

REPORT OF THE COMMISSION ON FIDUCIARY APPOINTMENTS

February 2005

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SUMMARY OF RECOMMENDATIONS

Guardianship Oversight

- ? The Commission recommends establishing offices of “court examiner specialists” within the court system to monitor court examiner performance, review work product, ensure that all required accountings are being timely filed and expeditiously examined, and target cases that are out of compliance.
- ? The Commission also would support bringing the court examiner function in-house.
- ? The Commission recommends that the court system explore, initially on a limited or pilot basis, the viability of outsourcing the court examiner function to interested and appropriate outside nonprofit organizations.
- ? The Commission recommends that the Appellate Divisions adopt regular evaluation and reappointment systems for court examiners.
- ? The Commission recommends that the court system maintain strong internal controls and continue its efforts to develop an active and vigorous auditing system that deters wrongdoing and laxity.
- ? The Commission recommends that the Appellate Divisions consider adjusting court examiner fees, which have not been increased since 1991, to help attract and retain competent court examiners.
- ? The Commission recommends that the Part 36 annual compensation limit be raised from \$50,000 to \$75,000 for court examiners.
- ? The Commission recommends that court examiner fees paid by the State Comptroller in estates with minimal or no assets should not be included in the Part 36 annual compensation limit, and that the Administrative Board of the Courts consider a similar approach for other fiduciary categories.
- ? The Commission recommends that Part 36 be amended to address critical gaps in the transition from guardianship to estate as follows:
 - * Require guardians to notify the courts, court examiner and family members (and public administrator where appropriate) of the death of an IP within 30 days of the IP’s death.
 - * Require guardians to file a final accounting within 90 days of the IP’s death.
 - * Require that court examiners review final accountings within 45 days of submission.
 - * Establish uniform rules governing the procedure upon the death of an

incapacitated person for the settlement of final accountings in guardianships.

- * Amend the uniform rules of the trial courts to make clear that the 60-day deadline for deciding motions in civil matters applies to guardianships.

- ? The Commission supports the court system's proposed model guardianship part pilot, which should help the courts develop more effective ways to serve IPs' needs in the future.

Intestate Estate Administration: The Public Administrator and Counsel to the Public Administrator

- ? The Commission recommends that the Part 36.2(c) disqualification provisions be applied to the PA and PA Counsel to assure the public that these fiduciaries are being appointed on the basis of merit rather than political or personal considerations.
- ? The Commission recommends amending SCPA 1128 to make binding the fee schedules and guidelines promulgated by the Administrative Board of the Public Administrator.
- ? The Commission recommends amending Part 26 to require Surrogates to file with OCA reports of all awards of compensation to PA Counsel in excess of \$500. These reports should be made available electronically on the internet for public review.
- ? The Commission recommends adoption of court rules that require Surrogates to report to OCA on a regular basis concerning specified aspects of the performance of the PA and PA Counsel. These reports also should be accessible to the public.
- ? The Commission recommends that OCA take affirmative steps to ensure that independent audits of the PAs are expeditiously conducted.
- ? The Commission recommends that the court system encourage the involvement of outside entities in intestate estate administration.

Review of the Part 36 Reforms

- ? The Commission recommends the use of official forms in guardianship matters throughout New York State. The Office of the First Deputy Chief Administrative Judge, supported by the UCS Office of Guardianship and Fiduciary Services, should lead a Statewide Task Force of members appointed by the Chief Administrative Judge and the Presiding Justices.
- ? The Commission recommends that the Task Force develop a best practices manual

for Statewide use by guardianship judges, clerks and fiduciaries.

- ? The Commission recommends that the Task Force develop a plan to reconcile Parts 26 and 36 of the Rules of the Chief Judge to ensure that they are consistent in their application to fiduciaries.
- ? The Commission recommends that the court system adopt standardized accounting software for use by all guardians and examiners.
- ? The Commission supports efforts to establish a mentoring program for novice fiduciaries and recommends that the court system work with interested bar associations to provide appropriate incentives to participation in such a program.
- ? The Commission recommends that OCA continue to expand the information available on the fiduciary database.

PART I INTRODUCTION TO REPORT

Judges often appoint private individuals, known as fiduciaries, to serve litigants and the courts in a broad range of situations. Fiduciaries may, for example, serve as guardians responsible for making financial and/or personal decisions on behalf of incapacitated persons; legal counsel for estates lacking interested beneficiaries; guardians representing the interests of children in Family Court proceedings; or receivers managing property during foreclosure proceedings. Fiduciaries, who are usually attorneys, generally are awarded fees from the assets and income of the persons or property they represent or manage.

If our inquiry into New York State’s fiduciary system has led us to one conclusion above all others, it is that the overwhelming majority of fiduciaries are honorable and conscientious people wholly dedicated to the well being of their charges. This broader perspective informs our report throughout. Even as we focus on the weaknesses of the fiduciary oversight system and the relatively few but often well-publicized abuses by individual fiduciaries, it should be kept in mind that most fiduciary appointments are uncontroversial, involve relatively small estates, generate insignificant fees, and provide much-needed assistance to vulnerable people.

However, some appointments do generate significant fiduciary fees. This fact, coupled with the special position of trust which these court appointees occupy, means that the fiduciary system has always been vulnerable to financial abuses. As far back as the seventeenth century, the English Crown treated the Court of Wards as a major source of revenue, auctioning off guardianship appointments to persons who routinely plundered the

estates of their charges.¹ In the late nineteenth century, Albert Cardozo, father of highly venerated jurist Benjamin Cardozo, was forced to resign his position as a New York County Supreme Court Justice after it was revealed that he repeatedly appointed political allies and family members as fiduciaries.²

In 2004, a Queens Grand Jury issued a special report and recommendations arising from the conviction of an attorney who systematically stole \$2 million from the estates of fourteen different wards over a five-year period. According to the Grand Jury report, these crimes went undetected because other fiduciaries, known as court examiners, did not exercise adequate vigilance in reviewing the attorney's work; and because of other systemic weaknesses in the guardianship oversight system.³

Problems of financial and other abuses by fiduciaries are not unique to New York. For example, in October 2003, an audit of five probate courts in Michigan found, among other problems, widespread financial abuses by fiduciaries entrusted with the assets of incapacitated wards, including: failure to account for the spending of estate assets, taking interest-free loans from estates, and purchasing personal items with estate funds.⁴

¹ C.V. Wedgwood, *The English Civil War, Vol. 1: The King's Peace*, pp. 117-18, 129 (The Folio Society 2001).

² Andrew Kaufman, *Cardozo*, pp. 16-19 (Harvard Univ. Press 1998).

³ *Report of the Grand Jury of the Supreme Court, Queens County* (March 2004), available at www.queensda.org/

⁴ Michigan Supreme Court, State Court Administrative Office, *Interim Report on Investigative Follow-up Review of the Michigan Office of the Auditor General Performance Audit of Selected Probate Court Conservatorship Cases*, October 2003. Available at www.courts.michigan.gov/scao/resources/publications/reports/

In June 2003, the *Washington Post* published a two-part series on the District of Columbia's fiduciary system which uncovered two dozen cases of misappropriation and/or mishandling of estate funds and a lax culture in which court appointees often ignored their charges and let them languish in unsafe conditions.⁵ The American Bar Association has also identified significant problems with guardianships nationally, including a lack of oversight, training, due process protections, and a lack of awareness of alternatives to guardianships.⁶

Modern efforts to increase the accountability of fiduciary appointees in New York State began in 1967 with the enactment of Judiciary Law Part 35-a, which requires judges to file statements with the Office of Court Administration (OCA) upon approving fees in excess of \$500. In the early 1970s, court rules were promulgated to restrict the ability of close relatives of judges to receive fiduciary appointments. In 1986, Part 36 of the Rules of the Chief Judge was adopted, further limiting the field of those eligible for fiduciary appointments, imposing restrictions on compensation, and establishing filing requirements for fiduciaries.

For reasons addressed in our prior report, Part 36 did not remedy all abuses and irregularities. Throughout the 1990s, there was mounting evidence that a relatively small group of fiduciary appointees received a disproportionately large number of lucrative

⁵ Carol D. Leonnig, Lena H. Sun and Sarah Cohen, *Misplaced Trust*, Washington Post, June 2003. Available at www.washingtonpost.com/wp-dyn/metro/specials/guardian/

⁶ American Bar Association Commission on Legal Problems of the Elderly, *Report to the House of Delegates*, August 2002. Available at www.abanet.org/aging/elder_abuse.pdf

appointments, with many of the most remunerative positions bestowed on politically connected individuals such as campaign donors, political party officials, former judges, and relatives of court staff.

Concern over the fiduciary appointment system peaked in January 2000 when the media obtained a letter from a pair of lawyers active in the Kings County Democratic Party. These individuals complained about being excluded from lucrative appointments as counsel for receivers. The letter acknowledged that a political *quid pro quo* was at work in Brooklyn, i.e., services were provided to the Party, including free legal representation of judicial and other candidates, in return for financially desirable appointments by judges.

Chief Judge Kaye responded by immediately implementing a three-part program: appointment of a Special Inspector General for Fiduciary Appointments with authority to investigate and report violations of ethics and fiduciary rules to prosecutorial and professional disciplinary agencies; a direction to administrative judges to reevaluate and take direct responsibility for the appointment processes in their respective districts; and establishment of this Commission to study the problems surrounding fiduciary appointments and recommend appropriate reforms.

In December 2001, the Commission issued a report containing numerous recommendations to overhaul the fiduciary selection process.⁷ Eligibility standards were strengthened significantly. More rigorous training requirements were recommended and adopted. Reliable updated lists of eligible appointees were developed, and judges were

⁷ *Report of the Commission on Fiduciary Appointments*, December 2001. Available at <http://www.courts.state.ny.us/ip/gfs/>

limited to selecting fiduciaries from these lists, except for good cause shown. Part 36 was expanded to cover a broader range of fiduciaries and secondary appointments, and restrictions on fiduciary compensation were strengthened. Finally, a number of “sunlight” provisions were adopted, including the establishment of a comprehensive database containing detailed information on each fiduciary appointment, which is available to the public on the internet.

As section IV of this report makes clear, the reforms adopted over the last three years have in general been functioning quite well, and virtually all those involved in the fiduciary selection process, from judges to practitioners, agree that the worst abuses have been successfully curtailed. Moreover, First Deputy Chief Administrative Judge Ann Pfau has assumed Statewide responsibility for overseeing the fiduciary system, further reflecting the court system’s strong commitment to continued progress in this area.

However, if history has taught us anything in this field, it is the need for constant vigilance. It was for this reason that the Commission concluded its 2001 report with a request to reconvene in the future to assess progress and the need for additional reform. In January 2004, Chief Judge Kaye formally asked the Commission to reconvene for this purpose.

The Commission’s latest inquiry focused on three main areas. As the Queens Grand Jury report confirmed, the existing fiduciary oversight system suffers from vulnerabilities that must be addressed. In our first report, we focused primarily on the processes governing the appointment of fiduciaries. In general, we did not address the efficacy of the systems for monitoring the performance of fiduciaries after appointment. In this report, we propose a number of recommendations designed to improve fiduciary oversight.

Another area of concern not addressed in our prior report involves the Public Administrator (PA) and the Counsel to the Public Administrator. These fiduciaries represent the estates of persons who die without a will when no other person is available or eligible to serve as administrator or executor. Some PA offices have been criticized over the years for mismanagement of estate assets and failure to meet other responsibilities. Counsel to the PAs have come under much scrutiny recently due to: the large legal fees they are awarded, which can run into the hundreds of thousands of dollars annually in some counties; the personal and political connections that frequently underlie these lucrative appointments; and, the conflict of interest inherent in awarding legal fees to the PA counsel from estates they are appointed to represent. We propose a package of legislative and administrative recommendations designed to promote greater accountability and transparency for these fiduciaries.

Finally, the Commission has evaluated the effects of the most recent fiduciary reforms to ascertain how well they are meeting their intended goals. Based on our findings, we propose a limited fine-tuning of the rules.

Over the last year, it has become clear to us that the people and systems charged with monitoring fiduciary behavior in New York State have not always met their responsibilities of ensuring adequate oversight and accountability. The sources of this failure are many and complex. They include, in the area of the PA, a legislative scheme that inhibits rather than promotes accountability, and in the guardianship field, a court culture and court processes steeped in the traditional detachment from litigants rather than the more active management these cases demand. In both areas, a lack of funding and personnel have exacerbated existing problems.

The number of Americans age 65 and older is expected to double to approximately 71 million by the year 2030,⁸ with the number of guardianships and intestate estates expected to increase proportionately. It is vital that the New York courts keep pace with the challenges presented by these cases, particularly with regard to ensuring that fiduciaries fulfill their responsibilities. We believe that the recommendations in this report will help put the court system on the road to meeting these challenges.

⁸ American Bar Association, *Facts About Law and the Elderly*, 1998, citing U.S. Bureau of the Census statistics.

PART II GUARDIANSHIP OVERSIGHT

A. Introduction and Overview of Guardianship Process

Many thousands of people in New York, particularly the elderly and persons with disabilities, are affected by the guardianship process. When a court determines that a person no longer has the capacity to make decisions on his or her own behalf, such powers are transferred to a guardian, who is often granted extensive control over the financial and personal affairs of the incapacitated person (IP). Guardianship can be an ideal mechanism for protecting the rights of people with serious physical or mental impairments, and we found that the vast majority of guardians in New York are in fact skilled and dedicated advocates for their wards, managing their finances responsibly and obtaining healthcare and other services for them in a timely manner. However, in a limited number of cases, guardians have abused their positions of trust. The courts have a special duty to guard the interests of the incapacitated, and reforms must be enacted to ensure adequate oversight of guardians.

In New York State, Mental Hygiene Law (MHL) article 81 provides that if a person is incapable of managing his or her own affairs because of a mental disability or other cause, the court may appoint a guardian to act as the IP's surrogate decision maker. Most proceedings to appoint a guardian are commenced by a family member, health care facility or local Department of Social Services. Once a petition is filed, the court appoints a "court evaluator," who acts as an independent investigator to gather information to assist the court in making a determination as to the person's capacity. The court evaluator is a professional specially trained in guardianship matters -- a lawyer, psychologist, accountant, social worker, etc. -- who provides the court with a written report and recommendations about the

nature and extent of the alleged incapacitated person's (AIP) disability and his or her health care, personal and financial management needs.

After receiving the court evaluator's report, the court holds an evidentiary hearing to assess capacity. In certain instances, such as when the AIP is contesting the petition, the court will appoint counsel to the AIP. If, after the hearing, the AIP is deemed incapacitated, the court will appoint a guardian. Most guardians are family members or persons nominated by the IP, but if no such person is available the court may appoint a private guardian, usually an attorney, from a list of eligible guardians. Guardians receive special training provided by the court system and are required to re-register with OCA every two years.

In New York, guardianship is considered a remedy of last resort because it can deprive the IP of so much power and control over his or her life. Accordingly, when appointing a guardian, the court seeks to impose the least restrictive form of intervention and to limit the guardian's powers to those required to meet the IP's specific personal and/or property management needs. These powers usually include overseeing the IP's financial affairs, paying bills, and making health care decisions.

The MHL requires that the guardian file with the court, within 90 days of issuance of the guardian's commission, an initial report to assess the IP's circumstances and whether any changes in the guardian's powers are required. The initial report is important because, among other things, it provides the court with "a verified and complete inventory of the property and financial resources over which the guardian has control." The MHL provides that the guardian must file an annual account every May with information about the IP's personal status and a detailed accounting of the IP's finances and property.

The MHL further requires that the guardian's initial and annual reports be examined

within 30 days by a fiduciary known as a court examiner. The court examiner reviews the guardian's report, requests additional information if needed, and is authorized to examine the guardian under oath. If the guardian does not comply with his or her duties, the court examiner can request that the court remove the guardian, reduce or deny the guardian's compensation, or impose sanctions.

B. Guardianship Oversight: Problems

Proper supervision of guardians is critical given their special position of trust and the sweeping powers and control they exercise. Unfortunately, New York's guardianship system, like that of many states, has not always met this difficult challenge. A 2001 report by the Special Inspector for Fiduciary Appointments unearthed frequent violations of reporting guidelines; excessive billing, particularly charging legal rates for nonlegal services; and other behavior generally at odds with the financial best interests of IPs.⁹ These abuses provided the impetus for this Commission's recommendations in 2001.

The 2001 reforms were addressed primarily to the processes governing the eligibility and selection of fiduciaries, although some measures did address guardianship oversight, including the appointment of fiduciary clerks charged with ensuring that fiduciaries complete all mandated filings and the establishment of a fiduciary database for improved tracking of appointments. However, due to time limitations, most of the complex issues and problems

⁹ New York State Unified Court System Special Inspector General, *Fiduciary Appointments in New York: A Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman*, 2001. Available at www.nycourts.gov/ip/gfs/igfiduciary.html

associated with monitoring the performance of guardians went unaddressed in the Commission's first report.

1. Court Examiners

The court examiner – another category of fiduciary – is the key to guardian oversight in New York. One witness described the court examiner as the “eyes and ears” of the court. Most court examiners are attorneys, although many are accountants or social workers. Court examiners are responsible for monitoring the guardian's performance. They review the guardian's annual reports within 30 days of filing to assess “the condition and care of the incapacitated person, the finances of the incapacitated person, and the manner with which the guardian has carried out his or her duties and exercised his or her powers” (§81.32). In reviewing the guardian's reports, the examiner may elicit the testimony of the guardian and other witnesses either in person or in writing. Expenses for examinations, including examiner fees, are borne by the estate of the IP when the estate is valued at more than \$5,000, and by state or local government when the estate is valued at less than \$5,000.

Though generally staffed by skilled and dedicated individuals, the guardianship oversight system suffers from several structural drawbacks. Administrative complexity is one. Many upstate counties have a single court examiner permanently assigned by the Presiding Justice of the Appellate Division; in other areas, court examiners are assigned on a case by case basis by the judge presiding over the guardianship or by court clerks. Each Department administers its court examiner program differently and procedures governing the filing of reports, training, and payment can vary greatly, even from county to county within the same Department.

Beyond these administrative complexities, many court examiners deal with large caseloads, as there is a decided tendency in this area to pursue a high-volume business model. The average examiner in New York, even in sparsely populated rural areas like the Third Department, handles well over 100 examinations annually.¹⁰ Furthermore, we heard repeated testimony that already high rates of court examiner turnover are being exacerbated by the recently adopted \$50,000 annual compensation limit. We heard testimony that examiners generally rely on volume to make this work profitable because they earn relatively low fees for each matter. In addition, their efforts are highly concentrated during the summer months between May, when guardians must file annual accountings, and September, when examiners must file their reports with the court.

Court examiner fees in New York State are set by the Appellate Division.

<u>First Department</u>		<u>Second Department</u>
Under \$5000	\$100, including disbursements	Same
5001-7500	\$200	Same
7501-10000	\$225	Same
10001-20000	\$250	Same
20001-30000	\$300	Same
30001-40000	\$400	Same
40001-50000	\$425	Same
50001-60000	\$450	Same
60001-100000	\$500 to 550	Same
100001-150000	\$575 to 600	Same
150001-1,000,000	\$600 plus \$35 for every \$25,000 over \$150,000	\$150,001 and above: \$600 plus \$50 for every \$25,000 over \$150,000 up to a maximum fee of \$4,000.
1,000,001 plus	\$1790, plus \$30 for every \$25000 over	

¹⁰ According to data submitted by the Special Inspector for Fiduciary Appointments, the ratio of cases to examiners has increased by 21% Statewide between 2003 and 2004. Particularly large swings have occurred in Nassau and New York counties, where the respective changes have been 187% and 105%.

\$4 million one million
\$1000 per million

Third Department

Initial report	\$75
under \$5000	\$100
5001-25000	\$150
25001-50000	\$200
50001-100000	\$250
100001-150000	\$350
150001-225000	\$450
Over 225000	\$500

Fourth Department

\$75
\$50 per hour
ranges from \$120 to \$190
ranges from \$190 to \$250
ranges from \$260 to \$300
ranges from \$335 to \$370
ranges from \$405 to \$470
\$500

We heard repeated testimony that examinations of financial records are often cursory, confirmation of the guardian's report with backup documents is not common, face-to-face interviews with guardians are rarely conducted, many key tasks are delegated to secretarial staff, and lines of communication between examiners and guardians are frequently so poor or nonexistent that many examiners learn about the deaths of IPs only by reading obituary columns.

These findings are consistent with those of the Queens Grand Jury Report that lax oversight by court examiners facilitated an attorney-guardian's thefts, which took fairly simple forms: writing checks from the incapacitated person's account to himself; drawing up fraudulent wills; and, simply expropriating assets missed during the initial evaluation of the IP's estate. The report also found that the attorney-guardian often failed to file any accountings and was not compelled to do so by court examiners or the courts, and that the attorney-guardian failed to promptly notify the court of the death of his wards or to file the statutorily required final accountings.

The report recommended that the present system of court-appointed court examiners be replaced by the use of permanent OCA employees. Further recommendations sought to

promote more thorough examinations by, for example, requiring financial institutions to report the status of incapacitated persons' estates to the courts, placing responsibility on examiners to ensure the timely filing of guardians' reports, requiring face-to-face interviews with guardians, and requiring that court examiners review final, not just annual, accountings.

The current guardianship oversight system is only as good as the examiners it utilizes. At its best, and indeed in most instances, New York's reliance on court appointed examiners provides for a cadre of highly experienced, dedicated professionals willing and able to expend great efforts to protect the best interests of incapacitated persons. However, if examiners are not properly monitored and held accountable by the courts, or if they are not experienced, well-trained and diligent in discharging their duties, the entire system – but particularly the vulnerable people it is intended to protect -- will inevitably suffer.

C. Guardianship Oversight: Solutions

1. Structural Recommendations

As a threshold matter, we found that the wide differences in how the guardianship oversight system is administered around the State present a significant obstacle to developing effective recommendations in this area. We refrain here from recommending uniform Statewide solutions. If there is a “one size fits all” approach to guardianship oversight in a State as large and diverse as New York, it should be devised by those individuals immersed in these issues on a day-to-day basis. Later in this report, we urge the Appellate Divisions to come together in an effort to promote greater uniformity across the State. We note that the Appellate Division, Second Department's Guardianship Task Force recently issued a report

that recommended creation of a uniform “court order and judgment appointing the guardian” that would harmonize many of the key guardianship requirements and procedures in the Department’s ten counties.¹¹

Notwithstanding the difficulties posed by the varying administrative structures around the State, we believe that meaningful reform is possible. We discuss two separate structural approaches, either of which would produce significant improvement in the quality and accountability of the persons and systems charged with overseeing guardians. We recommend establishing an office in the courts dedicated to overseeing the work of court examiners. While we also would support utilizing court staff as court examiners, we recognize that this proposal is not very feasible in the current fiscal climate. Finally, we make a number of additional recommendations to complement these approaches and strengthen accountability.

a. Establish Offices in the Court System to Oversee Court Examiners

We heard much testimony in support of establishing offices within the court system charged specifically with monitoring court examiners and reviewing their work product. One such office has been operating successfully in Manhattan. We believe that such offices would significantly improve the accountability and performance of court examiners, would be far less expensive than hiring a large number of in-house court examiners, and would

¹¹ Supreme Court of the State of New York: Appellate Division, Second Judicial Department, *Report and Recommendations: The Guardianship Task Force*, November 2004. Available at www.nycourts.gov/courts/ad2/

preserve the best aspects of the current court examiner system.

Under this model, an attorney supervisor, with the assistance of court-employed accountants and/or clerks, would be asked to “manage” a panel of court examiners assigned to his/her county or district. Duties would include:

- ? reviewing examiners’ reports to ensure that all mandated guardian accountings are being timely filed and thoroughly reviewed;
- ? targeting any cases that are out of compliance;
- ? serving as a liaison between court examiners and judges;
- ? conducting periodic audits of examiners’ work product;
- ? monitoring caseload activity to promote an even workload distribution and ensure that examiners are neither overburdened nor being disqualified excessively due to the compensation limits; and
- ? assessing the performance of individual examiners on a regular basis.

The Second Department is in the process of hiring “court examiner specialists” for each of its five judicial districts. We understand that a court examiner specialist is being hired in the Bronx as well. According to the Second Department’s Guardianship Task Force report, a crucial court examiner specialist responsibility will be to monitor the timeliness and quality of court examiners’ reports with respect to the status and safety of the IP’s assets.

The specialist will also, among other duties: ensure that court examiners are monitoring guardians’ attention to IPs’ personal needs; monitor the timely filing of the guardian’s bond; assist guardianship judges in completing the annual court examiner evaluation forms; and assist lay guardians in meeting their responsibilities.

We envision the court examiner specialist as an office with adequate support staff involved in actively managing a panel of court examiners. Such an office would be well positioned to implement some of the practical suggestions made to us, such as staggering guardians’ reports. Although guardians’ accountings and examiners’ reports must be filed by statutorily prescribed deadlines, there is no reason why guardians cannot be encouraged to

submit their accountings earlier in the year so as to better distribute court examiners' workloads over time. In addition, the specialist could work to distribute appointments more evenly and avoid the situation where some examiners are being disqualified for exceeding the compensation cap while other examiners are being underutilized.

We believe that the court examiner specialist model provides a cost-effective approach to improving the guardianship oversight system. However, we are concerned that the vast responsibilities of the office could easily overwhelm a single individual. It is critical to provide court examiner specialists with adequate support staff and training if they are to be effective in monitoring the activities of large numbers of court examiners and in reviewing potentially hundreds of examiners' reports annually. Finally, if the court examiner specialist approach proves successful, it should be extended to other Departments.

We further submit that compliance parts, staffed by dedicated judges or judicial hearing officers, could serve as effective complements to the work of court examiner specialists. The compliance parts could calendar guardianship matters on a regular basis or at the suggestion of the court examiner specialist to ensure compliance with court rules and directives and to assess the IP's personal and financial situations. Although our inquiry has made clear the importance of active court management and supervision of guardianships, most courts are minimally involved in guardianships once they have issued the order appointing the guardian. We believe compliance parts can help provide the kind of post-judgment follow-up that these cases require.

b. Bring the Court Examiner Function In-house

Many observers have recommended that the court system end its reliance on outside

professionals and hire permanent employees to serve as court examiners. This would address many of the structural flaws in the current oversight system. Court-employed court examiners would:

- ? be subject to continuous and direct oversight and therefore be more accountable;
- ? devote themselves exclusively to examinations, thereby gaining great expertise;
- ? avoid the financial disincentives that court examiners face, i.e., low per case fees that dictate handling a high volume of cases to ensure profitability, and the resultant temptation to skimp on time devoted to examinations in favor of more remunerative work;
- ? eliminate concerns over excessively close ties between examiners, guardians and evaluators;¹² and,
- ? help obtain and coordinate governmental and nongovernmental services to address IPs' personal needs.

One major disadvantage of this approach is the significant budgetary and administrative strains on the court system, which is presently laboring under a hiring freeze instituted in response to the State's continuing fiscal crisis. In order to supplant the current group of approximately 125 court examiners utilized by the First and Second Departments, it would be necessary to hire dozens of new employees at a cost of several millions of dollars annually to the court system.¹³

Creating a staff of in-house examiners also would effectively discard the services of many highly qualified and experienced court examiners. We heard concerns that court

¹² Some areas of the State have relatively small communities of Article 81 appointees – court evaluators, guardians, court examiners – who frequently serve together on the same cases, often in different capacities. There is a danger that a “clubbiness” or culture of familiarity may result that is not conducive to the detached and vigilant monitoring required by court examiners.

¹³ It is possible that some portion of this cost could be offset by amending MHL Article 81 to provide for reversion to the court system of fees presently earned by court examiners.

examiners, many of whom have served as guardians themselves, exhibit a level of flexibility, understanding and respect for guardians and their needs that could be lost with government-employed examiners.

While we believe that bringing the court examiner function in-house has many advantages, we do not think it is feasible to accomplish at this time because of the significant fiscal impact on the court system. We note that in 2004 the Appellate Division, Second Department, introduced a joint pilot program with OCA in which employees of OCA's Internal Audit Department were randomly assigned as court examiners in 50 guardianship matters in Queens, Kings and Richmond counties. The results of this pilot should be evaluated carefully to determine whether the benefits of utilizing in-house examiners sufficiently outweigh their adverse fiscal impact.

c. Outsourcing

In addition to the two preceding approaches, the Commission considered whether the court examiner function could be outsourced to private firms or nonprofit organizations. Accounting firms and certain institutions of higher education and nonprofits possess the necessary expertise to rigorously monitor guardian activity. It has been suggested to us that competition for the contract to provide court examiner services would help keep costs down and the quality of service high. However, we are doubtful whether sufficient fees could be generated to attract private firms, and whether there are enough nonprofits willing to serve in this area. Nonetheless, we believe the court system should do more to encourage the involvement of institutions of higher education and other appropriate nonprofits in the guardianship process, particularly professionals who bring specialized backgrounds that can

be matched to the specific personal and financial needs of the IP. We believe that there are interested nonprofits with the requisite resources to make an important contribution in this area, and we recommend that the court system explore, initially on a limited or pilot basis, the viability of outsourcing the court examiner function to interested and appropriate outside nonprofit organizations.

2. Monitoring Court Examiner Performance

We believe that key components of a successful guardianship oversight system are accountability and transparency. Structural changes, such as the creation of an office of the court examiner specialist or the use of OCA staff as examiners, would go far toward furthering these goals. However, reform cannot stop there. Processes for scrutinizing the performance of examiners and guardians must be regularized and strengthened.

a. Regular Evaluation and Reappointment Process

The Second Department has adopted a system of reappointing court examiners on an annual basis. All judges are asked to provide an evaluation of the persons they have utilized as court examiners, with those receiving favorable evaluations retained for continued service. A regularized evaluation and appointment process can only improve the quality of court examiners by weeding out poor performers or ensuring that they address any performance deficiencies. It also sends the message that guardianship oversight is a priority for the judiciary. We note that the court examiner specialist office discussed earlier in this report could play an important role in providing relevant feedback on the performance of individual examiners.

We believe that evaluation and reappointment of court examiners should take place regularly at least once every two years. Such a system should form an essential element of any effort to reform guardianship oversight in New York. We strongly urge adoption of the Second Department's approach throughout the State.

b. Auditing

No guardianship oversight system can be fully effective without a strong commitment to both regular and random auditing. We have been informed that the court system's Internal Audits Unit is conducting scheduled and random audits of guardianship matters around the State. These audits continue to uncover precisely the kinds of problems – failure to file accountings, and failure of court examiners to timely demand accountings – that we seek to address through strengthened oversight of court examiners. Given the inherent vulnerabilities in this area, it is vital that the court system maintain strong internal controls and continue its efforts to develop an active and vigorous auditing system that deters wrongdoing and laxity.

3. Court Examiner Compensation Issues

While improved oversight of guardians is vital, our inquiry has also led us to conclude that substantial changes should be made regarding compensation of court examiners. Evidence brought before this Commission indicates that significant numbers of court examiners are being disqualified from service each year for exceeding the Part 36 \$50,000 annual compensation limit. Moreover, this situation is likely to worsen in the future if recommendations in this report are adopted that would create new court examiner duties and increase court examiner fees. Therefore, we recommend an increase in the annual

compensation limit to \$75,000 in recognition of the likely impact of our recommendations, and to insure that the court system continues to attract and retain a large, skilled and dedicated pool of court examiners.

a. Raise the \$50,000 Compensation Cap for Court Examiners

The “\$50,000 rule” limits appointments by providing that an appointee whose aggregate fiduciary compensation exceeds \$50,000 in any calendar year shall be unable to accept compensated appointments during the next calendar year. The \$50,000 rule has succeeded in introducing many excellent new professionals to the court examiner pool, but in some areas of the State it also has made it more difficult for judges to find experienced court examiners. Many experienced court examiners are being lost for a year at a time, and the critical early learning process for novice court examiners is similarly being interrupted. Court examiners not only must be sufficiently versed in the law to master the complexities of MHL article 81, but also must have a working knowledge of the accounting, medical, and mental health fields. Skills such as these are built over years of experience; one knowledgeable witness testified that it often takes two to three years for a novice examiner to become fully versed in his or her field.

In Manhattan, nearly half of the cadre of 30 court examiners stopped accepting new cases in 2004. Six of these were ineligible because they had previously exceeded the \$50,000 cap. Eight others gave varying reasons for declining new assignments, ranging from generalized dissatisfaction with service in this area to more specific assertions that the work is not sufficiently remunerative. In the Bronx, which has 20 court examiners, six will be ineligible for appointments in 2005 because of the \$50,000 rule. In the Second Department,

which has a total pool of 76 court examiners, 19 will be unavailable to accept new fiduciary assignments in 2005 due to the \$50,000 rule.

It is clear that the \$50,000 cap on annual fiduciary compensation is having a disproportionate impact on court examiners. Despite much testimony suggesting that other fiduciaries, especially guardians, are being lost from service as a result of the annual compensation limit, we have not been made aware of any empirical evidence to that effect. We are grateful to the New York State Bar Association's Elder Law Section for volunteering to survey its membership to help assess the impact of the \$50,000 rule on their members' ability to serve as fiduciaries. The 31 surveys received, while helpful and informative, constituted a tiny sample from which no definitive conclusions could be drawn, although the limited data was generally consistent with our conclusion that court examiners are being disproportionately affected by the \$50,000 rule.

Therefore, we recommend that the compensation limit be raised to \$75,000 for court examiners only. The frequency with which court examiners already are exceeding the current limit will only accelerate given our recommendation that examiners take on new duties in the form of reviewing all final accountings, and the likelihood that court examiner fees will be increased in the near future. We note that adjusting the annual compensation cap for court examiners should not produce untoward results given that their fees are not only low but are fixed on a per-case basis pursuant to a fee schedule. However, to insure that the benefit of the increased cap accrues to those fiduciaries who serve primarily as court examiners, we recommend that Part 36.2(d) be amended to provide that a court examiner may be awarded compensation by all courts during any calendar year up to an aggregate of \$75,000 without affecting his or her eligibility to receive compensated appointments during

the next calendar year, provided that at least 80% of the total fiduciary compensation awarded is for court examiner services.¹⁴ Finally, we recommend that the Administrative Board of the courts revisit the \$50,000 rule periodically to ensure that it is not discouraging service by other categories of fiduciaries.

b. Court Examiner Fees

Assuming the court system continues to appoint outside professionals as court examiners, we believe it will become increasingly difficult to recruit and retain well-qualified and experienced court examiners. We heard sufficient testimony about the increasing demands and labor intensive nature of this work to raise a realistic concern that many attorneys and other professionals may simply drop out of this area of practice should fees remain at present levels. Indeed, court examiner fees have not been adjusted for inflation since 1991.

We recommend that the Appellate Divisions consider adjusting these fees to ensure the ability to attract and retain the most competent court examiners. We recognize that in most cases fees are being charged to small estates and that it may not be feasible to sufficiently increase fees to fundamentally affect examiner behavior. However, a modest increase in fees combined with an upward adjustment of the overall compensation limit for court examiners should help avoid a decline in the number of highly qualified individuals

¹⁴ An alternative approach would amend Part 36.2(d) to provide that a fiduciary who has received more than \$50,000 but less than \$75,000 in aggregate compensation will remain eligible for appointments the following year provided that no more than \$10,000 in compensation is awarded for appointments other than those as court examiner.

willing to serve as examiners. We note here that the Second Department's Guardianship Task Force recently came to a similar conclusion regarding the need to increase court examiner fees.

Finally, we heard many complaints from guardians and court examiners about delays in receiving payment for their services. This inevitably breeds dissatisfaction and discourages continued service in this area. The court system must take steps to ensure timely payment of guardians and court examiners.

c. Encouraging Service in all Matters Regardless of Economic Status

We were informed by many witnesses that court examiners commonly are appointed to serve in guardianships with minimal or no assets. These assignments generate such low fees that appointees essentially are serving on a pro bono basis. It is critical that these professionals remain willing to accept and devote their full attention to these matters. As an incentive to doing so, we recommend that court examiner fees paid by state voucher by the Office of the State Comptroller, typically for estates of \$5,000 or less, should be excluded from the Part 36 annual compensation limit.

We recommend that the Administrative Board of the Courts consider a similar approach for other categories of fiduciaries, such as guardians, court evaluators, and attorneys for AIPs, to ensure that highly qualified fiduciaries remain available to serve all individuals and estates regardless of economic status. We note that the Second Department's Guardianship Task Force, which recently pointed to the increasing difficulty in finding guardians willing to serve pro bono, recommended that "either CLE credits (up to 3 per year) and/or an offset of up to \$25,000 per year against the \$50,000 Part 36 cap (based on the value

of the services rendered as fixed by the court) be offered.”

4. Final Accountings and the Transition Between Guardianships and Estates

A significant vulnerability in guardianship oversight occurs following the death of an IP. While the guardian is required to file a final accounting with the court under MHL article 81, the statute does not specify a deadline for doing so. Nor is there a requirement in the statute that the guardian notify the court, the examiner or family members of the IP’s death. If the court and court examiner are unaware of the IP’s death and examiners are somehow remiss in demanding annual accountings, there is the potential for the guardianship to lapse into an extended limbo during which it is vulnerable to unscrupulous guardians. The Commission heard testimony that, absent provisions requiring notification of death and setting deadlines to file final accountings, the only real impetus for guardians to file final accountings is the desire to get paid, as fees cannot be awarded until the final accounting is processed and approved by the court.

Once the final accounting is submitted, there is no standardized process governing its review. The court examiner’s responsibilities technically end with the death of the IP. While some counties require the court examiner to review the final accounting, others do not. Moreover, the final accounting is submitted to different offices in different districts, often resulting in confusion, and there are neither standardized software nor forms for preparing and submitting final accountings.

We also have been made aware of significant processing delays in some areas, particularly in New York County, of up to two years for final accountings. It is absolutely vital that courts review and judicially settle final accountings in a timely manner. Delays in

winding up the guardianship can be damaging to the deceased IP's estate and beneficiaries, since the administrator cannot undertake his or her responsibilities until the guardianship process is completed by the courts. A guardian cannot turn over estate proceeds until the Supreme Court has reviewed and judicially settled the final accounting and officially discharged him/her and the surety from liability. Significant judicial delays can mean, for example, that representatives of estates are unable to file tax returns and pay applicable taxes, causing financial harm to the decedent's estate in the form of penalties and interest.

In view of the foregoing problems, we recommend that Part 36 be amended to address critical gaps in the transition from guardianships to estates as follows:

- ? Require guardians to notify the courts, court examiner and family members (and PA where appropriate) of the IP's death within 30 days of the date of death.
- ? Require guardians to file a final accounting within 90 days of the IP's death.
- ? Require review of the final accounting by a court examiner within 45 days of its submission.
- ? Establish uniform rules and procedures for the settlement of final accountings in guardianships upon the death of an incapacitated person.
- ? Amend the uniform rules of the trial courts to make clear that the 60-day deadline for deciding motions in civil matters applies to guardianship proceedings.

Finally, it is important that the court system enforce these new requirements. The courts have the authority to penalize guardians and examiners who fail to discharge their duties in a satisfactory or timely manner, including denying or reducing the guardian's compensation under MHL 81.28.

5. Model Guardianship Part

The judge's traditional role as a detached arbiter is not well suited to guardianship matters, which demand continuing court involvement and oversight. Evidence before the Commission indicates that most courts have little or no involvement in a matter once a

guardian is appointed. Lines of communication between the court, the examiner, and the guardian are weak, as is so frequently evidenced by the failure to notify the courts of an IP's death. We believe that the court system's approach to these issues should borrow from some of the key principles underlying its highly successful problem-solving courts, such as Drug Treatment Courts and Integrated Domestic Violence Courts.

We note that the court system is currently developing a model guardianship part pilot to better address the unique needs of IPs, especially those who are victims of abuse. The pilot will provide specialized training for court personnel as well as for family members who are appointed guardians. The pilot also will introduce a mediation alternative into guardianship proceedings, which often involve much acrimony among family members. The model guardianship part will focus on:

- ? providing protection for victims of physical and financial abuse;
- ? integrated treatment by a single court of all pending court matters affecting the IP;
- ? using resource coordinators with social services backgrounds to interview parties and connect them to appropriate services;
- ? coordinating the efforts of courts and government agencies to provide services and protection to IPs; and,
- ? using trained volunteers with law enforcement, medicine and social work backgrounds.

As an element of the pilot, the court system is working with a non profit group, Vera Institute of Justice, which has agreed to provide specialized professionals such as social workers, accountants and government benefits specialists to help address the personal needs of IPs. This model guardianship part is scheduled to begin operating in 2005 in a county within the Second Department. The invaluable lessons to be learned from this pilot will help the courts develop more effective ways to serve the needs of IPs in the future.

D. Summary of Recommendations

- ? **The Commission recommends establishing offices of “court examiner specialists” within the court system to monitor court examiner performance, review work product, ensure that all required accountings are being timely filed and expeditiously examined, and target cases that are out of compliance.**
- ? **The Commission also would support bringing the court examiner function in-house.**
- ? **The Commission recommends that the court system explore, initially on a limited or pilot basis, the viability of outsourcing the court examiner function to interested and appropriate outside nonprofit organizations.**
- ? **The Commission recommends that the Appellate Divisions adopt regular evaluation and reappointment systems for court examiners.**
- ? **The Commission recommends that the court system maintain strong internal controls and continue its efforts to develop active and vigorous auditing.**
- ? **The Commission recommends that the Appellate Divisions consider adjusting court examiner fees, which have not been increased since 1991, to help attract and retain competent court examiners.**
- ? **The Commission recommends that the Part 36 annual compensation limit be raised from \$50,000 to \$75,000 for court examiners only.**
- ? **The Commission recommends that the Administrative Board of the courts revisit the \$50,000 rule periodically to ensure that it is not discouraging service by other categories of fiduciaries.**
- ? **The Commission recommends that court examiner fees paid by the State Comptroller in estates with minimal or no assets should not be included in the Part 36 annual compensation limit, and that the Administrative Board of the Courts consider a similar approach for other fiduciary categories.**
- ? **The Commission recommends that Part 36 be amended to address critical gaps in the transition from guardianship to estate as follows:**
 - * **Require guardians to notify the courts, court examiner and family members (and public administrator where appropriate) of the death of an IP within 30 days of the IP’s death.**

- * **Require guardians to file a final accounting within 90 days of the IP's death**
- * **Require that court examiners review final accountings within 45 days of submission**
- * **Establish uniform rules and procedures for the settlement of final accountings in guardianships upon the death of an incapacitated person.**
- * **Amend the uniform rules of the trial courts to make clear that the 60-day deadline for deciding motions in civil matters applies to guardianships**

? The Commission supports the court system's proposed model guardianship part pilot, which should help the courts develop more effective ways to serve IPs' needs in the future.

PART III INTESTATE ESTATE ADMINISTRATION: THE PUBLIC ADMINISTRATOR AND COUNSEL TO THE PUBLIC ADMINISTRATOR

A. The Public Administrator's Office

Created by Section 1001(8), and governed by Articles 11 and 12 of the Surrogate's Court Procedure Act (SCPA), the Public Administrators' (PA) Offices are charged with administering the estates of citizens who die without leaving a will and whose heirs are unwilling or unable to administer the estate. The administration of intestate estates, much like the handling of guardianship proceedings, varies greatly throughout the state. PA offices exist in the counties that compose New York City and in Erie, Monroe, Nassau, Onondaga, Suffolk, and Westchester Counties. In other areas, this function is handled by the County's chief financial officer.

Despite efforts to develop statewide guidelines governing the PAs, marked differences continue to exist between jurisdictions regarding the governance and operation of their offices. The volume and size of estates at issue also vary greatly between counties. For example, in Richmond County, the PA in 2002 managed 195 estates with an estimated value of \$9.1 million; in Kings County, the corresponding figures were 1,202 estates valued at \$57.3 million.

All PAs are charged with making burial arrangements and managing and collecting the assets of the decedent. These assets are distributed either to heirs (whom the PA is

charged with locating) or to the State Comptroller's unclaimed funds account. In managing the estate, the PA not only is empowered to utilize his/her own staff but is free to contract with a number of outside service providers and vendors, for which the estate is billed.

The PA is not an employee of the judicial branch but a salaried City or County employee. However, PAs are appointed to office by the County Surrogate and must report to the same Surrogate to document the fulfillment of their fiduciary duties. The SCPA authorizes the selection of one or more private attorneys to serve as counsel to the PA and provide necessary legal services and prepare legal papers for the intestate estate. Within New York City, the Surrogates select the PA counsel; outside the City, the PA selects counsel, albeit with the Surrogate's approval and input.

Most intestate estates generate insubstantial legal fees, but occasionally very large estates can generate lucrative fees for the PA counsel. Moreover, because it is common in many counties for a single attorney to serve as counsel to the PA, the cumulative legal fees generated can be quite substantial. Information submitted to the Commission by the PAs indicated that total annual legal fees awarded to PA counsel range from \$87,500 to \$1,055,000 depending upon the county in question. Currently, the Part 36 rules, including the \$50,000 rule, do not apply to the PA or PA counsel.

1. Historical Background

The PAs' offices, particularly those in New York City, have long been criticized for maladministration of intestate estates and inappropriate conduct with regard to appointment and compensation of outside service providers, including legal counsel. In 1987, 1988 and 1992, the New York State Attorney General and the State Comptroller issued three joint audit

reports on the operations of the PAs in and outside of New York City.¹⁵ The joint reports identified many serious problems, including delays in the administration of estates, inadequate record keeping, excessive legal and other estate administration fees, and asset management problems. The audit reports recommended legislation to vest the power to appoint the PA in the appropriate local government rather than the Surrogates, and/or to provide for a staff of salaried government employees to supplant appointment of private legal counsel. These proposals ran into strong opposition, particularly from Surrogates outside New York City, who feared the loss of their appointing authority and claimed the PA system's weaknesses were strictly confined to New York City. In 1993, the Legislature passed a compromise measure, amending SCPA 1128 to create an "administrative board" charged with drafting guidelines governing the functions and duties of the PA.

2. The Administrative Board of the Public Administrator

Pursuant to SCPA 1128, the administrative board consists of representatives appointed by the Surrogates, Chief Administrative Judge, New York State Bar Association, State Comptroller, and Attorney General. It is charged with establishing rules for the inspection of decedents' property; drafting guidelines governing the selection and fees of investigators, appraisers, accountants, auctioneers, etc.; creating procedures for the disposal of real property; and drafting guidelines and fee schedules for any other aspect of PA operations,

¹⁵ New York State Attorney General and State Comptroller, *New York City Public Administrators: An Operational Review*, November 1987; New York State Attorney General and State Comptroller, *Public Administrators in Monroe, Nassau, Onondaga, Suffolk and Westchester Counties: An Operational Review*, February 1988; New York State Attorney General and State Comptroller, *Estate Assets Continue to be at Risk*, July 1992.

including the selection and operation of PA counsel.

Extensive though these powers may sound, the actual authority of the Board is rather limited. Guidelines are not binding but rather establish uniform best practices which PAs should follow absent a compelling reason to deviate from them. Nonetheless, positive strides have been made over the last decade in improving PA office operations around the State. Though irregularities continue to surface, recent audits appear to confirm that the PAs have adopted more effective accounting systems and put a stop to the worst examples of mismanagement and waste of estate assets. One problematic area, however, has not seen much improvement: the selection and compensation of PA counsel.

3. Counsel to the Public Administrator

The County Surrogate (or PA in some counties outside New York City) is authorized to appoint one or more counsel to the PA. While practice varies around the State, many Surrogates have appointed just one counsel. Counsel are entitled to “reasonable counsel fees” as compensation from the estates for which legal services are rendered. Any legal fees allowed by the court are to be supported by an affidavit of legal services setting forth in detail the services rendered, time spent, and method/basis by which the requested compensation was determined. SCPA 1108 sets forth a series of criteria that the court “shall consider” in fixing the amount of legal fees.

In October 2002, the administrative board established a “uniform fee schedule” covering compensation of PA counsel in New York City, but these guidelines were not binding on the PAs and, until recently, generally were not followed. Rather, some counties used a graduated fee schedule while others calculated fees based on a flat percentage of the

size of the estate. Moreover, fees generally were calculated without reference to the amount of time spent on the matter, complexity of the issues, or quality of the legal services provided.

The evidence subsequent to October 2002 indicates that some PA counsel in New York City were awarded fees in excess of applicable guidelines. Moreover, PA counsel frequently did not provide adequate – or any – documentation of their activities by which to assess the reasonableness of their bills, even though such documentation is required by statute.¹⁶ The print media, particularly in New York City, has devoted significant coverage to the practice of “fee bumping,” by which Surrogates have increased PA counsel fees above the limits set by the administrative board’s guidelines without explanation or apparent good cause. These news reports spurred an investigation by the New York State Commission on Judicial Conduct, which has since charged the Surrogate of Kings County with routinely awarding fees to the PA counsel that were two percent higher than those provided for in the applicable guidelines, and with approving the awards without the required documentation from PA counsel.¹⁷

There also is great concern that Surrogates are appointing as PA counsel politically connected lawyers who are benefitting handsomely from legal fees that can amount to hundreds of thousands of dollars annually.¹⁸ These developments are damaging to public

¹⁶ New York State Comptroller, *Richmond County Public Administrator: Selected Aspects of Estate Administration*, 2003; New York State Comptroller, *Kings County Public Administrator: Selected Aspects of Estate Administration*, 2004.

¹⁷ Daniel Wise, *Feinberg Case Argued Before Conduct Panel*, NY Law Journal, Sept. 24, 2004, at p. 1, col. 3

¹⁸ See e.g., Nancie Katz and Larry Cohler-Esses, *Where There’s No Will, There’s a Way*, New York Daily News, May 13, 2002, at p.8, col. 2.

confidence in the integrity of the courts. The lack of accountability that pervades this arcane field, which is little known and understood by the public and peopled by a very small group of specialty practitioners who can and do earn very large legal fees, constitutes a serious threat to public confidence. Other than approval by the Surrogate, there is no independent oversight mechanism to ensure the reasonableness of compensation awarded to PA counsel. This overall situation is contrary to Chief Judge Kaye's continuing efforts to reaffirm public trust and confidence in the judiciary by eliminating the perception that lucrative court appointments are being made for reasons other than merit.

B. Findings and Conclusions

Both because the issues surrounding PA counsel selection and remuneration seem to pose the most direct threat to public confidence in intestate estate administration, and because of the relative abundance of tools at the courts' disposal for coping with this threat, most of our proposals seek to address the PA counsel, rather than the PAs themselves.

The problems and concerns raised in the course of the Commission's examination into intestate estate administration in New York boil down to a lack of accountability. The intestate administration system is structured in such a way as to actually diffuse accountability and weaken incentives to rigorously monitor the behavior of key actors. Although the Surrogates appoint them, PAs are City/County officials. The Surrogates and OCA do not fund the PAs and are not the entities statutorily designated to oversee them. The local governments who do fund and employ the PAs and are statutorily charged with this oversight are in no position to exercise this responsibility in an effective manner because they have virtually no interaction with the PAs. Finally, PA commissions and PA counsel fees are

drawn from estates that by definition lack interested parties capable of providing independent oversight.

The Surrogates are wont to further diffuse accountability by repeatedly emphasizing that the responsibility of regulating PA-related conduct falls to local government rather than the courts. This reasoning ignores the reality that the PA effectively operates as an adjunct to the Surrogate's court. It also fails to account for the significant differences between the PA and PA counsel. While the former technically are employees of the executive branch, the latter are clearly fiduciaries appointed directly by the Surrogate, or with the approval of the Surrogate, to provide legal services to litigants. Thus, it appears that the court system would be on solid legal ground in subjecting the PA Counsel to the kinds of standards addressing fiduciary eligibility, qualifications and conduct already contained in Part 36.

The court system also has a sound basis for holding the Surrogates themselves directly accountable for whom they appoint as PA counsel and for their actions in reviewing and compensating the work of these fiduciaries.

Further, we see no reason why the Judiciary should not also hold the Surrogates formally accountable for the selection and functioning of the PAs. Even accepting the premise that the Judiciary does not have a strong legal basis for directly regulating the PAs, it does have a strong basis for ensuring that the Surrogates are held accountable for the quality and performance of the individuals they have personally appointed and whose work they regularly review and approve.

Based on these premises, we propose the following package of legislative, rule making and administrative recommendations intended to greatly strengthen the accountability and performance of the persons and processes involved in intestate estate administration. We

believe these recommendations have the major advantage of being realistically achievable. If adopted, we are confident that they will bring significant positive change to this area.

- ? Apply Part 36.2(c), which sets forth certain disqualifications from appointment, to the PA and PA counsel to ensure that they are being appointed on the merits rather than for political or personal considerations;
- ? amend SCPA 1128 to adopt binding fee schedules for PA counsel and eliminate the practice of “fee bumping;”
- ? adopt new public reporting requirements for the Surrogates with respect to awards of legal fees and the performance of the PA; and,
- ? ensure that independent audits of the PAs are conducted regularly.

We recognize that previous reform efforts have focused on sweeping legislative measures aimed at bringing fundamental structural change to this field. We discuss these recommendations below and would support their enactment. However, given the wide differences between New York City and counties outside the City with regard to PA counsel selection and compensation, and the vast disparities in the volume and value of intestate estates around the State, any expectation of legislative action on large-scale structural reforms is probably unrealistic.

C. Recommended Measures

1. Strengthen the Administrative Board’s Powers and Make its Fee Schedules and Guidelines Binding

Although the administrative board adopted a schedule of appropriate counsel fees in October 2002, several Surrogates continued to deviate from the schedule to varying extents and for reasons that were unclear or could not be verified. Given the lucrative sums at issue in certain cases, these deviations have attracted significant media attention and even led to judicial disciplinary proceedings. There is a clear need to institute controls to ensure that

awards of counsel fees are reasonable, consistent and based on rational uniform standards adopted by a detached oversight body. Deviations from the guidelines similarly should be circumscribed by appropriate standards and take place as part of a transparent process.

We recommend that SCPA 1128 be amended to give the administrative board of the public administrators the authority to adopt binding fee schedules. This would ensure that awards of compensation to PA counsel are uniform. Deviations should be for good cause only, supported by affidavits of legal services detailing the nature and extent of the legal work provided. The Surrogates should retain discretion to award higher legal fees in extraordinary circumstances, as there is an occasional need for counsel to provide extraordinary services to an estate, provided that the grounds for such deviation are set forth clearly in writing by the Surrogate.

2. Apply Part 36.2(c)'s Disqualification Provisions to the PA and PA Counsel

Although the PA and PA Counsel are currently excluded from the scope of Part 36, there was no basis for that exclusion other than the Commission's inability to reach the complex questions surrounding intestate estate fiduciaries in our first report. Both evidence brought before this Commission and information made available through the press indicate the insufficiency of current appointment procedures. Instances of financial and political connections between Surrogates, PAs, and PA counsel have been documented. We heard testimony in which Surrogates candidly admitted to political and personal ties with appointees they had selected. Though such ties need not implicate the functioning of any of these officials, they give rise to a public perception of an opaque system that operates on the basis of connections and cronyism.

We believe that section 36.2(c) could properly be applied to the PA and PA Counsel without usurping or unduly intruding on the Surrogates' statutory right to select these fiduciaries.¹⁹ Rather, that authority would be subject to the standards applicable to all other fiduciaries. Persons disqualified from serving as PA or PA Counsel would include, among others:

- ? judges and relatives of judges;
- ? court employees and relatives of court employees;
- ? officials of state or county political parties (and their relatives), including the members, associates, counsel and employees of any law firm or entity with which the official is associated (while that official serves in that position and for a period of two years thereafter); and
- ? persons who have served as campaign officials (and their relatives) for judicial candidates or anyone associated with the law firm of such persons, for a period of two years following the judicial election.

Applying these disqualifications to the PA and PA counsel would do much to assure the public that these fiduciaries are being appointed on the basis of merit rather than political connections or personal favoritism. Significantly, several current PA Counsel would be disqualified from appointment should this recommendation be adopted.

Other Part 36 Requirements

Part 36 also obliges candidates for appointment to obtain training and to apply for

¹⁹ It does not appear possible to apply Part 36's annual compensation limits to PA counsel. Section 36.2(d) provides that no person may receive more than one appointment per year in which the compensation exceeds \$15,000, or may be awarded more than \$50,000 in aggregate compensation during any calendar year. SCPA 1108 authorizes the Surrogates to appoint "one or more counsels." In counties with a heavy volume of estates generating substantial counsel fees, imposing the Part 36 compensation cap would necessitate appointment of multiple counsel, thereby impairing the Surrogates' legislative prerogative to appoint a single counsel.

placement on a list of approved fiduciaries. We see no reason why such provisions would not similarly suit the appointment of PA counsel and recommend their extension to do so.

3. Enhanced Reporting Requirements

The PA and PA Counsel are appointed by and report to the Surrogate to document the fulfillment of their fiduciary duties, and in the case of PA counsel, to get paid. Thus, the Surrogates are better positioned than anyone to evaluate and monitor the work of these fiduciaries. Yet, the Commission has found that some Surrogates historically have failed to oversee these appointees and have shown little interest in doing so. Needless to say, effective oversight is crucial given the extensive powers possessed by these appointees, particularly in the procurement of services and disposal of assets, and given the inherently lucrative nature of the appointment.

The Surrogates should be held directly accountable for the performance of these appointees and that accountability should be inherent in the very structures and processes that govern their day to day interaction with these fiduciaries. This can be accomplished by applying existing court rules that provide for enhanced reporting and transparency.

a. Extend Part 26 Fiduciary Reporting Rule to Cover Awards of Fees to PA Counsel

Part 26.2 and 26.3 of the Chief Judge's Rules provide:

Any judge or justice who has approved compensation of more than \$500 to a court appointee shall file with the administrative office of the courts, on the first business day of the week following approval, a statement of compensation on a form authorized by the Chief Administrator of the Courts.

The judge or justice approving compensation shall certify that

the compensation approved is fixed by statute or, if not, is a reasonable award for the services rendered by the appointee. If the fee for services performed is fixed by statute, the judge or justice shall specify the statutory fee and the section of the statute authorizing the payment of the fee.

Part 26 should be extended to address awards of fees to PA Counsel. Surrogates should be required to file with OCA reports of all awards of legal fees to PA Counsel exceeding \$500. These reports should be made available electronically on the internet for public review. The Surrogates would merely have to complete a simple form that provides certain basic information about the amount of compensation awarded and whether that amount complies with the applicable fee schedule. A written explanation from the Surrogate would be required in the event of a departure from the schedule. Each such report should be accompanied by the PA counsel's required "affidavit of legal services setting forth in detail the services rendered, the time spent, and the method or basis by which requested compensation was determined" (SCPA 1108). Significantly, virtually every audit conducted by State and City officials has reported that these affidavits either are not being filed or contain information that is too vague or incomplete to permit assessment of the validity of the fee award.

We believe that expanding Part 26 to cover fees awarded to the PAs' counsel would significantly improve the accountability of these appointees. The Surrogates would then be called upon to ensure the adequate reporting of PA counsel services and compensation, and a central repository of records of these activities would be located within OCA and available to the public in a readily accessible manner, thereby engendering increased public confidence.

b. Surrogates to Report Regularly on Performance of PA and PA Counsel

In addition to the Part 26 reporting requirements, court rules should be amended to require the Surrogates to report to OCA on a regular basis concerning specified aspects of the performance of the PA and PA Counsel. These reports also should be accessible to the public. Active judicial oversight is the best means of promoting accountability and ensuring that any class of fiduciary performs at a high level. The quality of intestate estate administration is best assured by the active involvement of the Surrogates. To encourage this goal, we recommend that Surrogates be required to provide court administrators with regular reports evaluating the performance of the PA and PA counsel. Such evaluations, which should address both qualitative and quantitative issues, will bring sunlight to activities and processes that have long been too opaque.

We do not believe this recommendation would impose any significant new burdens on the PAs. We note that each PA already is statutorily obligated to file monthly statements with the Surrogate on each account that has been closed. Every six months, the PA is obligated to file a report with the Surrogate concerning every estate that has not been fully distributed within the last two years. Thus, the PAs already are in the habit of reporting to the Surrogates on a regular basis.

4. Independent Auditing

More frequent auditing of the PA and PA Counsel is critical. SCPA 1109 requires that “each public administrator shall conduct annually an audit of his office by an independent CPA.” Yet no such audit has ever been conducted in New York City due to a lack of funding from the City. The Attorney General and the State and City Comptrollers have all conducted

periodic audits, but these are infrequent and irregular and many counties have not been audited for many years. Several witnesses with extensive experience in intestate estate administration testified that such audits are crucial; witnesses from counties where funding is available stated that such audits significantly improved the performance of their PAs' offices. We strongly urge responsible policymakers to ensure that adequate funds for independent audits are provided in the future. Should funding remain unavailable, we recommend that OCA step in to help provide funding for these audits or otherwise ensure that the audits are conducted by requesting that the City delegate its audit duty to OCA.

5. Encourage Involvement of Outside Entities

The obscure nature of intestate estate administration contributes to the public perception that this area is the lucrative bastion of political insiders. It may be possible and beneficial to interest outside entities, such as not-for-profits, in becoming more involved in the work of the PA and PA Counsel. Any attention to or involvement in this area by good government and similar private groups can only advance the goals of public education and transparency. One method of doing so would be a pilot project wherein a not-for-profit serves as PA counsel for estates with small or minimal assets or provides funding for counsel for those estates. This would accomplish two goals: help eliminate the rationale advanced by the Surrogates and PA Counsel for charging high fees to well-funded estates, i.e., that it encourages PA counsel to accept the large number of non-remunerative small estates; and ensure that all estates in fact receive the full attention and effort of counsel regardless of their economic status. Absent legislation, however, such a pilot would require the cooperation of an interested Surrogate.

D. Other Suggestions Not Adopted by the Commission

During the course of our deliberations we were presented with a number of possible reform measures which, if adopted, would have a positive impact on intestate estate administration. Although we do not feel that these measures are ripe for implementation at this time, we believe that they have merit and could bear fruit at a future date.

1. Vest Power to Appoint PA in Local Government Rather than Surrogates

This measure was previously advanced on several occasions by the Attorney General and the State Comptroller. It is premised on the theory that those charged with funding and overseeing the PAs should also control their appointment. So doing would address the inherent conflict of having Surrogates appoint individuals who are funded and supervised by another branch of government, a situation that effectively leaves those individuals unaccountable. As a practical matter, since the PA essentially works as an adjunct of the Surrogate's Court, local governments would have to take affirmative steps to foster coordination with the Surrogate's Court and ensure that they are in a good position to evaluate and monitor the operations of the PA.

2. Replace Private Legal Counsel With In-house Legal Staff

This approach would remove the Surrogate's power to appoint private legal counsel and instead give local governments the power to hire legal staff to serve as PA counsel. This reform undoubtedly would increase accountability, since local governments would have direct and continuous oversight over the lawyers serving intestate estates and would be able to better

monitor the quality of legal services being provided. This system also would substantially reduce costs to estates, solve the problem of excessive legal fee awards, and eliminate the perception that a small cadre of politically connected private lawyers are being enriched at the expense of intestate estates.

In order to implement this measure, it would be necessary to amend SCPA 1108, which presently gives the Surrogate the right to select “one or more counsels” to the PA. While in theory the Surrogates may exercise this prerogative by selecting in-house counsel, it will be difficult to convince them to do so in practice. Furthermore, this approach would have a significant budgetary impact in some areas of the State, particularly in counties where the aggregate value of estates under management is too small to justify the expense of paid staff. Of course, fees ordinarily earned by private counsel could revert to local governments to offset staff salaries.

3. Amend SCPA to Limit Compensation that may be Awarded to PA Counsel

This option stops short of removing the Surrogates’ power to appoint private lawyers as PA Counsel while still addressing the troubling perception created when one or more private counsel earn large legal fees from intestate estates by virtue of a judicial appointment. Adopting a cap would necessitate the appointment of multiple counsel in those counties that generate significant legal fees and work to spread those fees around. Fee awards below a certain threshold could be exempted from the cap to encourage counsel both to accept appointments to represent low-asset estates and provide high quality legal services to those estates.

4. Amend SCPA to Create Independent Screening Panel Process

This approach would retain the Surrogate's power to appoint the PA and PA Counsel but would limit their selection to a list of candidates screened and approved by an independent panel appointed by court officials. This measure would ensure that applicants are found to possess adequate qualifications, training and backgrounds before they can be appointed by the Surrogates. The intent would be to ensure that appointees meet certain minimum standards for service as PA and PA counsel, and not to intrude on the Surrogate's statutory power to appoint these fiduciaries under the SCPA.

E. Summary of Recommendations

- ? **The Commission recommends application of Part 36.2(c), which sets forth certain disqualifications from appointment, to the PA and PA counsel to assure the public that these fiduciaries are being appointed on the basis of merit rather than political or personal considerations.**
- ? **The Commission recommends amending SCPA 1128 to make binding the fee schedules and guidelines promulgated by the Administrative Board of the Public Administrator.**
- ? **The Commission recommends amending Part 26 to require Surrogates to file with OCA reports of all awards of compensation to PA Counsel in excess of \$500. These reports should be made available electronically on the internet for public review.**
- ? **The Commission recommends adoption of court rules that require Surrogates to report to OCA on a regular basis concerning specified aspects of the performance of the PA and PA Counsel. These reports also should be accessible to the public.**
- ? **The Commission recommends that OCA take affirmative steps to ensure that independent audits of the PAs are expeditiously conducted.**
- ? **The Commission recommends that the court system encourage the involvement of outside entities in intestate estate administration.**

PART IV REVIEW OF THE PART 36 REFORMS

A. Findings, Conclusions and Additional Recommendations

In general, the evidence brought before this Commission indicates that the recent revisions to Part 36 instituted in response to our earlier report have been achieving their intended goals. Underlying our prior recommendations was the premise that fiduciary appointments are a matter of judicial discretion. The judge knows the needs of a pending matter and is in the best position to select an appropriate and qualified appointee to meet those needs. The new rules governing fiduciary appointments facilitate the judge's choice by providing for a broader, more diverse pool of better trained and qualified candidates whose credentials and appointment histories are readily available for public review pursuant to an electronic database that provides updated, accurate data on virtually every fiduciary appointment.

With few exceptions, affected stakeholders seem to agree that the Part 36 reforms are having a positive impact on New York State's fiduciary appointment system. For the most part, fiduciaries are being selected from larger pools of eligible candidates; the appointment process is being conducted in a far more open manner; appointments are being made on considerations of merit; and fiduciary reporting requirements are being enforced. The information about appointments contained in the online database is readily accessible, searchable and retrievable by the public, a feature which promotes oversight and accountability of the entire fiduciary appointment system by rendering it transparent and open

to public scrutiny.²⁰

The administrative mechanisms that have been put in place to support the new fiduciary appointment system appear to be functioning well. At the operational level, the position of fiduciary clerk has been established in each judicial district to assist the Administrative Judge in the supervision of fiduciary appointments. The fiduciary clerk ensures that all required forms are filed by judges and appointees, reviews those filings for accuracy and completeness, and is responsible for collecting and recording accurate data for the new database. The fiduciary clerks are quickly becoming the local means by which an emerging structure for communicating policy and procedures is taking hold around the State.

As a reflection of the court system's high-level of commitment to this area, First Deputy Chief Administrative Judge Ann Pfau has been appointed to oversee the fiduciary system Statewide and to lead the court system's continuing efforts to institutionalize the recent Part 36 reforms. Her efforts are supported by the Office of Guardian and Fiduciary Services (GFS), which is responsible for training judges, court personnel, and fiduciaries in the new rules, as well as coordinating the certification of all training programs for Part 36 fiduciaries. The GFS serves as an invaluable Statewide resource and clearinghouse for judges, court staff, fiduciaries, lawyers and the general public. The GFS is well positioned to help foster much-needed uniformity around the State.

The court system's Office of the Inspector General has appointed a Managing Inspector General for Fiduciary Appointments to provide for continuity of attention in this area, a move we applaud, and the court system's Internal Audit Unit is conducting random

²⁰ www.nycourts.gov/ip/gfs/index.shtml

and scheduled audits of guardianships around the State. While the online publication of data on fiduciary appointments and compensation have served to increase accountability and deter wrongdoing, there is no substitute for this kind of regular auditing. We have heard testimony documenting OCA's difficulties in attracting and retaining sufficient numbers of qualified auditors. Though we are cognizant of current budget constraints, we urge OCA to take appropriate steps to ensure the availability of sufficient auditors in this area.

Notwithstanding these positive developments, there is room for improvement in the implementation of Part 36.

1. Promoting Uniformity

Practitioners and fiduciaries who spoke with us repeatedly voiced frustration over the absence of uniform rules and procedures in guardianship matters. We heard testimony from attorneys who had their papers rejected weeks after they were filed for trivial technicalities, and of their difficulties in explaining to clients the reasons for the extra cost and delay. We heard from fiduciaries bewildered by the different accounting and examination procedures followed in different counties, and by the varying requirements they must meet in order to be awarded fees. This lack of uniformity adds confusion and inefficiency to an already complex area of law and is detrimental to all involved, including IPs, family members, fiduciaries and lawyers. There is a compelling need to bring greater standardization to guardianship practice in New York State.

We recommend that the uniform rules of the trial courts and Part 36 be amended to provide for the use of official forms in guardianship matters throughout New York State. In order to develop these forms, we recommend that the First Deputy Chief Administrative

Judge, supported by the GFS, lead a Statewide Task Force of members appointed by the Chief Administrative Judge and the Presiding Justices. Members should consist of guardianship judges, Appellate Division personnel, practitioners, clerks, fiduciaries, and other appropriate personnel. Uniform forms would be available online for use by courts, fiduciaries and practitioners throughout the State. Inasmuch as forms tend to dictate practice and procedure, we suggest that the Task Force focus first on producing a comprehensive set of official forms.

The Task Force also should build on work already begun by Judge Pfau's Committee of Guardianship Judges to develop a best practices manual for Statewide use by guardianship judges, clerks and fiduciaries. The best practices manual should address key aspects of the guardianship process, including, but not limited to:

- ? court hearings;
- ? applications for secondary appointments;
- ? filing and examination of initial, annual and final accountings, including guidelines on obtaining and using documents from financial institutions to verify guardian accountings;
- ? personal meetings with guardians;
- ? fee awards;
- ? court evaluators' powers; and,
- ? medicaid liens and settlements.

We note that the Second Department's Guardianship Task Force report attempts to promote symmetry throughout that Department by creating a uniform "Order and Judgment Appointing the Guardian" that contain a minimum of twelve standard provisions covering:

1. appointment of the court examiner;
2. the filing of a bond, commission, designation and consent to act by a specific date;
3. guardian's obligation to notify both the court and court examiner of the IP's death;
4. opening of IP's safety box in presence of bank personnel and certification thereof;
5. directing guardians to establish accounts at banks that provide statements and cancelled checks;
6. direction to guardian to notify court of a change in his/her domicile;
7. filing of final accounting within 60 days of death of IP or depletion of IP's assets;
8. guardian's pre-payment of reasonable funeral expenses;

9. guardian's notification to examiner of any assets not listed in court evaluator's report and any personal injury awards/settlements on IP's behalf;
10. guardian's written notification to court examiner within 30 days of any change in IP's residence or any significant changes in IP's physical/mental condition;
11. bold face language stating that guardian shall not be permitted access to funds without a commission issued by the clerk of the court; and,
12. direction to guardian to provide the court and court examiner with copies of the Commission within 5 days of issuance.

These provisions relate to key aspects of the guardianship process, and many have a direct bearing on the system's ability to monitor the well being of IPs, the activities of guardians and the performance of court examiners. Agreement by the Statewide Task Force on a uniform Order and Judgment for use throughout the State that addresses these issues could only have a decidedly positive impact on the quality and efficiency of New York's guardianship oversight system.

Finally, the court system should ensure adoption of standardized accounting software for use by all guardians and examiners. Currently, only a few Districts employ such software, which differs from area to area. Standardized software would greatly improve communication, professional training, expedite the examination process, and ease the ability to thoroughly review financial accountings and reports to ensure that all necessary information has been provided.

2. Reconciling Part 36 and Part 26

We recommend that Parts 26 and 36 of the Rules of the Chief Judge be reconciled to ensure that they are consistent in their application to fiduciaries. Part 26 requires the filing of a "Statement of Approval of Compensation" for all appointments with approved compensation of more than \$500. However, not all of these filings involve fiduciaries

covered under Part 36. Conversely, there are some Part 36 fiduciaries who are not required to comply with Part 26's approval of compensation filings. This situation creates confusion among courts and fiduciaries. For example, we had difficulty obtaining updated empirical data regarding the impact of the \$50,000 annual compensation cap on court examiners because they are not covered by the \$500 filing requirement. As a result, although court examiners are required to affirm that they have not exceeded the \$50,000 limit before they accept additional appointments, no basis exists for outside verification.

It is important that a separate committee or task force of knowledgeable persons be appointed to conduct a comprehensive examination of whether and to what extent Part 36 should apply to the many different types of fiduciaries in New York State. In addition, the committee should ensure that there is consistency between Parts 26 and 36. Presumably, fiduciaries subject to the standards and limitations governing compensation in Part 36 should also be subject to the reporting and transparency requirements embodied in Part 26.

Finally, in deference to the Chief Judge's Matrimonial Commission, which is addressing issues surrounding matrimonial law guardians in New York, we take no position on the application of Parts 36 and 26 to these fiduciaries.

3. Compensation Issues

As discussed in greater detail in Part II, we recommend adjusting the Part 36 compensation limit to prevent the loss of experienced examiners; suggest that the Appellate Divisions consider raising court examiners' fees, which have not been adjusted for inflation since 1991; and further suggest that fees paid to court examiners by the Office of the State Comptroller in estates that lack sufficient funds should be exempted from the annual

compensation limit. These recommendations recognize that a large percentage of experienced court examiners are exceeding the \$50,000 limit in a given year, to the detriment of the guardianship system, and that this trend may accelerate given our recommendations that court examiners review final accountings. They also recognize the importance of taking steps to aid in the recruitment and retention of court examiners and to encourage court examiners to take on all assignments, including nonremunerative matters.

4. Ensuring Competency

Although the quality of fiduciary services in New York is generally high, the complexity of guardianship law and practice demands continued training of fiduciaries, judges and court staff. Such training is vital to improving the guardianship system. Under the auspices of OCA's GFS, the frequency and quality of training have improved considerably. For example, GFS has developed a specialized curriculum for each category of fiduciary appointment, which serves as the basis for the certification of training programs that the office administers. GFS has also conducted or participated in numerous training programs for fiduciaries throughout the State and has published comprehensive manuals for many appointment categories. Live and video conferences have been conducted regularly for fiduciary clerks in every judicial district, and a *Fiduciary Clerk's Best Practices Committee* is in formation. The committee's first task is to develop a *Best Practices Manual* for Statewide use. Basic and advanced guardianship training have been offered to judges and law clerks.

We believe that the court system must continue to emphasize professional education and training. We heard testimony suggesting that some judges assigned to handle guardianship matters are not well versed in guardianship law and procedure, and lack any

great interest in, or appreciation for, the court's role and best practices in this area. We heard about some clerks who were uninformed or confused about filing processes, deadlines, and destinations, and about clerks who made multiple demands for filings that had already been submitted. In fairness, many of these complaints appear to relate back to the inception of the Part 36 reforms when fiduciaries and clerks alike were getting acclimated to many new procedures, but this does not detract from our conclusion that excellent professional training is the best guarantor of successful reform in this area, including continuous training of those professionals with a critical role to play in the guardianship process.

Training for lay guardians is equally important to improving the delivery of services to the elderly and disabled. Currently, GFS is planning, in Spanish and English, a plain language brochure and training video explaining the duties and obligations of a lay guardian, as well as available resources for assisting guardians in fulfilling their responsibilities. The provision of training and assistance to lay guardians is critical, as they constitute the majority of all guardians in New York State.

Finally, in light of the many new professionals who have joined the ranks of eligible fiduciaries, we support the New York State Bar Association Elder Law Section's efforts to establish a mentoring program in which experienced fiduciaries would share their experience with novice fiduciaries and help accelerate and ease their integration into this area of practice. We recommend that the court system work collaboratively with the Elder Law Section to provide appropriate incentives to participation in a mentoring program in this area.

5. Enhancing the Fiduciary Database

The online fiduciary database has been a very helpful development, providing

information about prior appointments, pending cases, fee awards, appointing judges, etc. OCA has indicated that it plans to expand the information available on the database to include the date those eligible for appointment must reregister. Other items that should be added include: the name of the court examiner charged with oversight of a given case, additional background information on appointees which might help to document expertise (listings of classes taught or taken for example), and data concerning cases in which the fiduciary is nominated by the IP rather than appointed by the court. With regard to nominated guardians, the database should distinguish between compensation awarded as a result of appointments and nominations, since the latter are not subject to the Part 36 compensation limits.

B. Summary of Recommendations

- ? The Commission recommends the use of official forms in guardianship matters throughout New York State. The Office of the First Deputy Chief Administrative Judge, supported by the UCS Office of Guardianship and Fiduciary Services, should lead a Statewide Task Force of members appointed by the Chief Administrative Judge and the Presiding Justices.**
- ? The Commission recommends that the Task Force also develop a best practices manual for Statewide use by guardianship judges, clerks and fiduciaries.**
- ? The Commission recommends that the Task Force develop a plan to reconcile Parts 26 and 36 of the Rules of the Chief Judge to ensure that they are consistent in their application to fiduciaries.**
- ? The Commission recommends that the court system adopt standardized accounting software for use by all guardians and examiners.**
- ? The Commission supports efforts to establish a mentoring program for novice fiduciaries and recommends that the courts work with interested bar associations to provide appropriate incentives to participation in a mentoring program.**
- ? The Commission recommends that OCA continue to expand the information available on the fiduciary database.**

PART V CONCLUSION

Before closing, the members of this Commission wish to express our gratitude to Chief Judge Kaye for giving us the opportunity to serve and recommend reforms to New York's fiduciary system. We reiterate our admiration for her efforts to promote public trust and confidence in our judicial system.

We also reiterate our admiration for the thousands of fiduciaries who serve individuals and estates faithfully and with great integrity each year. The vast majority of these fiduciaries are highly competent and ethical people wholly committed to the well being of their charges. As a result of our examination of this area, we found that the fiduciary system is by and large fulfilling its mission of providing much-needed services and protection to vulnerable people and estates. We also were pleased to learn that the reforms adopted over the last three years are having a positive impact on the processes governing selection of fiduciaries.

However, it is clear that the systems and people charged with overseeing fiduciaries in New York suffer from a number of significant weaknesses that must be addressed if the court system is to meet its obligations to protect and serve the needs of incapacitated persons and intestate estates. The recommendations in this report represent what we believe are significant, meaningful, realistic and achievable reforms that will improve the accountability and quality of the staff and systems charged with overseeing the work product and performance of key fiduciaries such as guardians, court examiners, public administrators and counsel to the public administrator.

Respectfully submitted,

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GLOSSARY OF TERMS

Alleged Incapacitated Person (“AIP”) ó an individual alleged in a petition filed with the court to have mental and/or physical incapacities that prevent him from making decisions in his own best interests as defined in NYS Mental Hygiene Law (öMHLö) Article 81.

Annual Report ó an annual report submitted by the guardian, pursuant to MHL Sect. 81.31, documenting the financial and/or personal circumstances of the incapacitated person (öIPö).

Counsel to the Public Administrator ó pursuant to NYS Surrogates Court Procedure Act (öSCPAö) Sect. 1108 (a), the Public Administrators of the counties of the city of New York may appoint one or more counsels. SCPA Sect. 1108 (b) allows reasonable compensation of such counsel to be paid from the respective estates in which legal services are rendered, and may be paid as provided in EPTL 11-1.1(b), and shall be supported by an affidavit of legal services. Pursuant to SCPA Sect. 1206 (3), the Public Administrators of the counties of Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester may employ counsel in any estate, whose fees and expenses therein shall be approved by the court of his county and shall be charged against the estate.

Court Evaluator ó a fiduciary appointed by the court, pursuant to MHL Sect. 81.09, to help determine the capacity of an AIP. The court evaluator interviews the AIP and the petitioner; investigates the nature and extent of the AIP’s alleged incapacity; and ascertains the nature and value of the AIP’s property. As specified in MHL Sect. 81.09 (c) (5), the court evaluator’s report is provided to the court prior to a hearing.

Court Examiner ó a fiduciary appointed by the court, pursuant to MHL Sect. 81.32, to examine initial and annual reports filed by a guardian. The court examiner also may serve the guardian with a demand to follow Article 81 provisions if a guardian fails to file a report, files an incomplete report or does not file a petition for discharge.

Guardianship Referee (formerly called “Court Examiner Specialist”) - a court employee who ensures compliance with all mandated filings and monitors the work of court examiners in a particular judicial district.

Fiduciary- an individual, usually but not always an attorney empowered by the courts to make decisions and perform services on behalf of another individual or estate.

Fiduciary Clerk- a court employee responsible for ensuring that fiduciaries complete all mandated filings pursuant to Parts 26 and 36 of the Rules of the Chief Judge; and that the information contained in those filings is entered into the fiduciary database maintained by the Unified Court System (öUCSö), Office of Court Administration.

Fiduciary Database- an online repository of information regarding fiduciary appointments maintained by the UCS Office of Court Administration and made available

to the public. The database provides information about the prior appointments, fee awards, current appointments and appointing judge of each Part 36 fiduciary.

Fiduciary List- an online list of names of individuals who are qualified for appointment as fiduciaries under Part 36; and from which an appointing judge must choose when making appointments regulated by Part 36. To be listed, a candidate must complete an application, and the UCS, Office of Court Administration certified training if required.

Final Accounting- a report filed by the guardian, pursuant to MHL Sect. 81.44, upon the death of the IP or the depletion of his assets documenting the accounts of the estate and any pending fees or commissions. MHL Sect. 81.44 sets deadlines for notification of death and filing of the Final Accounting. Until such report is filed, the guardianship case is not discharged and estate assets cannot be distributed.

Guardian- a fiduciary charged with decision making responsibilities for a person adjudicated to be incapacitated by a court. Guardians appointed pursuant to MHL Article 81 may be charged with decision making powers over the person and/or the property of the IP. Guardians may be appointed pursuant to Part 36, or they may be delay guardians, usually family members of the IP¹

Incapacitated Person (“IP”) - an individual who, upon adjudication, has been found to be incapable of making decisions regarding his own personal needs and/or finances. Upon a determination of incapacity, a guardian may be appointed by the court.

Initial Report- a mandatory report filed with the court, pursuant to MHL Sect. 81.30, by the guardian within 90 days of the issuance of his commission. The initial report reviews the IP's personal and financial circumstances and allows the guardian to notify the court if any changes are necessary concerning the specific powers granted to him. In the case of a property guardian, it should provide the court with a complete inventory of property and financial resources over which the guardian has control.

Intestate Estate- an estate in which a person dies without having a valid will. Property in such an estate passes by intestate succession to heirs according to state law. In New York City, pursuant to SCPA Article 11, intestate estates are handled by the Public Administrator in each of the five counties. In Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester counties the Public Administrator handles intestate estates pursuant to SCPA Article 12. In all other counties, intestate estates are administered by the county's chief financial officer.

Mental Hygiene Law Article 81- the NYS statute governing the appointment, conduct and monitoring of guardians for incapacitated adults.

¹ Note- the term “guardian” may also refer to guardians appointed pursuant to the Surrogates Court Procedure Act Article 17. These guardians are not subject to Part 36. However, Guardians ad Litem, who may be appointed in both Surrogates and Supreme Court proceedings are, with certain exceptions, subject to Part 36. Guardians ad Litem are appointed for individuals incapacitated due to mental or physical disability as well as infancy.

Office of Guardian and Fiduciary Services- Unit of the UCS, Office of Court Administration charged with providing training and education regarding NYS fiduciary appointments.

Part 26 of the Rules of the Chief Judge (“Part 26”) (22 NYCRR 26) - requires that judges file a notice with the UCS, Office of Court Administration upon approving compensation of \$500 or more for enumerated court-appointed fiduciaries.

Part 36 of the Rules of the Chief Judge (“Part 36”) (22 NYCRR 36) - creates a system that broadens the eligibility for appointment to a wide range of applicants well-trained in their category of appointment. It establishes procedures that promote accountability and openness in the selection process, and insulates that process from appearance of favoritism, nepotism or politics by disqualifying certain individuals from serving as fiduciaries, as well as limiting the number of new appointments qualified individuals may accept.

Public Administrator (“PA”) ó Official charged with administering estates for which no individual is willing or available to act as administrator or executor. The PA is appointed by the Surrogate but is employed by the city or county government.

ELDER LAW SECTION FIDUCIARY APPOINTMENT SURVEY

1. For the calendar year 2004, please check the categories of fiduciary appointments for which your name appeared on the Part 36 fiduciary list.

Guardian _____
Court Evaluator _____
Attorney for AIP _____
Court Examiner _____
SNT Trustee _____

2. During the calendar year 2004, were you (individually) excluded from accepting new Part 36 fiduciary appointments due to fees awarded to you in 2003 (i.e. total fees awarded in 2003 exceeded \$50,000)?

a. Yes _____
b. No _____

3. If so, please state the total fees you were awarded during 2003 for services as:

a. Guardian \$ _____
b. Court Evaluator \$ _____
c. Attorney for AIP \$ _____
d. Court Examiner \$ _____
e. SNT Trustee \$ _____

4. Will you be excluded from accepting new fiduciary appointments in 2005 due to fees awarded in 2004?

a. Yes _____
b. No _____

5. If you will be excluded in 2005, please state the total fees you were awarded during 2004 for services as:

a. Guardian \$ _____
b. Court Evaluator \$ _____
c. Attorney for AIP \$ _____
d. Court Examiner \$ _____
e. SNT Trustee \$ _____

6. If you were eligible to enroll on the Part 36 fiduciary list on or after June 1, 2003, did you voluntarily decide NOT to enroll in any category?

- a. Guardian _____
- b. Court Evaluator _____
- c. Attorney for AIP _____
- d. Court Examiner _____
- e. SNT Trustee _____

7. If so, what was your rationale for not enrolling in that category?

- a. Guardian _____
- b. Court Evaluator _____
- c. Attorney for AIP _____
- d. Court Examiner _____
- e. SNT Trustee _____

8. During the calendar year 2003, did you accept appointments for which you did not receive compensation?

- Yes _____
- No _____

9. If so, what was the type of appointment?

- a. Guardian _____
- b. Court Evaluator _____
- c. Attorney for AIP _____
- d. Court Examiner _____
- e. SNT Trustee _____

10. During the calendar year 2004, did you accept appointments for which you did not receive compensation?

- Yes _____
- No _____

