵⁹ These documents are then examined, usually by referees appointed by the court.²⁶⁰ If the documents are filed late or are incomplete, the examiner may submit an order to the court requiring the conservator to correct the deficiency and supply the necessary documents.²⁶¹

The examiner may take testimony, including that of the conservator, and must make a report of his findings to the court.²⁶² If the examiner suspects that the conservator is guilty of misconduct, he may make a motion for the conservator's removal.²⁶³ At the time of the annual accounting, the conservator must also report on the personal status of the conservatee, the conservator's plan for the maintenance of the conservatee's well-being, and the need for the continuance or discontinuance of the conservatorship or any needed alteration in the conservator's powers.²⁶⁴

VIII. Termination of Conservatorship and Final Accounting

Conservatorship can end for a number of reasons.²⁶⁵ The most common are the death of the conservatee or the depletion of the conservatee's assets.²⁶⁶ When the conservator has died, resigned or has been removed or suspended, the court may appoint another conservator to fill the vacancy.²⁶⁷

The court that originally appointed the conservator may remove the conservator from office after a motion if the conservator is found guilty of misconduct, or for any other cause the court deems to be just.²⁶⁸ The motion can be made by the person who examines the annual accounts, or any other interested person, including the conservatee or the court on its own motion.²⁶⁹

A court may suspend a conservator's duties during war service upon motion of the conservator, but a suspended conservator may apply for reinstatement when he is again able to serve.²⁷⁰ A substitute

259. See *id.* § 77.23 (McKinney 1978).

260. See *id.* § 78.25 (McKinney 1978).

261. See *id.*

262. See *id.*

263. See *id.* § 77.33 (McKinney 1978).

264. See *id.* § 77.29 (McKinney 1978).

265. See *infra* notes 266-74 and accompanying text.

266. N.Y. MENTAL HYG. LAW § 77.41 (McKinney 1978).

267. See *id.*

268. See *id.* § 77.33 (McKinney 1978).

269. See *id.*

270. See *id.* § 77.39 (McKinney 1978).

conservator is appointed to serve in the meantime.²⁷¹ The statutory scheme allows a conservator to resign or a court to suspend the conservator's powers "without any guidelines or limitations other than apparently the court's own good judgment and discretion."²⁷² A court may discharge a conservator: (1) when conservatorship becomes unnecessary for the proper care of the conservatee's personal or financial well-being; (2) when the conservatee dies; (3) when the conservatee is adjudicated an incompetent; or (4) when the conservatee's assets and income have been depleted.²⁷³ In a rare instance, conservatorship may terminate because the conservatee has become able to care for his property personally.²⁷⁴ If conservatorship ends because of depletion of assets, the conservator should apply for discharge when the remaining assets and income total approximately \$7,000-\$10,000. In this way, there will be enough money left in the estate to pay compensation to the conservator; to pay fees to guardians *ad litem* and the conservator's attorney for their work in the final account proceeding; and to set aside a burial fund and a personal luxury fund for the conservatee. Thereafter, medicaid is available to pay for health care services.²⁷⁵

When a petition (usually verified) is filed seeking discharge, removal, suspension or resignation of a conservator, a final accounting of all the conservator's actions with respect to the conservatee's property from the date of the conservator's appointment must be filed.²⁷⁶ When a conservator is being removed for cause, a referee or guardian *ad litem* is often appointed to file the final accounting, although the appointees probably will lack access to the needed facts and figures.²⁷⁷ At the time of the final accounting, a guardian *ad litem* is usually appointed to protect the rights and interests of the conservatee even when the conservator files the accounting.²⁷⁸ While the court sets the compensation of these court appointees from the conservatee's assets, if the conservator is removed for cause, the court may charge the cost of the motion to the conservator.²⁷⁹

Notice of the filing of a final account must be given to the conservatee or, if he is deceased, to his personal representative and

271. *See id.*

272. *See In re Kaufman*, 114 Misc. 2d 1078, 1081, 453 N.Y.S.2d 304, 305 (Sup. Ct. Bronx County 1982).

273. N.Y. MENTAL HYG. LAW § 77.35 (McKinney 1978).

274. *See id.*

275. *See id.* § 77.31(c) (McKinney 1978).

276. *See id.* § 77.31(b).

277. *See id.* § 77.31(c).

278. *See id.*

279. *Id.* § 77.33.

all those entitled to receive notice of the original petition that sought the appointment of a conservator.²⁸⁰ Usually the bonding company that supplied the conservator's bond is also notified. The conservator will not be released from the bond, however, until the court has approved the final account. If the conservator has died, the conservator's personal representative files the final account and petitions the court for discharge and the appointment of a successor.²⁸¹ The court will usually approve the final account after it has received a favorable referee's report or after the court itself judicially determines and files the account.²⁸² When the conservatee dies, the conservator must provide for the conservatee's burial or other funeral arrangements.²⁸³ The conservator may even be responsible for these arrangements after he or she has been discharged because of depletion of the conservatee's assets.

Thus, to gain release from the bond, the petitioner must file a petition showing a final account that taxes and all final payments ordered by the court have been paid and present acknowledged instruments of interested parties whose claims have been satisfied, releasing and discharging the conservator or his personal representative. At this point, the court may "make a decree releasing and discharging the petitioner and the sureties on his bond, if any, from any further liability to the persons interested."²⁸⁴

IX. Attorney's Fees

When Article 77 of the Mental Hygiene Law was first enacted, it contained no specific provision on the payment of attorney's fees.²⁸⁵ The New York State Court of Appeals noted that the legislature patterned the conservatorship statute on the provisions for the appointment of a committee of an incompetent, which expressly provided for the payment of attorney's fees.²⁸⁶ It therefore held that the lack of a similar provision in Article 77 was not an oversight.²⁸⁷ This decision led the legislature to amend Article 77: "When the

280. *Id.* § 77.31(c).

281. *See id.* § 77.32.

282. *See id.* § 77.31(c).

283. *See id.* § 77.35.

284. *See id.* § 77.32(d).

285. 1972 N.Y. Laws ch. 251, at 554-58.

286. *See* N.Y. MENTAL HYG. LAW § 78.03(h)(2) (McKinney 1978) (court may award reasonable attorney's fees).

287. *See Green v. Potter*, 51 N.Y.2d 627, 630-31, 416 N.E.2d 1030, 435 N.Y.S.2d 695, 696-97 (1980). Strong language in *Green* distinguished the legislature's unequal treatment of attorney's fees in articles 77 and 78. *See id.*

petition [for the appointment of a conservator] is granted, the court may award reasonable counsel fees to the attorney for the petitioner"²⁸⁸ The attorney for the cross-petitioner has been properly awarded fees under this section when the cross-petition was granted.²⁸⁹

While the conservatorship statute does not expressly provide for the conservator's attorney to receive fees from the conservatee's estate in accounting and discharge proceedings, the conservator usually makes this request and courts commonly grant it. When counsel fees are awarded to either the attorney for the petitioner for the appointment of a conservator, or to the conservator's attorney in accounting and discharge proceedings, the amount of the fee is determined by the size of the estate and the services performed. Courts usually require the attorney to file a complete and detailed affidavit of services performed before a request for fees is granted.

X. Conclusion

The statistics are clear. People eighty-five years old or older will continue to comprise a larger and larger percentage of the American population. Concurrent with this undisputed aging of society, an ever-increasing number of individuals are suffering from both mental and physical impairments caused by widespread alcoholism, mental illness, drug addiction and other types of disabling conditions. As a result, it is agreed that a long-term care system providing for medical, physical, emotional and financial support services should be implemented to protect these vulnerable segments of our population. It is further agreed that such services should be individualized so that they are adequately coordinated and matched with the impaired individual's needs. While a federally-developed comprehensive program has yet to be created, and traditional mechanisms such as "incompetency proceedings" and "power of attorney" have been relatively ineffective in addressing many issues, the recently developed New York statutory device of conservatorship has provided an effective solution.

This Article has traced the development of the doctrine of conservatorship and has attempted to provide a pragmatic approach to the understanding of the doctrine for individuals in both the health care and legal professions. While it is clear that the statutory device of conservatorship is not as efficient as it will be in time,

288. N.Y. MENTAL HYG. LAW § 77.07(d) (McKinney Supp. 1986).

289. See *In re Noel*, 92 A.D.2d 1053, 1054, 461 N.Y.S.2d 536, 537 (3d Dep't 1983).

it cannot be disputed that its success in the State of New York will not only make the doctrine an attractive statutory model for other state legislatures, but will also insure the presence of conservatorship in the New York State statutory scheme for a long time to come.