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Legislation—The New York Conservator Law

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LEGISLATIVE NOTE

LEGISLATION—THE NEW YORK CONSERVATOR LAW

Recently enacted provisions of the New York Mental Hygiene Law[1] provide for the appointment of a fiduciary, termed a "conservator," for anyone "who by reason of advanced age, illness, infirmity, mental weakness, intemperance, addiction to drugs, or other cause, has suffered substantial impairment of his ability to care for his property . . . ."[2] The present article will discuss the statute, define the problems that existed prior to passage of the new law, and analyze the likely effect that the law will have in solving these problems.

I. THE STATUTE: GENERAL PROVISIONS

Article 77 of the New York Mental Hygiene Law, entitled "Conservators," is intended to provide a flexible means to protect persons with certain debilities.[3] Basically, the statute enables county courts outside of New York City and state supreme courts to appoint a conservator for any person who has become unable to care for his property, or to provide for himself or others dependent upon him.[4] The court proceeding can be initiated by the proposed conservatee, a friend or relative, or, if the proposed conservatee is a patient in a mental hospital or institution, by the official in charge of the institution.[5] Before the court can appoint a conservator, it must be satisfied that there is clear and convincing proof of the need for one.[6] Any party has the right to request a jury trial as to an issue of fact concerning the need for a

1. N.Y. MENTAL HYGIENE LAW § 77 (McKinney Supp. 1972) (effective Jan. 1, 1973).

2. *Id.* § 77.01. The scope of this legislative note is restricted to the impact of the statute with respect to elderly people. The possible effect on individuals with other types of debilities is not discussed; however, in a three-year study (1960-1962) of a similar District of Columbia statute (D.C. CODE § 21-1301 (1967)) providing for the appointment of a "committee" for persons unfit to manage or control their property because of "habitual use of intoxicating liquors, opium, cocaine, or any similar substance . . . ," no reported cases were found where this section of the law was used. Zenoff, *Civil Incompetency in the District of Columbia,* 32 GEO. WASH. L. REV. 243, 250-51 (1963).

3. Legislative Memoranda, *N.Y. Sess. Laws 1972,* at 3290.

4. N.Y. MENTAL HYGIENE LAW § 77.01 (McKinney Supp. 1972).

5. *Id.* § 77.03(a).

6. *Id.* § 77.01.

conservator.[7] However, failure to request a jury waives the right.[8] A guardian ad litem may be appointed by the court to protect the interests of the proposed conservatee at the trial.[9]

The proposed conservatee can nominate a preferred conservator, but the court has discretion to reject this suggestion and select another person, in what it deems to be the best interests of the conservatee.[10] The appointed conservator gains actual control over the real and personal property of the ward with a duty to use this property for the support of the latter and any of his legal dependents.[11] The exact powers of management are flexible, and the court has discretion to allocate them to fit the conservatee's condition.[12] Although the conservatee loses control over his property, the statute stipulates that he may not be deprived of any civil right solely because of the appointment of a conservator.[13]

When petitioned by any interested person, including the ward, the court must reexamine the situation to determine if the ward has recovered sufficiently to be able to care for his property himself.[14] If requested by any party to such proceeding, the ability of the conservatee to care for his property will be determined by a jury trial.[15]

II. Purpose of the Statute

In recent years there has been a growing concern over the state of the law relating to persons unable to manage their own affairs because of advanced age. The New York statute recognizes the fact that the subject of fiduciary protection for the aged is becoming increasingly important since, due to the increase in average life expectancy in the United States, the percentage of older persons in the general population has increased.[16] Furthermore, with the widespread advent of pen-

7. *Id.* § 77.07(c).
8. *Id.*
9. *Id.* §§ 77.07(b), 77.09.
10. *Id.* § 77.03(c).
11. *Id.* § 77.21.
12. *Id.* § 77.19. It should be noted that in contrast to similar laws in some other states, the New York law does not give a conservator powers over the person of the conservatee. *See, e.g.,* Cal. Prob. Code § 1851 (West Supp. 1972); Ill. Rev. Stat. ch. 3, § 121 (1961).
13. N.Y. Mental Hygiene Law § 77.25(a) (McKinney Supp. 1972).
14. *Id.* § 77.35.
15. *Id.*
16. White House Conference on Aging, The Nation and Its Older People 117 (1961).

sion plans (public and private) and public assistance, these senior citizens now have more funds.[17]

The New York statute was designed to deal with certain weaknesses in existing incompetency laws.[18] First, individuals were reluctant to initiate incompetency proceedings because of the stigma associated with such a finding. Complications also arose when the impaired person was merely semi-incompetent.[19] Further, the incompetency law attempted to fit a physical and mental impairment which is not sharply defined into an "either-or" legal format.[20]

A. *Inadequacies of the Incompetency Law*

A field study was recently instituted in New York's Onondaga and Tompkins Counties to ascertain how the incompetency law has been administered.[21] The results of the study show that many of the safeguards in the law were insufficient.[22] Under the incompetency statute, the test for the appointment of the surrogate manager, termed a "committee," is that the proposed incompetent be "unable" to conduct his personal or business affairs.[23] The study found that in practice labelling replaces legal analysis, and that the real decision maker is the examining physician.[24] None of the court transcripts examined revealed any attempt by the physician to detail how the impaired person's medical condition affected his capacity to manage his estate.[25] Thus, it

17. G. MATHIASEN, GUARDIANSHIP AND PROTECTIVE SERVICES FOR OLDER PEOPLE 25 (1963).

18. N.Y. MENTAL HYGIENE LAW § 78 (McKinney Supp. 1972). The incompetency section was revised and renumbered along with the rest of the mental hygiene law during the 1972 legislative session. Basically, the only substantial changes pertained to the procedures relative to a patient of a state institution. The old version of this part of the statute can be found in *N.Y. Sess. Laws 1966,* ch. 550.

19. McAvinckey, *The Not-Quite-Incompetent Incompetent,* 95 TRUSTS & ESTATES 872 (1956).

20. Legislative Memoranda, *N.Y. Sess. Laws 1972,* at 3290; N.Y. LAW REVISION COMM. REP., at 219 (1967).

21. G. ALEXANDER & T. LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT (1972) [hereinafter cited as ALEXANDER].

22. *Id.* at 137.

23. N.Y. MENTAL HYGIENE LAW § 78.01 (McKinney Supp. 1972).

24. ALEXANDER 23.

25. *Id.* at 24. The study of incompetency in the District of Columbia revealed confusion among members of the medical profesion about the nature of the incompetency proceedings. Zenoff, *supra* note 2, at 255. *See generally* Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetence—A Skeptical Inquiry into the Courtroom Functions of Psychiatrists,* 14 SYRACUSE L. REV. 564 (1963).

seems that the courts seldom attempt to apply the statutory test of whether economic value judgment is affected.[26]

At the incompetency proceeding, the alleged incompent is given the assistance of a guardian ad litem who is an attorney.[27] The field study revealed that in practice the guardian ad litem tends not to view himself as an advocate of the alleged incompetent, but rather as an impartial agent of the court.[28] Thus, the viability of the advocacy which the alleged incompetent receives at the trial seems questionable.

When a "committee" is appointed for the incompetent, his actions are subject to the control of the court. To insure that the committee complies with the court's orders, an annual accounting must be filed.[29] However, the field study concluded that adequate judicial supervision is hampered since, out of 419 estate files examined, less than 19% of the committees had fully complied with the accounting requirements.[30] Furthermore, nearly 40% had never filed any reports.[31] In no case did the court take any action to compel compliance.[32] The field study further revealed that committees did not bother to consult with the incompetent before making major decisions.[33] In fact, most attorney-committees for hospitalized wards never even met the patient.[34] Relatives appointed as committees usually visited their wards, but there was no indication that financial matters were discussed.[35] The fact that a relative, rather than an attorney, has been entrusted with managerial powers over the ward's property, does not necessarily foster preservation of the ward's financial interests.

An additional problem has developed in New York regarding the manner in which the incompetency law has been used with respect to patients in state mental hospitals. In New York, the patient, his estate, and his spouse are jointly and severally liable for the costs of medical care in a state institution.[36] However, the incompetency

26. ALEXANDER 23.

27. N.Y. CIV. PRAC. LAW § 1201 (McKinney Supp. 1972); N.Y. SURR. CT. PROC. LAW § 404(1) (McKinney 1967).

28. ALEXANDER 104. The study in the District of Columbia also found that the guardian ad litem was a neutral factfinder for the court rather than an attorney to represent the ward. Zenoff, *supra* note 2, at 252.

29. N.Y. MENTAL HYGIENE LAW § 78.23 (McKinney Supp. 1972).

30. ALEXANDER 111.

31. *Id.*

32. *Id.*

33. *Id.* at 114-23.

34. *Id.* at 114.

35. *Id.* at 122.

36. N.Y. MENTAL HYGIENE LAW § 43.03(a) (McKinney Supp. 1972).

statute has provided a shortcut to traditional creditor remedies to collect costs of medical care.[37] This result is achieved through the interplay of the commitment and incompetency provisions. The mental hospital cannot initiate incompetency proceedings against a patient who is voluntarily admitted.[38] However, if a voluntary patient who is indebted to the institution is discovered to have substantial funds, the hospital can (and does) initiate steps to change the patient's status to "involuntary."[39] This is accomplished by a certificate of examination from two physicians accompanied by an application for involuntary admission from an interested person (who can be the hospital's director).[40] Once the patient has become an involuntary admission, the state hospital can initiate an incompetency proceeding to create a committee, who is thereby obligated to pay the patient's debts.[41] The incompetency proceeding for an involuntary admission is thus different from a normal incompetency action; it is summary, with no need for an adjudication, by a judge or jury, of actual incompetency.[42] A special committee of the New York City Bar Association[43] has stated:

> The director of the hospital, represented by the Assistant Attorney General in charge of the case, may present a petition to the court alleging that the patient has been duly certified and that he is still in the hospital. The statute indicates no need for more evidence of incompetency than that which may be provided by proof of these allegations. The court may even dispense with notice to the patient if "sufficient reasons" for doing so are alleged. The court, acting without a jury, is then required to determine whether the allegations are true and, if they are, may proceed immediately to appoint a committee.[44]

37. Lewin, *The Laws for the Aged: A Study in Discrimination,* 23 SYRACUSE L. REV. 68, 69 (1972).

38. ALEXANDER 68.

39. Lewin, *supra* note 37, at 70.

40. N.Y. MENTAL HYGIENE LAW §§ 31.17(b), 31.27 (McKinney Supp. 1972).

41. *N.Y. Sess. Laws 1966,* ch. 550, as amended N.Y. MENTAL HYGIENE LAW § 78.07 (McKinney Supp. 1972).

42. *Id.*

43. SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK WITH CORNELL LAW SCHOOL, MENTAL ILLNESS AND DUE PROCESS (1962) [hereinafter cited as SPECIAL COMMITTEE].

44. *Id.* at 202. It should be noted that the section dealing with the appointment of a committee for a patient in a state facility was changed during the 1972 session of the legislature. *N.Y. Sess. Laws 1972,* ch. 251, *amending* N.Y. MENTAL HYGIENE LAW § 102 (McKinney 1971). The petition must now be verified and state facts showing that the patient is unable to adequately conduct his personal or business affairs. A right to a trial by jury on the issue of the patient's ability to conduct personal or business affairs is also provided. At this point it is unclear whether these changes will in fact alter the summary nature of proceedings for patients in state institutions.

Thus, the decision to initiate an incompetency proceeding in this situation can be purely administrative, based upon the financial criteria of whether the patient owes the hospital money and is found to own sufficient assets to cover the debt. The legal tests for involuntary commitment and for incompetency seem to be irrelevant to the administrative decision-making process.[45]

Families of patients in a state facility have preferred to use the simpler procedure for an involuntary admission[46] rather than the normal procedures for declaration of incompetency.[47] It is conceivable that the family of a person not yet in a state hospital could have him certified and placed in an institution solely to take advantage of the less onerous procedure for patients of a state facility.[48]

B. *Existing Alternatives to Incompetency Proceedings and Their Practical Limitations*

In addition to the new conservator statute, there are several alternatives to incompetency proceedings to protect impaired individuals, including: (1) power of attorney; (2) joint tenancy; and (3) inter vivos trust. Creation of the power of attorney is the most common.[49] However, it suffers from the serious limitation of being terminated by the principal's incapacity to contract; "the loss of capacity by the principal has the same effect upon the authority of the agent during the period of incapacity as has the principal's death."[50] Even where the individual is not fully incompetent, there would be a problem, because the agent would be acting at his peril if the principal were to become legally incompetent.[51]

Joint tenancy is a common device for use within the family group.[52] It is inexpensive and provides temporary protection against the contingency that one of the parties will lose his ability to manage

45. An additional injustice in this procedure is that while the hospital treats the switch from voluntary to involuntary status as a routine matter, there are substantial differences in the patient's rights between the two classifications. For a discussion of this issue, see ALEXANDER 69.

46. *N.Y. Sess. Laws 1966,* ch. 550, *as amended* N.Y. MENTAL HYGIENE LAW § 78.07 (McKinney Supp. 1972).

47. SPECIAL COMMITTEE 212.

48. *Id.*

49. Zillgitt, *Planning for Incompetency and Possibilities and Practices Under the Conservatorship Law,* 37 So. CAL. L. REV. 181, 182 (1964).

50. RESTATEMENT (SECOND) OF AGENCY § 122(1) (1958).

51. Zillgitt, *supra* note 49, at 182.

52. *Id.*

property.[53] A joint tenancy's basic limitation is that it becomes uneconomical for estate tax reasons if the value of the property is substantial.[54] Furthermore, if both husband and wife are quite old, a joint tenancy arrangement is not satisfactory, since in time neither the couple nor the survivor will be able to manage his affairs.[55]

An inter vivos trust is the most sophisticated of these alternatives to an incompetency proceeding, and provides the greatest flexibility. The settlor may create a trust naming himself as trustee, with provision for a successor trustee upon his incapacity. The settlor can also create a trust with another person or institution as trustee, and still retain complete power to direct the trustee until the settlor becomes incompetent.[56] However, the inter vivos trust does have limitations as a mechanism for planning for incapacity. Most people do not possess an estate of sufficient value to warrant the creation of a trust. Moreover, people are often reluctant to turn over all or a portion of their property to someone else while they are still personally able to exercise effective control over it.[57]

III. Section 77 of the Mental Hygiene Law: An Analysis

A. *General Policy Considerations*

The White House Conference on Aging made these recommendations concerning the rights of the elderly:

> Older persons should be encouraged and enabled to be an integral and non-segregated part of the family and community life according to their desires. Their responsibility for independent decision making, retirement planning, choosing living arrangements and their continued independence in the management of their affairs should be zealously safeguarded. When physically or mentally unable to do so, they have the right to receive personal, social, and legal protection from the family and the community.[58]

This policy statement comports with the underlying social value that adults should be entitled to make their own decisions, even if such decisions are unwise. Everyone should have the right to make foolish

53. *Id.* at 182-83.
54. *Id.* at 183. *See* Int. Rev. Code of 1954, §§ 2001-2209.
55. Zillgitt, *supra* note 49, at 183.
56. *Id.*
57. *Id.* at 183-84.
58. White House Conference on Aging, *supra* note 16, at 226-27.

expenditures. However, where older people with declining physical and mental capacity are involved, there is a conflicting paternalistic social value tending to impose restrictions upon people whom society feels should receive protection.

The New York incompetency provisions evidence this sentiment. The law preserves from waste or destruction the property of the person whom it declares to be incompetent.[59] There is an implicit assumption in this statute that the declared incompetent would squander his estate if given the opportunity. Diminution of the estate is considered inappropriate because: (1) if the person recovers he will need the money for support; and (2) it is thought that the estate should be kept intact to provide for dependents, and upon the death of the incompetent, to provide for his heirs.[60]

Opposing these considerations is the argument that the court should not intervene because a proceeding that divests a person of his property rights has a potential for abuse. Many guardianships are instituted by anxious expectant heirs who disapprove of the nature of a relative's expenditures.[61] Statutes providing for the appointment of fiduciaries are "dangerous . . . easily capable of abuse by designing relatives to accomplish the very wrong intended to be guarded against, and therefore to be administered by the courts with utmost caution and conservatism."[62] These same policy considerations underlie the conservator law.

The conservator law should not encounter constitutional criticism. The jurisdiction of a court to intervene in business affairs to prevent incompetents from squandering their estates has been repeatedly upheld. In *Sporza v. German Savings Bank*[63] Judge Haight of the New York Court of Appeals stated:

> Jurisdiction is inherent in the state over unfortunate persons within its limits who are idiots or have been deprived of the use of their mental faculties. It is its duty to protect the community from the acts of those persons who are not under the guidance of reason, and also to protect them, their persons and property from their own disordered and insane acts.[64]

59. N.Y. MENTAL HYGIENE LAW § 78.01 (McKinney Supp. 1972).
60. Lewin, *supra* note 37, at 69.
61. ALEXANDER 71.
62. In re Hoffman's Estate, 209 Pa. 357, 359, 58 A. 665, 666 (1904).
63. 192 N.Y. 8, 84 N.E. 406 (1908).
64. *Id.* at 14, 84 N.E. at 408.

Conservator laws similar to New York's new statute also have successfully resisted challenge on constitutional grounds. The Illinois Supreme Court, in *Loss v. Loss*,[65] upheld the constitutionality of an Illinois statute[66] providing for conservators for persons unable to protect themselves or their property. The court found that the statute does not deprive one of property rights because it becomes operative only when a person is incapable of exercising his rights. In a later case, *In re Estate of Stevenson*,[67] the same court decided that the standard of inability to manage one's estate is sufficiently clear so as not to be unconstitutionally vague or indefinite.

B. *Practical Effect of the Statute*

The basic impact of the new statute lies in the broadening of the categories of persons for whom a fiduciary may be appointed. The definition of the class of individuals for whom a surrogate manager may be appointed is no longer restricted to those legally incompetent.

The conservator statute must deal with several problems that every statute providing for the appointment of a fiduciary must face. Initially, the court must decide when a person has reached the status where there is a need for assistance. This issue is perhaps best determined by a test phrased in terms of managerial ability, with final determination to be made by a jury.[68] The New York statute utilizes this test.[69] A further issue arises concerning the burden of proof which must be sustained. Under the New York statute, the factfinder must be satisfied that there exists "clear and convincing" proof of the need for a surrogate manager.[70] It could be argued, of course, that because of the deprivation of rights over property, and because of the probable stigma that will be associated with the adjudication, the standard of proof should be that of "beyond a reasonable doubt."[71]

Another problem that a statute providing for the appointment of

65. 25 Ill. App. 2d 515, 185 N.E.2d 228 (1962).

66. ILL. REV. STAT., ch. 3, § 112-13 (1961).

67. 44 Ill. App. 2d 525, 256 N.E.2d 766 (1970); *see In re* Guardianship of Schmidt, 221 Ore. 535, 352 P.2d 152 (1960).

68. The California Conservator Law has no provision for jury trial; however, its courts have decided that the subject of the conservatorship proceeding can demand a jury determination. Le Jeune v. Superior Court, 218 Cal. App. 2d 696, 32 Cal. Rptr. 390 (1963).

69. N.Y. MENTAL HYGIENE LAW §§ 77.01, 77.07(c) (McKinney Supp. 1972).

70. This statutory standard of proof is in accord with judicial decision. *See In re* Myer's Estate, 395 Pa. 459, 150 A.2d 525 (1959).

71. *See generally In re* Winship, 397 U.S. 358 (1970).

a surrogate manager must face is assuring that the appointed fiduciary performs in the best interests of the conservatee. The new law has two provisions, not included in the incompetency law, that are designed to ensure this result. The conservatee, subject to court discretion, has the option of selecting his own conservator.[72] The effect of this provision is to increase the likelihood that the outlook of the person selected is compatible with that of the ward. Additionally, the court is given substantial flexibility in determining what powers should be granted to the fiduciary.[73] It is submitted that instead of granting a total transfer of powers, the court should discriminate and grant only those powers necessary to compensate for the ward's particular impairment. A useful approach in determining how much of a transfer is necessary would be to select the least restrictive alternatives. A least-restrictive-alternative analysis is required before a first amendment right may be limited by court decision.[74] This approach could be applied to the incompetency proceeding. Furthermore, it would be in the conservatee's interests to require the surrogate manager to periodically contact his ward to ascertain his needs and to determine whether progress toward recovery has been made. This is particularly important when lawyers or banks are appointed as fiduciaries, since such conservators frequently neither know the ward nor visit him.

In analyzing the law, several possible areas of internal inconsistency are revealed. Section 77.25 (b) states that "[a]ppointment of a conservator shall not be evidence of the competency or incompetency of the conservatee." However, § 77.25 (c) provides that certain "contracts, conveyances, or dispositions" shall be voidable at the option of the conservator. It seems that the conservatee is thereby relegated to the status of a de facto incompetent. Such a relegation would seem to be contrary to the general policy of § 77.25 (b). Furthermore, though the conservatee is protected by the objective of preventing him from squandering his estate, appointment of a conservator does not interfere with his power to dispose of property by will.[75] He can choose to

72. N.Y. MENTAL HYGIENE LAW § 77.03(c) (McKinney Supp. 1972).

73. *Id.* § 77.19.

74. Aptheker v. Secretary of State, 378 U.S. 500, 512-14 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960). For a discussion of the least restrictive means test when a compelling state interest is shown, see Tippett v. Maryland, 436 F.2d 1153, 1160 n.3 (4th Cir. 1971) (dissenting opinion). The policy of least restrictive alternative is utilized in the involuntary admission section of the Mental Hygiene Law. N.Y. MENTAL HYGIENE LAW § 31.27(d) (McKinney Supp. 1972).

75. N.Y. MENTAL HYGIENE LAW § 77.25(c) (McKinney Supp. 1972).

whom his property will devolve, but he cannot transfer the property for his own benefit. A possible explanation of this paradox may appear in light of the discussion below which suggests that the real beneficiary of the appointment need not be the ward.[76]

Recovery is always at least a remote possibility for debilitated persons. The incompetency law does not provide specific guidelines for legal restoration of competency status. Since separate statutory provisions are lacking, the courts have followed common law procedure.[77] The conservator law is an improvement over the incompetency law in that express restoration guidelines are included.[78] But their value in practice is questionable in light of the requirement revealed in the field study by George Alexander and Travis Lewin: though general allegations of incompetency are sufficient in incompetency proceedings, specific proof is necessary before a court will restore a person to competency.[79] There is little reason to believe that the courts will not apply the new law in a similar manner. Further, though there is a provision for the discharge of the conservator if the conservatee recovers, there is no incentive built into the law to change the status quo. There should be some requirement of periodic review so that in those cases where recovery in fact occurs, restoration will follow. In reality, because conservators are usually sought in cases of advancing age, there is usually little reason to expect that the ward will recover his mental powers. The parties who are motivated to initiate conservatorship proceedings are usually expectant heirs or creditors. There is thus an obvious conflict of interest between the self-interested fiduciary and the ward.[80] This is particularly true if the value of the estate is significant. The law should recognize that the beneficiaries may be self-interested, even though they couch their position in terms of benefit to the ward. Alexander and Lewin have suggested that the legislature should identify legitimate interests of special classes of beneficiaries in the ward's property as an alternative to depriving the ward of complete control of his property by way of conservatorship or incompetency proceedings.[81] "A

76. *See* text at notes 80-82 *infra.*

77. *In re* Abrams, 25 Misc. 2d 610, 199 N.Y.S.2d 894 (Sup. Ct. 1960).

78. N.Y. MENTAL HYGIENE LAW § 77.35 (McKinney Supp. 1972).

79. ALEXANDER 24.

80. *See In re* Guardianship of Malnick, 180 Neb. 748, 145 N.W.2d 339 (1966); *In re* Estate of Washam, 364 P.2d 896 (Okla. 1961); Olson v. Olson, 242 Iowa 192, 46 N.W.2d 1 (1951); Denner v. Beyer, 352 Pa. 386, 42 A.2d 747 (1945); *In re* Lamont's Estate, 95 Utah 219, 79 P.2d 649 (1938).

81. ALEXANDER 4.

better procedure would be to attempt legislatively to identify legitimate interests of others and to protect them expressly in law rather than to protect them circuitously through incompetency proceedings."[82] An important element of this proposal would be the recognition of legitimate interests. For example, a wife would have an interest in the property of her spendthrift husband, while distant relatives, who might otherwise expect to be heirs, could not interfere in an attempt to conserve the property for themselves.

CONCLUSION

The New York Conservator Law is an affirmative step toward the protection of the elderly. However, the effect of the statute is still that an individual is stigmatized and deprived of property rights. One of the lessons that should be evident from study of the incompetency law is that better safeguards are needed. At this point it is difficult to determine if the courts will apply the new law any differently from the incompetency law. They should observe extreme caution to ensure that any loss by the conservatee of such a basic right of citizenship as control over property is necessary and in fact in his best interests. When a first amendment right is limited by court decision a least-drastic-means test must be applied.[83] A similar test should be used to require that the least restrictive alternative is selected when the individual is deprived of the power to manage his property.

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82. *Id.*

83. Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).