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TOWARD UNIFORM GUARDIANSHIP LEGISLATION

William F. Fratcher*

THE Model Probate Code,¹ part IV of which covers guardianship of the persons and property of infants and mental incompetents, was published in 1946 under the auspices of the University of Michigan Law School. It was prepared for the Probate Law Division of the Section of Real Property, Probate, and Trust Law of the American Bar Association by its Model Probate Code Committee in cooperation with the research staff of the Law School.² No state has adopted the Model Probate Code in its entirety, but parts of it have been enacted in Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Indiana, Missouri, North Carolina, Oregon, and Texas, and it has influenced legislation elsewhere, notably in Pennsylvania. In 1962 the American Bar Association Section of Real Property, Probate, and Trust Law established the Special Committee on Revision of Model Probate Code, and the National Conference of Commissioners on Uniform State Laws organized the Uniform Probate Code Committee. Under the guidance of these two committees, a Reporting Staff headed by Professor William J. Pierce³ is engaged in drafting a revised and expanded version of the 1946 Model Probate Code designed for promulgation by the National Conference of Commissioners on Uniform State Laws as a Uniform Probate Code.⁴ Among the drafts currently under consideration by the committees and the Reporting Staff is the First Tentative Draft of Revised Part IV, Model Probate Code, entitled "Protection of Persons Under

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1. SIMES, MODEL PROBATE CODE (1946) [hereinafter cited as MPC].

2. The subcommittee on drafting consisted of Rufford G. Patton, of the Minnesota Bar; Lewis M. Simes, Professor of Law and Director of Legal Research at the University of Michigan; Thomas E. Atkinson, Professor of Law at the University of Missouri; and Paul E. Basye, Research Associate in Law at the University of Michigan.

3. Professor of Law and Director of the Legislative Research Center, University of Michigan; Chairman of the Executive Committee, National Conference of Commissioners on Uniform State Laws. Professor Richard V. Wellman of the University of Michigan Law School is Staff Director during the current year.

4. See generally *Report of the Special Committee on Revision of Model Probate Code*, 1963 PROCEEDINGS, AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW pt. I, 17, 81; 1964 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 13; Fratcher & Straus, *Model Probate Code*, 35 Pa. B.A.Q. 206 (1964).

Disability and Their Property.”⁵ Some of the problems which this draft is designed to solve may be of interest to the profession.

I. SOURCE OF THE PROBLEM: THE LINGERING PAST

The law of guardianship in the United States was developed primarily to meet the problem of protecting the person and property of the orphan in a rural community with closely knit families. Such a child ordinarily owned only the whole of, or an undivided interest in, a family-sized farm. The task of the guardian was to find a suitable short-term tenant for the farm and to apply the rent to the support of the ward. Ordinarily there was no problem of investment because the income from the farm was no more than enough to support and educate the ward. Sale of the land was not anticipated because it was expected that the ward would work the farm himself when he reached majority. In a society with short life expectancies and few tensions, mentally incompetent adults of substantial means were relatively rare. In the few instances when adults were afflicted with serious mental disorders, their persons and property could usually be protected adequately without guardianship. The mental incompetent's wife and children simply worked the family farm and used its product for the support of the whole family, while he sat on his own front stoop or on a bench at the asylum.

In view of the context in which it developed, it is not surprising that the American law of guardianship conferred clear authority for very few property transactions. The guardian could conduct, on behalf of his ward, whatever litigation was necessary to collect and protect the ward's property.⁶ He could also lease the ward's land for terms which would not outlast the guardianship,⁷ and he was generally authorized to sell the ward's personal property for cash, if funds were needed to pay debts or expenses of administration or

5. [Hereinafter cited as FTD.] This draft was prepared by the present writer in conformity to the replies to a lengthy questionnaire sent to thirty-one experienced judges, practicing lawyers, and law teachers in thirteen states. The recipients of the questionnaire were members of the Special Committee on Uniform Probate Code of the National Conference of Commissioners on Uniform State Laws, the Special Committee on Revision of Model Probate Code of the American Bar Association Section of Real Property, Probate and Trust Law, and a specially constituted advisory committee of experts. See Fratcher & Straus, *supra* note 4, at 210-11. The draft is dated July 10, 1965, but at the time this article was written the draft had not yet been discussed by the Reporting Staff or its guiding committees and may, of course, undergo substantial change in their hands.

6. See Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 294 (1960).

7. *Id.* at 301.

to support and educate the ward and his dependents.⁸ The guardian could invest his ward's surplus funds in a few types of securities, primarily first mortgages on land worth twice the amount loaned, but many states have required prior court authorization or subsequent court approval for the making of even such obviously conservative investments.⁹ Finally, the court could authorize him to sell or mortgage the ward's land.¹⁰ Beyond these few types of property transactions, both the power of a guardian to act without court authorization and the power of the court to authorize action become highly doubtful.

Although guardians may feel that prudent management requires greater freedom in dealing with a ward's property, they are reluctant to act, in light of the risk of incurring heavy liability. Similarly, third parties are hesitant to enter into transactions with a guardian, feeling that the guardian may lack authority either to sell the guardianship assets or to enter into other contractual arrangements involving the ward's property. If the circumstances require action beyond that within the traditional powers of the guardian, the ward must suffer the consequences of inaction, for want of anyone with clear power to act. Thus, it is obvious that the traditional powers of guardians are inadequate for the acquisition, retention, and management of an extensive and well diversified portfolio of securities, an active business, or a group of urban real estate investments, such as apartment houses or commercial buildings. In short, unless the ward is very poor or owns only a small home or farm, his property cannot be managed efficiently under the traditional American scheme of guardianship.

It is clear that our system of guardianship is woefully out of date and inadequate.¹¹ That lawyers have not exerted greater pressure

8. *Id.* at 308.

9. *Id.* at 270-88.

10. *Id.* at 302-04.

11. The English law of guardianship of the property of infants, from which the American system was originally derived, is equally out of date and inadequate, but this causes no trouble because it is no longer used. Under current English statutes, court rules, and judicial practice, property of infants is managed by trustees with broad and adequate powers conferred by statute. See Fratcher, *Fiduciary Administration in England*, 40 N.Y.U.L. REV. 12, 73-80 (1965). The English law governing the management of property and affairs of mental incompetents was modernized and codified by Part VIII of the Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, §§ 100-21, and by comprehensive rules issued thereunder. See the Court of Protection Rules, [1960] Stat. Instr. 1935, (No. 1146 (L.7)), as amended, The Court of Protection (Amendment) Rules, [1962] Stat. Instr. 529 (No. 553 (L.7)). For a discussion of the Mental Health Act, see Fratcher, *supra*, at 80-96. The draft under consideration owes much to the provisions of this legislation.

for its modernization may be because those who guide wealthy families have usually been able to avoid guardianship of property by the use of trusts and other devices, and because academic lawyers have little awareness of the problem, since guardianship is not included in law school curricula. There is a marked dearth of literature on the topic, nothing of real consequence having been published during the period from Judge Woerner's 1897 treatise¹² until the *Iowa Law Review* symposium of 1960.¹³

It is equally clear that lawyers who know much about guardianship of property avoid it whenever possible as a means of protecting the welfare of a minor or an incompetent.¹⁴ Both Congress and the state legislatures have enacted statutes to facilitate avoidance of the guardianship system. Numerous statutes authorize federal agencies to pay out funds to or for minors and incompetents without the intervention of a guardian appointed and supervised by the state.¹⁵ The Uniform Gifts to Minors Act, which has been adopted, at least in substance, in every state,¹⁶ provides a cheap, efficient system for the management of a donee's securities by a custodian who has adequate powers of management which he can exercise without court authorization or supervision. The Uniform Law Commissioners' Model Special Power of Attorney for Small Property Interests Act¹⁷ provides a similar system for persons who anticipate approaching incompetence due to senility or similar causes.

Despite the flexibility of the trust device in the hands of a skilled lawyer, the useful federal devices for avoiding guardianship, and the modern substitutes for guardianship offered by the various uniform acts, it is impossible in many cases to keep substantial accumulations of property from falling into the grasp of our archaic system of guardianship, which lacks the means for efficient management. Even though a parent may have set up a testamentary trust and thereby avoided guardianship of the property provided for in his will, a minor whose father dies shortly before his grandfather may inherit directly property which the grandfather intended to go to the father. Furthermore, an orphan's cause of action for the wrongful death of

12. WOERNER, *THE AMERICAN LAW OF GUARDIANSHIP* (1897).

13. Atkinson, *et al.*, *Symposium on Guardianship*, 45 *IOWA L. REV.* 209-419 (1960).

14. Atkinson, *Foreword to Symposium on Guardianship*, 45 *IOWA L. REV.* 209, 211 (1960).

15. *E.g.*, 37 U.S.C. § 602 (1964) (payments by Secretary of the Army to mental incompetents); 38 U.S.C. §§ 1701(c), 3202 (1964) (war orphans educational assistance); 20 C.F.R. § 404.1601 (1965).

16. See Fratcher, *Trustees' Powers Legislation*, 37 *N.Y.U.L. REV.* 627, 628 (1962).

17. 1964 *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 273, 275.

his parents may be a very substantial asset which can be realized only by a guardian, and a wealthy man may be incapacitated without warning by a stroke.¹⁸ There is urgent need for replacement of the traditional system of property guardianship with a modern system which will permit the cheap and efficient management which is possible with a trust, a custodianship under the Uniform Gifts to Minors Act, and an attorneyship in fact under the Uniform Law Commissioners' Model Special Power of Attorney for Small Property Interests Act.

II. WEAKNESSES OF PART IV OF THE 1946 MODEL PROBATE CODE

A. *Adoption of the General Scheme of the Uniform Veterans' Guardianship Act*

The 1946 Model Probate Code was carefully drafted by able lawyers, and contains many excellent provisions which clarify and improve the law of guardianship.¹⁹ These provisions should be retained in any revision of the Code. On balance, however, part IV of the 1946 Model Probate Code, instead of providing a modern, cheap, and efficient system for the management of the property of minors and incompetents, aggravates the worst weaknesses of the traditional system by depriving guardians of the few powers which they could formerly exercise without court authorization, notably those of

18. See generally *Report of the Committee on Administration of Property of Persons Under Disability*, 1965 PROCEEDINGS, AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW pt. I, 58.

19. For example, it improves upon the traditional system of guardianship by clarifying the power of the courts to authorize both the continuation of a ward's business (MPC §§ 131, 222) and investments of types permitted for trustees (MPC § 225). Section 227 permits creditors of both the ward and the guardian to file claims in the guardianship proceeding for direct payment from the ward's funds. This procedure is a marked improvement over the traditional system, under which creditors of the guardian had to exhaust their remedies against the guardian personally before they could proceed against the ward's property. Section 235, which permits the guardian to administer a deceased ward's estate, is a sensible device calculated to save time and expense, so long as the guardian is appointed by and responsible to the same court which appoints administrators. Section 237, which permits dispensing with guardianship in certain cases, is also an improvement over the traditional system. Section 201 provides helpful clarification of the rules of venue in guardianship proceedings and permits transfer of such proceedings between courts. Section 205 permits a single guardianship proceeding when there are several wards from the same family who are of a common parent, parent and child, or husband and wife. Section 209 permits interested parties, including agencies which are caring for or paying benefits to the ward, to request and receive notices of hearings in guardianship proceedings. Section 215 permits summary appointment of a temporary guardian. Section 228(c) bars attachment and execution against property under guardianship. Section 229(b) permits the court to approve the compromise of a claim in favor of a minor ward, for personal injury or otherwise, without appointing a guardian. Section 231 provides safeguards against the acts of a guardian working an ademption of specific devises and bequests.

making short-term leases of land,²⁰ investing funds,²¹ and selling personal property.²² The explanation for this anomaly may lie in the fact that the draftsmen were required by their terms of reference to incorporate without change the provisions of the Uniform Veterans' Guardianship Act of 1942,²³ and the general scheme of the latter act was utilized throughout part IV of the Model Probate Code. As a result, the Model Code is based upon two general principles. First, in the absence of prior authorization by court order after a hearing, the guardian should be powerless to act with reference to the ward's property. Second, the power of the court to authorize a guardian to act with reference to his ward's property should be narrowly circumscribed. Both principles are, of course, inimical to economical and efficient management of large aggregations of property of varied types. However, if the basic administrative provisions of the Uniform Veterans' Guardianship Act had not been extended to all types of guardianships, the Model Code would have established two divergent systems based upon fundamentally contradictory principles.

Most of the states have enacted either the 1928 or the 1942 version of the Uniform Veterans' Guardianship Act.²⁴ The movement for this legislation appears to have been inspired by difficulties which the Veterans Administration was encountering with guardianships of minor and incompetent pensioners in some states during the period between the First and Second World Wars. Throughout this period most beneficiaries of the Veterans Administration were

20. Section 230 of the MPC requires prior court authorization for every lease of land, no matter how short. Consider what this means in terms of delay, expense, and loss of desirable tenants when the ward owns several large apartment houses with numerous apartments customarily leased for one-year terms.

21. Sections 225 and 250 of the MPC, which correspond to § 13 of the Uniform Veterans' Guardianship Act, require a prior order of the court before guardians may invest in anything except bonds of the state and the United States or obligations guaranteed by the United States, and guardians must report to the court on the day of purchase of even these excepted securities. These sections could be read as precluding even a deposit in an insured savings and loan association without a prior court order. In the case of funds of a ward who has at any time received money from the Veterans Administration, the court order may be entered only after fifteen days' notice to the Veterans Administration (MPC § 247).

22. See MPC § 230. Section 159 of the MPC, which is incorporated by reference in § 230, may permit subsequent approval by the court of a sale of perishable or depreciating personal property made without prior court authorization. Nevertheless, § 159 would not permit a guardian of property to sell chickens and pigs produced on his ward's farm without a prior court order authorizing each individual sale.

23. See Atkinson, *The Law of Succession*, 1948 ANNUAL SURVEY OF AMERICAN LAW 749, 750 (1949).

24. See Fratcher, *supra* note 6, at 265. The Commissioners' prefatory note to the Uniform Veterans' Guardianship Act, 9C UNIFORM LAWS ANN. 318 (1957), gives the impression that they thought the act was restricted to guardianships of disabled veterans. Actually, its most frequent application is likely to be to beneficiaries of National Service Life Insurance policies, most of whom are not veterans.

recipients of pensions which were conditioned on a severe financial-means test; thus, most of them were paupers who were wholly dependent upon their pensions for support. The guardian was likely to be an equally impecunious relative, who was often ignorant and sometimes dishonest. Some courts with guardianship jurisdiction were staffed by ignorant or corrupt judges, and thus provided inadequate supervision. Given this setting, the acceptance of the principles underlying the Uniform Veterans' Guardianship Act is understandable; indeed, they may be sound as applied to such a situation. The difficulty is that the act applies to every ward who has ever received any money from the Veterans Administration, regardless of the nature of the payment or the extent of his property and other income. Prior to World War II few such wards had substantial means, but since then there have been many persons of property receiving disability compensation and proceeds of National Service Life Insurance. Virtually everyone who served in World War II has at least received a National Service Life Insurance dividend, and thus becomes subject to the act if placed under guardianship.

It may be difficult to determine whether an incompetent has ever received money from the Veterans Administration, and it is much more difficult to determine whether some of his property was acquired with money paid by the Veterans Administration to him or to some predecessor in title. Yet an order of a guardianship court may be void if the procedures of the act were not followed. For example, if the court authorized the sale of a ward's land without knowledge of his prior receipt of a National Service Life Insurance dividend, the sale may be set aside upon a showing that this or some other money paid to someone by the Veterans Administration was, at some time, used to acquire the land.²⁵ Hence, despite their similarity, the very existence of two systems of guardianship under the 1946 Model Probate Code is a grave threat to the security of titles.

B. *Parallel Systems of Inefficient Guardianship*

As the foregoing discussion suggests, part IV of the 1946 Model Probate Code provides for two systems of guardianship of persons and property. One system, prescribed by sections 238-255 and based on the 1942 version of the Uniform Veterans' Guardianship Act, is

25. Sections 2, 10, and 13 of the Uniform Veterans' Guardianship Act (MPC §§ 239, 247, 250) give the impression that notice to the Veterans Administration is a jurisdictional matter, if the property involved was acquired with money paid by the Veterans Administration and the ward has ever received money from it.

for the persons and the VA-tainted property—property acquired partially or wholly with money paid by the Veterans Administration or its predecessors²⁶—of incompetents who have received money from the Veterans Administration, such as pensions and payments under National Service Life Insurance policies. The other system, set forth in sections 198-237, is for all other persons, for property which is not VA-tainted, whether or not its owner is a present or former payee of the Veterans Administration, and for VA-tainted property owned by an incompetent who is not a present or former beneficiary of the Veterans Administration. The 1946 Model Probate Code does not provide special systems of guardianship for any other receipts from the federal government, such as Social Security benefits, civil service retirement pay, or military retirement pay.

Sections 225, 229, 230, and 250 require the guardian to secure court authorization before making an investment other than in federal or state bonds or obligations guaranteed by the United States, compromising a claim by or against the ward, or selling, mortgaging, leasing, or exchanging real or personal property of the ward. In the case of VA-tainted property of a ward who has received money from the Veterans Administration, the latter must be given at least fifteen days notice of the hearing.²⁷ It is quite evident that these requirements are both complex and burdensome. In this regard it is interesting to note that fifteen years after the Code was promulgated the chief draftsman of the guardianship provisions stated that "the principal problems of property guardianship have not been losses due to dishonesty or incompetence of the fiduciary but rather to the red tape and expense of the court supervised administration."²⁸

III. PROTECTION OF PERSONS UNDER DISABILITY

The portion of the 1946 Model Probate Code which incorporates the Uniform Veterans' Guardianship Act makes no distinction between guardianship of persons and of property, and has no provisions concerning the responsibilities of a guardian appointed for the protection of the person of his ward.²⁹ The other parts of the Model Code recognize that only guardianship of the person or of

26. See MPC § 238 and text accompanying note 58 *infra*.

27. See MPC § 239.

28. Atkinson, *supra* note 14, at 210-11.

29. Section 238 of the MPC defines "guardian" as "any fiduciary for the person or estate of a ward," but there is no other mention in the act of the guardian's powers and duties with respect to the ward's person.

property may be needed in a particular case, but there is a single system, based upon a single adjudication of incompetency, for both types of supervision.³⁰ The First Tentative Draft of Revised Part IV, Model Probate Code, like the English Mental Health Act of 1959,³¹ establishes sharply distinct systems for guardianship of the person and protection of property,³² and provides that an adjudication that a person is incompetent to care for his person has no bearing on the issue of his ability to manage his property and affairs.³³

A. Statutory Guardians

Under English law a surviving parent is automatically the statutory guardian of the person of his minor child, and a parent may appoint a "testamentary" guardian for his minor child by deed or will.³⁴ Some American states have retained comparable arrangements for the designation of guardians of the persons of minors without judicial appointment, but the 1946 Model Probate Code makes no provision for guardians other than those appointed by a court.³⁵ The Tentative Draft makes the first qualified person on a prescribed list the statutory guardian of the person of an infant; the list consists of the infant's (1) spouse, (2) father, (3) mother, (4) testamentary guardian appointed by the father's will, and (5) testamentary guardian appointed by the mother's will.³⁶ This section is designed to eliminate, in most cases, the necessity for judicial proceedings to secure the appointment of guardians of the persons of infants. Provision is made for judicial removal of a statutory guardian upon a showing of good cause and for judicial appointment of a guardian of the person of an infant who has no statutory guardian.³⁷

30. See MPC §§ 200, 202-04, 208, 210-13, 219-21.

31. 7 & 8 Eliz. 2, c. 72, §§ 25-51, 100-02. See Fratcher, *supra* note 11, at 81.

32. Sections 401(a)-(d) and 404-17 of the FTD relate to guardianship of the person; §§ 401(f)-(j) and 418-39 relate to the protection of property. The scheme for protection of property is by means of a trust created and supervised by a court of equity in what is called a "curatelic proceeding."

33. FTD §§ 401(b), 407. Conversely, an adjudication of inability to manage property and other affairs effectively has no bearing on the issue of a person's competence to care for his own person. See FTD §§ 401(f), 418.

34. Guardianship of Infants Act, 1925, 15 & 16 Geo. 5, c. 45, §§ 4, 5. See Fratcher, *supra* note 11, at 76.

35. MPC § 199. Section 203 of the MPC admonishes the court, in appointing a guardian, to have "due regard to . . . any request for the appointment contained in a will or other written instrument executed by the parent for the appointment as guardian of his minor child."

36. FTD § 404. The guardian must be a resident of the state. *Ibid.*

37. FTD §§ 404-05.

B. Court-Appointed Guardians

The Uniform Veterans' Guardianship Act requires that every petition for the appointment of a guardian for a mental incompetent "show that such ward has been rated incompetent by the Veterans Administration."³⁸ It also provides that a certificate issued by the Administrator of Veterans' Affairs or his duly authorized representative indicating that the person has been rated incompetent "shall be prima facie evidence of the necessity for such appointment."³⁹ The latter provision has been held to authorize the appointment of a guardian without any other evidence of incompetency, even though the court deems the person to be competent.⁴⁰ The general provisions of the 1946 Model Probate Code make an adjudication of incompetency a prerequisite to the appointment of a guardian of the person of a mental incompetent,⁴¹ but there is no specification of the procedure or evidence required for such an adjudication.

The Tentative Draft also makes an adjudication of incompetency a prerequisite to the appointment of a guardian of the person of a mental incompetent, but it sets out in detail the procedure for such an adjudication.⁴² It permits the incompetent himself, or any other person interested in his welfare, to petition for the appointment of a guardian of the person. A certificate from the Veterans Administration is neither required nor given weight.⁴³ The incompetent is entitled to personal notice of the hearing; he can waive notice only by attending the hearing or by confirming the waiver in an interview with a court-appointed visitor, who must be an independent person trained in law or social work.⁴⁴ The section

38. UNIFORM VETERANS' GUARDIANSHIP ACT § 5(4) (MPC § 242(d)). This requirement probably cannot be met in the case of a person who is merely a payee of National Service Life Insurance proceeds.

39. UNIFORM VETERANS' GUARDIANSHIP ACT § 6 (MPC § 243).

40. *Morse v. Caldwell*, 55 Ga. App. 804, 191 S.E. 479 (1937); see Annot., 173 A.L.R. 1061, 1070 (1948); cf. *In the Matter of the Estate of Rickell*, 158 Md. 654, 149 Atl. 446 (1930).

41. See, e.g., MPC § 211. This section requires "sufficient competent evidence in a proceeding instituted for that purpose as provided by law." The comment contemplates that "other legislation" regulating such proceedings will be enacted. This approach leaves the section open to the construction that § 6 of the Uniform Veterans' Guardianship Act (MPC § 243) is such "other legislation." However, under this interpretation a payee of the Veterans Administration could be railroaded into guardianship on a mere certificate of an official of the Veterans Administration who has never seen or examined him. Cf. text accompanying note 39 *supra*.

42. FTD §§ 406-08.

43. Cf. FTD § 418, which provides that, in a proceeding for determination of inability to manage property, "a certificate of an official of a federal, state, or municipal agency which has been, is, or plans to, pay benefits to or for the disabled is evidence of the need for curatelic proceedings but not of disability."

44. FTD §§ 401(k), 408. Notice to the incompetent's spouse, parents, and at least one adult relative is also required.

dealing with adjudication of incompetence is designed to furnish adequate safeguards against competent persons being deprived of their liberty through the wiles of evilly disposed individuals who wish to control them or get them out of the way. In addition, this section provides for a private hearing in chambers when the alleged incompetent wishes to avoid the unpleasantness and publicity of a public hearing.⁴⁵

With respect to the appointment of a guardian for a minor, the 1946 Model Probate Code provides that the parents of an unmarried minor are entitled to the highest order of preference. Subject to this requirement, the court may appoint anyone who is willing to serve, giving due regard to nominations in the will of a deceased parent, nominations by a minor over fourteen years of age, and family relationships.⁴⁶ Regard is to be given to the spouse's wishes and family relationships in appointing the guardian of a mental incompetent.⁴⁷ The Tentative Draft confers preference for court appointment as guardian of the person of either a minor or a mental incompetent to (1) a nominee of the infant or incompetent if he has reached fourteen and has sufficient mental capacity to make an intelligent choice; (2) his spouse; (3) his parents; (4) a person nominated in the will of a deceased parent; (5) his children; (6) his next of kin; (7) the nominee of a person or agency caring for

45. FTD § 407 provides: "Upon petition of an alleged but unadjudicated incompetent or any person interested in his welfare for the appointment of a guardian of the person, the court shall set a date for hearing on the issue of competence. Unless the alleged incompetent has counsel, the court shall appoint an independent lawyer to represent him in the proceeding. The alleged incompetent shall be examined by an independent physician, not connected with any institution in which he is a patient, appointed by the court, and interviewed by a visitor sent by the court. The alleged incompetent shall be entitled to be present at the hearing, in person and by counsel, to see or hear all evidence bearing upon his condition, to present evidence bearing upon his competence, to cross-examine witnesses, including the independent physician and the visitor, and to trial by jury in open court. The issue may be determined at a hearing in chambers without a jury if the alleged incompetent so requests and his counsel, the independent physician, and the visitor, approve the request. An order adjudicating incompetence may specify a minimum period, not exceeding one year, during which no petition for an adjudication of competence may be filed without special leave of court. Subject to any such restriction, the incompetent and any person interested in his welfare may at any time present a petition or request for an adjudication of competence. Such a request may be made by informal letter to the court or judge. Any person who shall knowingly interfere or attempt to interfere with the making of such a petition or request or its transmission to the court or judge shall be guilty of a felony and shall be imprisoned in the state penitentiary for not less than five nor more than fifty years. The procedure and the rights of the incompetent shall be the same in a proceeding on such a petition or request as upon a petition for appointment of a guardian of an alleged but unadjudicated incompetent. Adjudications under this section have no bearing on the issue of inability to manage property and affairs."

46. MPC § 203.

47. *Ibid.*

him; and (8) a nominee of an agency which is paying benefits to him.⁴⁸ A person in priorities (2), (3), (5), or (6) may transfer his priority to a person with less priority or, if there is no person with less priority, to any other person. These provisions are based upon the assumption that an adult may be sufficiently incompetent, because of advanced age or otherwise, to need assistance in caring for his person, but still sufficiently competent to have a reasonable preference as to who shall care for him. The Tentative Draft also has the effect of empowering a person who qualifies in all respects, except state residency, as the statutory guardian of an infant⁴⁹ to designate, subject to court approval, the person to be appointed guardian.

The 1946 Model Probate Code gives a guardian of the person no power over the property of his ward.⁵⁰ In order to protect substantial aggregations of property, the Tentative Draft contemplates curatelic proceedings in equity, which are to be wholly separate from the guardianship proceeding.⁵¹ These proceedings will, of course, involve expense and should be unnecessary when the ward's only assets are personal effects and a small income from a pension, a trust, or insurance proceeds paid in installments. Accordingly, the guardian of the person is charged with a duty of caring for his ward's clothing, furniture, vehicles, and other personal effects.⁵² Moreover, if curatelic proceedings have not been commenced, the guardian is empowered to receive periodic payments voluntarily made for the care, support, and benefit of the ward by insurance companies, trustees, and federal, state, or municipal agencies.⁵³ If such payments exceed the requirements for the ward's maintenance and benefit, the guardian is directed to deposit the excess in an insured, interest-bearing bank or savings and loan association account in the ward's name. The guardian has no authority to make withdrawals from these or other accounts in the ward's name or to dispose of property other than money.

The Tentative Draft provides for removal of infants and incompetents to other states,⁵⁴ and attempts to discourage the growth of a guardianship "racket"⁵⁵ by restricting the compensation of

48. FTD § 411.

49. See note 36 *supra* and accompanying text.

50. MPC §§ 219(a), 220.

51. FTD §§ 401(f)-(j), 418-39.

52. FTD § 413.

53. FTD § 415. The payor can, as a condition of paying, insist upon curatelic proceedings, but voluntary payment to the guardian will discharge his liability.

54. FTD § 414.

55. See Regan & Farley, *Court Survey*, 34 Calif. S.B.J. 73 (1959); *Your Unknown Heirs*, Harper's Magazine, Aug. 1961, p. 29.

visitors, independent lawyers, and independent physicians to small fees paid by the county; by denying compensation to a guardian who is a spouse, parent, child, or statutory guardian of his ward and to all guardians ad litem; by restricting the amount of compensation of other guardians; and by prohibiting allowance of compensation to relatives and active political supporters of the judge.⁵⁶ However, no one would be so foolhardy as to contend that these safeguards are certain to succeed.

IV. PROTECTION OF PROPERTY OF DISABLED PERSONS

The systems for protecting the property of disabled persons provided by the traditional American scheme of guardianship and by part IV of the 1946 Model Probate Code have been outlined at the beginning of this article. Even if the Uniform Veterans' Guardianship Act is given the narrowest possible construction, so as to limit its application to the VA-tainted property of present and former beneficiaries of the Veterans Administration,⁵⁷ it is evident that a modern, efficient, and economical system for protection of the property of disabled persons is impossible, so long as that act remains in force. Millions of Americans are former beneficiaries of the Veterans Administration in that they have had a tooth pulled at a VA facility, received a dividend or payment under a National Service Life Insurance policy, or obtained educational benefits or a mortgage guarantee under the G.I. Bill. If anyone at any time paid part of the purchase price of a piece of property with funds derived from the Veterans Administration or its predecessors, that property is VA-tainted irrespective of the fact that it has changed hands since that purchase.⁵⁸ Thus, it would seem that if a Revolutionary War soldier invested some of his pension in a farm, that farm is VA-tainted and would be governed by the veterans' guardianship system if the present owner is an incompetent who is or has been receiving money from the Veterans Administration. Although as a practical matter it is impossible in most cases to determine whether a par-

56. FTD § 416.

57. The key sections are §§ 1 and 2 (MPC §§ 238, 239). The latter section appears to make notice to the Veterans Administration mandatory "in any suit or other proceeding affecting in any manner the administration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the Veterans Administration." "Ward" is defined in the preceding section as "a beneficiary of the Veterans Administration." "Veterans Administration" is defined as "the Veterans Administration, its predecessors or successors."

58. Cf. MPC § 238.

ticular piece of property is VA-tainted, this term probably covers most of the property in this country.

In light of these difficulties, it is not surprising that the First Tentative Draft of Revised Part IV, Model Probate Code, proposes repeal of the Uniform Veterans' Guardianship Act.⁵⁹ The Tentative Draft would establish only one system for the administration of property owned by persons under disability. It is, however, drawn in such a way as to make it possible to impose all of the essential restrictions of the Uniform Veterans' Guardianship Act in a particular curatelic proceeding.⁶⁰ It would seem that the revised part IV fully protects all legitimate interests of the Veterans Administration, while eliminating the confusion and hazards which arise from the existence of two divergent systems of guardianship of property.

Part IV of the 1946 Model Probate Code is restricted to the protection of the persons and property of "incompetents." "Incompetent" is defined as any person who is either under the age of majority or incapable, by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of managing his property or caring for himself.⁶¹ Although the Tentative Draft does not specifically include "idiocy" in its list of disabling conditions, it does repeat the other standards of incompetency found in the Model Code, and adds seven new categories: physical disability, spendthrift tendencies, imprisonment, compulsory hospitalization, confinement in an institution, detention by a foreign power, and unknown whereabouts.⁶² It is evident that the property of persons in these seven categories often needs protection which they are unable to provide themselves. It seems desirable to provide a single well-designed system for the protection of the property of all classes of persons who are unable to manage their own.⁶³

59. FTD § 440. Section 18 (MPC § 255), which permits the commitment of insane persons to the custody of the Veterans Administration instead of to a particular institution, is excepted from the repeal.

60. When the disabled person is receiving benefits from the Veterans Administration, it is an interested party entitled to initiate curatelic proceedings. FTD §§ 418-19, 426. If the proceedings are instituted by someone else, it is entitled to notice of and to participate in the initial hearing. FTD § 420. It may also request notice of and participate in subsequent hearings. FTD § 421. The powers of a limited protector may be restricted to those which a guardian of property would have under the Uniform Veterans' Guardianship Act. FTD § 425. He may be required to account periodically and submit to a physical check of assets as prescribed by that act. FTD § 428.

61. MPC § 196(c).

62. FTD § 401(f).

63. The Uniform Absence as Evidence of Death and Absentees' Property Act provides a system of judicial trusteeship for the property of missing persons. Some states have statutes providing for judicial trusteeship of property of imprisoned persons. See,

The provisions of the Tentative Draft governing adjudication of disability to manage property⁶⁴ are similar to those covering adjudications of incompetence, which have been quoted and discussed.⁶⁵ The issue is of course different, and there are a few variations in the procedure. In this regard, the individual who is allegedly disabled need not be notified personally if he is outside the state.⁶⁶ However, notice must be given to any federal, state, or municipal agency which is paying him benefits and to at least two, if so many can be found, of his children or potential devisees, legatees, heirs, and next of kin.⁶⁷ In addition, the court-appointed visitor must be a lawyer.⁶⁸ There is no right to a jury trial if the alleged disability is infancy, imprisonment, compulsory hospitalization, confinement in an institution, detention by a foreign power, or unknown whereabouts.⁶⁹ Finally, a recent adjudication of disability in the respondent's state of residence is admissible in proceedings in a second state as prima facie proof of disability, but this rule does not extend to certificates of incompetency issued by the Veterans Administration.⁷⁰ It is hoped that these provisions establish adequate safeguards against mistaken and unfair adjudications of disability, and also permit an elderly person whose powers are failing to secure the appointment of a judicial trustee of his property in a quiet hearing in chambers conducted without publicity.⁷¹

A. *Need for Supervision by Courts With General Equity Jurisdiction*

Although there is considerable difference of opinion as to the types of transactions a guardian should have power to undertake without special judicial authorization, most attorneys would agree that the power should exist somewhere to approve transactions which

e.g., Mo. REV. STAT. ch. 460 (1959). Such legislation and any other conflicting statutory provisions for protection of the property of persons in any of the categories covered by revised part IV should be repealed incident to the enactment of the revision.

64. FTD §§ 418-20.

65. See note 45 *supra* and accompanying text.

66. FTD § 420.

67. FTD §§ 420, 426. Failure to give required notice does not deprive the court of jurisdiction. FTD § 434(a).

68. FTD § 401(k).

69. FTD § 418. The respondent is entitled to demand a jury trial if the alleged disability is mental incompetence, habitual drunkenness, addiction to drugs, senility, physical disability, or spendthrift tendencies. However, he may waive this right if his counsel, the independent physician, and the visitor approve his doing so.

70. *Ibid.*

71. The disabled may petition for his own adjudication or appoint an agent or attorney to do so on his behalf. FTD §§ 418-19.

are necessary or advantageous for the protection of the ward's property. Yet there are decisions rendered under the traditional American system of guardianship that the courts lack power to authorize a lease binding beyond the period of guardianship,⁷² an exchange of lands,⁷³ a sale of land before all personal property has been exhausted,⁷⁴ a sale or release of contingent future interests or expectancies based upon rights of dower and curtesy,⁷⁵ the operation of an unincorporated business,⁷⁶ the payment of medical or funeral expenses of the ward's parent,⁷⁷ the making of gifts,⁷⁸ the exercise of the ward's powers as trustee or donee of a power of appointment,⁷⁹ a sale of the ward's property to the guardian or the guardian's property to the ward,⁸⁰ or the prosecution of a suit for the ward's divorce.⁸¹ Other decisions have held that the courts cannot even ratify transactions which they could have authorized in advance.⁸² Moreover, the 1946 Model Probate Code deprives the courts of power to authorize the purchase of a home for a minor ward's dependent family,⁸³ the purchase of a home from the guardian,⁸⁴ a sale of the ward's property to the guardian,⁸⁵ or the acceptance of a purchase money mortgage for more than one year.⁸⁶

It is evident from the statutes and decisions that legislatures and appellate courts have been unwilling to entrust much power over property to the courts with guardianship jurisdiction. One reason for this unwillingness probably stems from the fact that a number of states have constitutional provisions conferring guardianship jurisdiction on inferior courts presided over by judges who are not necessarily well qualified to handle complex problems of prop-

72. See cases collected in Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 301 n.138 (1960).

73. *Id.* at 303; cf. *Alexander v. Windsor*, 107 Mont. 152, 81 P.2d 685 (1938), suggesting that the courts lacked power to authorize a guardian of property to exchange sheep for calves.

74. Fratcher, *supra* note 72, at 306.

75. *Id.* at 305-06.

76. *Id.* at 313.

77. *Id.* at 315-16.

78. *Id.* at 316.

79. *Id.* at 318.

80. *Id.* at 320-24.

81. *Id.* at 320.

82. *Id.* at 272; cf. UNIFORM VETERANS' GUARDIANSHIP ACT § 13 (MPC § 250); MPC § 225(a).

83. MPC §§ 226, 252.

84. *Ibid.*

85. MPC § 230(b). This subsection does, however, empower the court to authorize a guardian who is the spouse, parent, child, brother, or sister of his ward and a cotenant with the ward in the property to purchase at public sale.

86. MPC §§ 154, 230(c). The mortgage may not exceed 50% of the purchase price.

erty law.⁸⁷ The draftsmen of the 1946 Model Probate Code urged that jurisdiction thereunder be conferred on trial courts of general jurisdiction or at least on courts with equally well-qualified judges.⁸⁸ Their plea has had little effect, but this result is not surprising in view of the difficulty of securing a constitutional amendment which would disturb vested political interests in a field that the public does not understand. The only practicable solution to the problem of the justifiable unwillingness of legislatures and appellate courts to permit courts with guardianship jurisdiction to exercise adequate power over property is to remove the whole subject of protection of the property of persons under disability from the ambit of guardianship and place it where it has always been in England—in the courts of equity jurisdiction. This should ensure a competent judge whose powers the legislature will agree to enhance and the appellate courts to respect. For the foregoing reasons the Tentative Draft provides that curatelic proceedings are within the general equity jurisdiction.⁸⁹

B. *The Need for Broad Judicial Authority*

The First Tentative Draft provides that "after it has adjudged that a person is disabled the court shall have all those powers over the property and affairs of the curatel⁹⁰ and other persons which the curatel himself could exercise if of age, not disabled, and present."⁹¹

87. In Missouri, for example, guardianship jurisdiction is vested in probate courts. Mo. CONST. art. V, § 16. In rural counties the probate judge is also the magistrate (justice of the peace). Mo. CONST. art. V, § 18. Thus, he spends most of his time disciplining drunkards and drivers of overweight trucks. Moreover, he is elected on a partisan basis for a four-year term, and the statutory salary is only \$6,600 per annum. Mo. REV. STAT. ANN. § 481.110 (1959), § 482.150(1)(1) (Supp. 1965); Mo. Laws 1965, H.B. No. 364, § 1. Although he must be a lawyer, he may not practice law. Mo. CONST. art. V, §§ 24, 25 (1945). See Simes & Basye, *The Organization of the Probate Court in America* (pts. 1 & 2), 42 MICH. L. REV. 965 (1944), 43 *id.* 113, 137-54 (1944), in SIMES, MODEL PROBATE CODE 385, 466-88 (1946).

88. MPC § 4 and comment; SIMES, MODEL PROBATE CODE 15 (1946).

89. FTD § 402. Revised Part IV has been drafted on the assumption that jurisdiction over guardianship of the person may not necessarily be vested in the same court that has jurisdiction over protection of the property of persons under disability. If both types of jurisdiction are vested in the same court, which is desirable so long as it is not an inferior court, provision should be made for the hearing of guardianship and curatelic matters at the same time. For example, a hearing on the issue of incompetence under FTD § 407 could be combined with one on the issue of disability to manage property under FTD § 418, with considerable saving of time and expense.

90. FTD § 401(g) defines "curatel" as "a person who has been adjudged to be disabled." This term was taken from the Roman civil law, and it is broad enough to include anyone whose property is managed by a fiduciary. As the disabled person may be neither an infant nor a mental incompetent, the terms "ward" and "incompetent" would seem to be inappropriate.

91. FTD § 422. This sentence was suggested by the Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, § 102.

This broad grant of judicial power is the most important provision of the entire draft. It is designed to ensure that courts have authority to do every act which ought to be done in connection with the property and affairs of a person who is under disability. This general grant of authority is limited, however, by a more specific direction:

The court will exercise, or direct the exercise, of its powers to exercise or release powers of appointment of which the curatel is donee, to make gifts exceeding one year's income of the curatelic property, to make, modify and revoke wills and codicils of the curatel, to create trusts of the curatelic property which may last longer than his disability or life, and to sue for dissolution of his marriage, only if satisfied, after notice and hearing, that the curatel, if of age, not disabled and present, would do so himself.⁹²

The judicial powers just quoted do not exist under present American law, but the creation of such authority is necessary if the property of disabled persons is to be protected against ruinous taxation. An estate plan may become very much out of date because of changes in the family and property of a person who is under disability for an extended period, and changes in tax legislation may make an old estate plan highly disadvantageous. In this regard, the Tentative Draft would make it possible to bring the curatel's estate plan up to date or, if he had none before he became disabled, to give him one which will provide for his dependents and prevent undue shrinkage of his estate at death due to estate and inheritance taxes. Similarly, the provisions of the Tentative Draft would permit a disabled person to divorce a spouse who has abandoned or maltreated him and thereby cut off the spouse's right to support, forced share, and other marital rights in property.

C. *The Role of a "Protector"*

Under the Tentative Draft a court may act, after adjudication, directly or through a protector or limited protector appointed by it.⁹³ The priorities for appointment as protector or limited pro-

92. FTD § 423.

93. FTD § 422. "Protector" is defined as "one appointed by a court to manage the property and affairs of a curatel." "Limited protector" is defined as "one whose letters of protectorship limit his powers." FTD § 401(h). "Protector" was the title of the official who exercised the powers of the Crown during the minority or other disability of a mediaeval English king. The term has been used in English conveyancing in the form "protector of the settlement." It has, however, no connotations which make it unsuitable for use as the distinctive appellation for a judicially appointed trustee of the property of a person under disability who may be neither an infant nor a mental incompetent.

In the case of some small estates, even the appointment of a protector or limited

protector are similar to those for appointment as guardian of the person,⁹⁴ and either a corporation or a natural person may qualify as the protector of a curatel.⁹⁵ The protector assumes title, in trust, to the curatel's property, and he has all the powers conferred upon trustees by the Uniform Trustees' Powers Act,⁹⁶ the same powers of investment as a custodian under section 4(e) of the Uniform Gifts to Minors Act, and any additional powers of investment conferred by law on other trustees in the state. The Uniform Trustees' Powers Act confers upon a trustee "power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust."⁹⁷ Section 4(e) of the Uniform Gifts to Minors

protector may be unnecessary. For example, the court could entrust the care of the curatel's home and furniture to a relative who agrees to pay taxes and make repairs while the curatel is in the asylum, and the court could give custody of his securities and jewelry to a bank.

94. FTD § 426. The order of preference is as follows: (1) the nominee of the curatel if he has reached eighteen and has sufficient mental capacity to make an intelligent choice; (2) his spouse; (3) his parents; (4) a nominee named in the will of a deceased parent; (5) his children; (6) his potential devisees, legatees, heirs and next of kin; (7) the nominee of a person or institution caring for him; and (8) the nominee of an agency which is paying benefits to him (e.g., the Veterans Administration). A person in priority (2), (3), (5), or (6) may transfer his priority to a corporation, a person with lower priority, or, if there is no person with lower priority, to any other person. These provisions attempt to place the selection of the protector in the hands of the person most interested in the proper protection of the curatel's property.

95. FTD § 424.

96. 1964 HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 265, 267. This provision was enacted by IDAHO CODE §§ 68-104 to -113 (Supp. 1965) and WYO. STAT. ANN. §§ 4-36 to -45 (Supp. 1965). An earlier but similar draft was enacted as FLA. STAT. ANN. ch. 691 (1944); OKLA. STAT. ANN. tit. 60, §§ 175.1-53 (1963); TEX. REV. CIV. STAT. ANN. art. 7425b (1960). The New York Fiduciaries' Powers Act, N.Y. DECED. EST. LAW § 127, is also similar.

97. UNIFORM TRUSTEES' POWERS ACT § 3(a). For the theory behind this broad grant of power, see Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627 (1962). The powers conferred by § 3(a) include, but are not limited to, those enumerated in § 3(c), as follows:

(c) A trustee has the power, subject to subsections (a) and (b):

(1) to collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(2) to receive additions to the assets of the trust;

(3) to continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

(4) to acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(5) to invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(6) to deposit trust funds in a bank, including a bank operated by the trustee;

(7) to acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(8) to make ordinary or extraordinary repairs or alterations in buildings or

Act empowers custodians, without court authorization or approval, to "invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital, except that he may, in his discretion and without liability to the minor or his estate, retain a security given to the minor. . . ."⁹⁸ Under the Tentative Draft, the foregoing powers of a protector may be exercised by him without special authorization or confirmation by the court.⁹⁹ Thus it is

other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) to subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries, or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(10) to enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

(11) to enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) to grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(13) to vote a security, in person or by general or limited proxy;

(14) to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) to sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) to hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(17) to insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(18) to borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(19) to pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(20) to pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;

(21) to allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) to pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;

(23) to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(24) to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(25) to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(26) to execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

98. 9B UNIFORM LAWS ANN. 186 (1957).

99. FTD § 424. CAL. PROB. CODE § 1853 permits the court to authorize a conservator

within a protector's discretion to sell, mortgage, or lease any of the curatelic property and make any investment permitted by the broad "prudent man rule." Consequently, in most cases there will be no necessity for any judicial proceedings whatever between the time the protector is appointed and the time the curatel comes of age, ceases to be disabled, or dies.

The broad, independently exercisable powers of a protector should, of course, be conferred only upon a corporation or person whose competence, integrity, and financial responsibility are adequate. When the qualifications of such a fiduciary are less than adequate or when an interested party, such as the Veterans Administration, so requests, the court may, instead of appointing a protector, appoint a natural person as limited protector.¹⁰⁰ A limited protector has all the title and powers of a protector, except those specifically withheld from him by the terms of his letters of protectorship. The letters may limit his title and powers to a part of the curatel's property, but more commonly they would require him to secure special court authorization for important transactions, such as sales, mortgages, and long-term leases of land. In the latter case, a limited protector would be in a position similar to that of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving protectors and limited protectors title as trustees is to give full effect to the provisions of the act protecting third parties who deal with them or who purchase property that has been conveyed by them.¹⁰¹

The Tentative Draft provides that the liability of a protector or limited protector to the curatel or his estate for breach of duty is confined to actual damages.¹⁰² This provision is designed to overrule decisions that a trustee or guardian who fails to invest the assets under his supervision is liable to the beneficiary or ward for amounts in excess of that which could have been earned by proper investment.¹⁰³ It also provides that a protector or limited protector is not liable to the curatel or the curatel's estate for losses which are not caused by his breach of duty.¹⁰⁴ This provision is designed to over-

of the property of a mental incompetent to exercise very broad powers, approximating those of an owner, without court authorization, confirmation, or approval of particular transactions.

100. FTD § 425.

101. See note 130 *infra* and accompanying text.

102. FTD § 428. Sections 172(c) and 233 of the MPC may accomplish this result but their language is not clear on the point.

103. See, e.g., *Wight v. Lee*, 101 Conn. 401, 126 Atl. 218 (1924); *Lipic v. Wheeler*, 362 Mo. 499, 242 S.W.2d 43 (1951); cf. RESTATEMENT (SECOND), TRUSTS § 181, comment c, § 207(1), comment b (1959).

104. FTD § 428. Compare MPC §§ 172(c), 233.

rule decisions holding that a fiduciary who fails to earmark trust property,¹⁰⁵ wrongfully delegates control over the trust property to another,¹⁰⁶ or sells his own property to the trust,¹⁰⁷ is liable for losses which occur to the property even though there is no causal connection between the breach of duty and the loss.

For purposes of personal liability to third persons, the protector or limited protector is treated as if he were the manager of a corporation. In the absence of a special agreement, he is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust. Similarly, he is not personally liable for obligations arising from possession or ownership of the curatelic property or for torts committed in the course of the administration of the trust, unless he is personally at fault.¹⁰⁸ These provisions are designed to abolish the existing rules that a trustee is personally liable on contracts entered into in his fiduciary capacity and that he is personally liable, on a respondeat superior theory, for the torts of servants properly employed by him in the administration of the trust.¹⁰⁹

D. *Claims by Third Parties*

The 1946 Model Probate Code permits a person who has a claim against the estate of a ward, whether based on a liability of the ward which arose prior to the guardianship or an obligation properly incurred by the guardian for the benefit of the ward or his estate, and whether arising in contract, tort, or otherwise, to file the claim in the guardianship proceeding.¹¹⁰ This expeditious procedure is a real improvement over the common-law rule that liabilities of the ward had to be established in a separate action against him, with consequent difficulties of collection from assets in the custody of the guardianship court.¹¹¹ It is an even greater improvement over the common-law rule that claims under contracts made by the guardian, and for torts committed by his servants, had to be enforced by an action at law against the guardian personally, so that the ward's

105. *Estate of Arguello*, 97 Cal. 196, 31 Pac. 937 (1893); *Harward v. Robinson*, 14 Ill. App. 560 (1884); *McAllister v. Commonwealth*, 30 Pa. St. 536 (1858); *Williams v. Williams*, 55 Wis. 300, 12 N.W. 465 (1882).

106. *In re Estate of Wood*, 159 Cal. 466, 114 Pac. 992, 36 L.R.A. (n.s.) 252 (1911).

107. *Cornet v. Cornet*, 269 Mo. 298, 190 S.W. 333 (1916).

108. FTD § 431. To this end, the contrary provisions of §§ 12(3) and 14(4) of the Uniform Trusts Act are made inapplicable to protectors and limited protectors.

109. See RESTATEMENT (SECOND), TRUSTS §§ 261-65 (1959); *cf.* UNIFORM TRUSTS ACT §§ 12-14.

110. MPC § 227; *cf.* UNIFORM TRUSTS ACT §§ 12, 14.

111. See Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 297-99 (1960).

estate could be reached only by a suit in equity for subrogation to the guardian's right to exoneration, after exhaustion of all remedies against the guardian's individual property.¹¹²

The Tentative Draft preserves these progressive features of the 1946 Code,¹¹³ and also provides that the protector should pay all claims against the curatel and against himself as protector, without filing in the curatelic proceeding unless it appears that the claim lacks merit or that payment would reduce the curatelic property to an amount insufficient to ensure adequate support of the curatel and his dependents.¹¹⁴ In the latter event the court may defer payment, and it may direct the protector to give the claimant a mortgage or other security on the curatelic property to secure payment of the claim at some future date.¹¹⁵ All actions pending against the curatel as sole defendant at the time he is found to be disabled are consolidated into the curatelic proceeding, and all subsequent actions against him as sole defendant must be by way of claim in that proceeding.¹¹⁶ A protector may, by advertising for claims against the curatel and the curatelic property, bar those not presented within four months after publication of the advertisement.¹¹⁷ By this means, the protector can inform himself promptly of the real value of the curatel's net estate.

E. *Legal Disabilities Imposed Upon Curatels*

There is considerable doubt in many jurisdictions about the extent to which the appointment of a guardian of property deprives the ward of capacity to enter into transactions affecting that property. The 1946 Model Probate Code contains no provision on this

112. *Id.* at 299-300; see Fulda & Pond, *Tort Liability of Trust Estates*, 41 COLUM. L. REV. 1332 (1941); Scott, *Liabilities Incurred in the Administration of Trusts*, 28 HARV. L. REV. 725 (1915); Stone, *A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee*, 22 COLUM. L. REV. 527 (1922); cf. UNIFORM TRUSTS ACT, §§ 12, 14; RESTATEMENT (SECOND), TRUSTS §§ 266-73 (1959).

113. FTD § 431.

114. *Ibid.*

115. *Ibid.*

116. *Ibid.* Actions pending at the time of adjudication of disability in which the curatel is a co-defendant may proceed in the court in which started, and, after such adjudication, actions against the curatel as co-defendant may be commenced in another court, with the consent of the court in which the curatelic proceeding is pending. However, writs of execution and garnishment may not be levied on curatelic property, and it may not be reached by judicial process issued other than in the curatelic proceeding. An action in another court against the curatel as co-defendant is, of course, defended by the protector. *Ibid.*

117. FTD § 432. The comment to MPC § 227 says that such provisions are "believed to be undesirable." However, such a provision has been found useful in England. Trustee Act, 1925, 15 & 16 Geo. 5, c. 19, § 27.

point. Since the Tentative Draft permits curatelic proceedings with respect to the property of persons other than infants and mental incompetents,¹¹⁸ it seemed desirable to specify in some detail the disabilities of a curatel. The applicable section provides that:

After an adjudication of disability the curatel is incapable of making a gift, of conveying, encumbering or making any charge on his property and of binding himself or his property by any contract, other than a contract for necessities for himself or his dependents The curatel lacks capacity to marry; to sue or be sued; to make, modify or revoke a will or codicil; to exercise a power of appointment; to exercise powers as trustee, protector, personal representative, custodian for a minor or attorney in fact; and to create, modify or terminate a trust¹¹⁹

These provisions constitute a drastic, perhaps too drastic, deprivation of the curatel of virtually all power to bind himself and his property. In view of the breadth of the incapacity imposed and the fact that a curatel may be a mentally sound adult who has no knowledge of his adjudication of disability (as in the case of a missing person or a person imprisoned or detained in a foreign country), some additional provision is necessary to avoid unfairness and hardship. For example, if during the course of a missing person's absence he marries, makes a will in favor of his spouse, and then dies, the marriage and the will would be nullities under this section even though neither the curatel nor his wife knew of his adjudication of disability. Consequently, the section provides that the court may confirm any transaction, including a marriage, before or after the death of the curatel.¹²⁰

V. PROTECTION FOR THIRD PERSONS

It was suggested above that the most important provision of the Tentative Draft is the broad grant of authority to the courts, giving them the same degree of power over the curatel's property and affairs as the curatel himself could exercise if he were of age, not

118. See text accompanying note 62 *supra*.

119. FTD § 430. As a matter of constitutional and international law, this section probably could not invalidate a marriage, as such, entered into by a sane curatel in another state or country. It could, however, effectively deprive the other party to the marriage of marital rights in curatelic property within the state. Similarly, although it could not, perhaps, make a will executed in another state or country a complete nullity, it could make it ineffective as to the curatelic property in the state.

120. *Ibid.* The court also may authorize any such transaction in advance, and the protector may authorize or confirm the transactions listed in the first sentence of FTD § 430, which is quoted in the text accompanying note 119 *supra*.

disabled, and present.¹²¹ Correlative to this, and next in importance, is the section on protection of third parties.¹²² As previously noted, under the traditional American system of guardianship of property a guardian is deterred, by his lack of adequate powers and his doubt as to the court's power to authorize any but a few routine transactions, from entering into many transactions which would be advantageous to the estate.¹²³ This feature of the traditional system, which tends to make a guardian of property an inactive preserver of the *status quo* instead of an active, dynamic, efficient manager of the estate, is complemented and buttressed by the traditional rules respecting third parties who have the temerity to deal with guardians of property. Even if a guardian has express court authorization to give a deed, mortgage, or lease, the other party to the transaction has no protection whatever if the court lacked power to give the authorization or there was an irregularity in the proceedings.¹²⁴ Therefore, an innocent purchaser who pays a full and adequate price at a judicially ordered sale and receives a guardian's deed gets nothing if the guardian fails to file a prescribed oath, secure a routine order of confirmation, or take some other technical procedural step required by statute. That is, the ward can recover the land from the purchaser, and the purchaser cannot recover the purchase price from the ward or his estate, except to the extent that he can show that the money is still in the hands of the guardian or ward or has been properly applied to the use of the ward. A third person who enters into a transaction with a guardian who has not received court authorization to convey the ward's property is in an even worse position. Since a guardian does not have title to the property under his supervision, the bona fide purchaser doctrine probably does not protect persons who purchase from him.¹²⁵ Thus, if the guardian lacked power to make the transfer, the purchaser has no protection, even though the most diligent inquiry would not have revealed this deficiency. The task of a title examiner with a guardian's deed in the chain of title is a nightmare.

The Tentative Draft provides that after the filing of a petition for adjudication of disability:

[T]he court has jurisdiction over every interest, legal or equitable, in, and every power over, property, to which the alleged

121. See note 91 *supra* and accompanying text.

122. FTD § 434.

123. See text accompanying notes 6-11, 72-86 *supra*.

124. See Fratcher, *supra* note 111, at 307.

125. See *id.* at 309-10. As this authority indicates, there is a great deal of confusion in this area.

disabled was entitled at the time of such filing or to which he thereafter became entitled, notwithstanding that the alleged disabled is not in fact disabled, that the form, content or verification of the petition is defective, or that any notice required by law has been omitted or defectively served. . . . Every disposition and encumbrance of any such interest, and every exercise of any such power, made or directed by the court while it has jurisdiction, shall bind the alleged disabled, and all persons claiming through or under him, to the same extent as if it had been done by him while of full age and not disabled.¹²⁶

This provision confers quasi-in-rem jurisdiction over property of the disabled which is located in the state. Letters of protectorship and court orders authorizing land transactions may be recorded.¹²⁷ As between a purchaser who relies on the record and the alleged disabled (and all persons who claim through or under him), the recording of letters or an order creates a conclusive presumption that the court had jurisdiction to issue the letters or order.¹²⁸ The Tentative Draft also provides that persons who deal with or assist a protector in the conduct of a transaction are protected by section 7 of the Uniform Trustees' Powers Act, which states:

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise¹²⁹

Purchasers and other persons who deal with a limited protector have no duty to inquire into his powers, except to examine his letters of authority. In the absence of imputed knowledge arising from this very limited duty of inquiry or actual knowledge that the transaction is unauthorized or improper, such a person is deemed to be in good faith. A person who contracts with, or receives a transfer of a legal or equitable interest in curatelic property from, a protector or limited protector, in good faith and for value paid or promised, is entitled to keep the property or enforce the contract,

126. FTD § 434(a).

127. FTD § 430.

128. FTD § 434(a).

129. FTD § 434(b). See also 1964 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 271.

free of all claims of the curatel, the protector, and their successors in interest.¹³⁰ This rule applies irrespective of any failure to give required notice, or any other procedural irregularity in the appointment of the protector or limited protector, or in the proceeding through which he was authorized to act.¹³¹ Persons who assist or participate with a protector or limited protector in the conduct of a transaction incur no liability to the curatel, unless they have actual knowledge that the transaction is unauthorized or improper.¹³²

The provisions already discussed would seem to indicate that a title examiner need insist on nothing in an abstract to support a protector's deed, except the letters of protectorship. However, the Tentative Draft was written by a former fly-specking title examiner who, out of an abundance of caution, added further provisions to protect subsequent purchasers.¹³³ These state expressly that a purchaser from anyone claiming under a deed given by a protector or limited protector has no duty to inquire into the regularity of the curatelic proceedings or the propriety of the transaction and may assume, in the absence of actual knowledge to the contrary, that the protector had the power purportedly conferred upon him by his recorded letters and that he exercised it properly. Since the protector or limited protector had legal title, such a purchaser is a bona fide purchaser for value who acquires title free of all equities of the curatel and persons claiming under him. One claiming through or under a bona fide purchaser has a good title, notwithstanding any knowledge that the transaction with the protector was unauthorized, improper, or irregular.

The provisions for the protection of third parties who deal with a protector or derive title through him are not designed solely for

130. FTD § 434(b).

131. *Ibid.*

132. *Ibid.* In the absence of such legislation, corporations which register transfers of securities to or from fiduciaries, brokers who effect such transfers and, in some cases, bankers who honor checks drawn by fiduciaries, have been charged with a duty of inquiry into the powers of the fiduciary and the propriety of their exercise, and subjected to liability if such inquiry would have revealed a breach of fiduciary duty. See Braucher, *Security Transfers by Fiduciaries*, 43 MINN. L. REV. 193 (1958); Conard, *A New Deal for Fiduciaries' Stock Transfers*, 56 MICH. L. REV. 843 (1958); Fratcher, *supra* note 111, at 326-27; Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 646-49 (1962); Merrill, *Bankers' Liability for Deposits of a Fiduciary to His Personal Account*, 40 HARV. L. REV. 1077 (1927); Scott, *Participation in a Breach of Trust*, 34 HARV. L. REV. 454 (1921); cf. UNIFORM COMMERCIAL CODE §§ 8-304, -318, -401 to -403; UNIFORM FIDUCIARIES ACT §§ 3, 7, 9; UNIFORM GIFTS TO MINORS ACT § 6; UNIFORM ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS §§ 3, 7; UNIFORM TRUSTEES' POWERS ACT § 7; UNIFORM LAW COMMISSIONERS' MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT § 6(c); RESTATEMENT (SECOND), TRUSTS § 326 (1959).

133. FTD § 434(c).

their benefit. These measures are also intended to benefit the curatel. Under existing law, transactions with guardians of property are so hazardous that guardians sometimes are unable to find anyone willing to deal with them and often find themselves obliged to deal on terms much less advantageous to the ward than those which an owner in his own right could obtain. It is hoped that the removal of these unreasonable hazards from transactions with protectors will enable protectors to secure, in transactions with third parties, as advantageous terms as could a beneficial owner. If a protector exceeds or abuses his powers, he will be liable to the curatel,¹³⁴ and any judgment against the protector will be collectible from his bond.¹³⁵

The First Tentative Draft of Revised Part IV, Model Probate Code, may be changed beyond recognition in the hands of the Reporting Staff, its two guiding committees, and the National Conference of Commissioners on Uniform State Laws. Perhaps it should be. If this proposed draft is of assistance in the task of promulgating new uniform guardianship legislation containing a clear solution to each of the problems which have been discussed, it will have served a useful purpose. The bane of the law of guardianship of property has been that since their powers are so doubtful, guardians and courts have been afraid to act in many situations where action was obviously needed to protect the property in their care. In many situations any clear rule would be better than the prevailing uncertainty.

134. FTD § 428.

135. FTD § 427 provides that a natural person who is serving as a protector or limited protector may be required to furnish a bond in the amount of the aggregate capital value of the curatelic property in his control plus one year's estimated income. Sureties or other security for the performance of the bond, such as a pledge of securities or a mortgage of land, may be required.