Caring for Persons Under a Disability: A Critique of the Role of the Conservator and the "Substitution of Judgment Doctrine"

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CARING FOR PERSONS UNDER A DISABILITY: A CRITIQUE OF THE ROLE OF THE CONSERVATOR AND THE "SUBSTITUTION OF JUDGMENT DOCTRINE"

PATRICK J. ROHAN*

The field of estate planning traditionally has centered around the preparation of a properly drawn will, augmented by a program of inter vivos gifts where the client has a sizeable estate.¹ Major emphasis was placed upon striking a balance between the desire to minimize the impact of taxation and the goal of securing sensible treatment of the beneficiaries.² Little, if any, thought was given to the possibility that the testator might become physically or mentally incapacitated months or years before his eventual demise. Accordingly, in the vast majority of cases, no legal machinery existed to safeguard the testator's person and property in his declining years. However, this past decade has witnessed attempts on the part of state legislatures to address the problems of the disabled.³ This

* Professor of Law, St. John's University School of Law. B.A., 1954, LL.B., 1956, St. John's University; LL.M., Harvard University, 1957; J.S.D., Columbia University, 1965.


³ In the past few years, articles dealing with such topics as the living will, the durable power of attorney, and the plight of those who are not incompetent but nonetheless are unable to manage their own affairs have begun to appear in significant numbers. See, e.g., Huff, Power of Attorney—Durable and Nondurable: Boon or Trap? 11 Institute on Estate Planning 3.1-.32 (P. Heckerling ed. 1977); Zicklin & Libow, The Penultimate Will, 47 N.Y.S.B.J. 31 (1975).
article is devoted to an analysis of two aspects of the legal machinery that is evolving in this area, namely “conservatorship statutes” and the “substitution of judgment doctrine.” Under the former, a conservator is appointed to look after the assets of a person who is incapacitated; under the latter, certain fiduciaries are empowered to engage in estate planning (or to make gifts to care for indigent relatives) on behalf of the incompetent or conservatee. After tracing the origin and development of these two distinct concepts, this Article will explore their interaction and the advisability of expanding their scope via legislation or judicial decisions. Some of the ethical problems encountered by the fiduciary and his counsel in this general area will also be discussed.

THE ORIGIN AND DEVELOPMENT OF THE CONSERVATORSHIP LEGISLATION

The principle object of conservatorship statutes is to provide protection for the property of persons who, by virtue of some disability are unable to manage it themselves. Unlike a guardian or the

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1 See notes 6-12 and accompanying text infra.
2 See notes 68, 71-97 and accompanying text infra.
5 Most jurisdictions define a guardian as a person who is appointed by a court and given custody and control of both the property and person of one who is unable to care for himself.
committee of an incompetent, the conservator's protective power typically is limited to the property of the conservatee and has no effect upon the latter's person. Since guardianships and conservatorships usually are not established until there has been a judicial declaration of incompetency, conservatorships often are preferred.

See, e.g., In re Cass' Guardianship, 155 Neb. 792, 54 N.W.2d 68 (1952); Filip v. Gagne, 104 N.H. 14, 177 A.2d 599 (1962); Miske v. Habay, 1 N.J. 368, 63 A.2d 883 (1949); In re Guardianship of Campbell, 450 P.2d 203 (Okla. 1966) (per curiam); UNIFORM PROBATE CODE § 1-201(16). In a small number of jurisdictions, however, the term guardian is used to describe a person appointed by the court to manage only the property, and not the latter, of one who is unable to manage it by himself. See, e.g., Md. Est. & Trusts Code Ann. § 13-201 (1974); Vt. Stat. Ann. tit. 14, § 2671 (1974).

In Kentucky and West Virginia have held that a committee is to be appointed for persons of unsound mind. The committee has a duty to care for the individual and his estate. See Williams v. First Nat'l Bank & Trust Co., 328 S.W.2d 152 (Ky. 1959); Harman v. Harman, 90 W. Va. 303, 110 S.E. 718 (1922). New York uses the term committee in lieu of the word guardian. See N.Y. Mental Hyg. Law § 78.01 (McKinney 1976).

The powers and duties of a New York conservator are set forth in N.Y. Mental Hyg. Law § 77.19 (McKinney 1976), which provides in part:

[A] conservator shall have control, charge, and management of the estate, real and personal, of the conservatee, and shall have all of the powers and duties granted to or imposed upon a committee of the property of an incompetent appointed pursuant to article seventy-eight of this chapter, subject to the jurisdiction of the court and in accordance with the procedure therein specified, and shall have such additional powers as the court by order may specify.

Notwithstanding this general statement of a conservator's power, many statutes expressly identify the classes of fiduciaries empowered to act under their terms. See note 118 infra. Additionally, statutes often confer certain rights or dispensations upon an "incompetent," which term must be read as meaning an adjudicated incompetent. Accordingly, the quoted passage from the Mental Hygiene Law is not a sufficient basis for inferring that a conservator may be equated with a committee in interpreting any or all statutes.

E.g., Carter v. Saxon, 358 A.2d 639 (D.C. 1976); Stevenson v. Peckham, 322 Mass. 693, 79 N.E.2d 282 (1948); Filip v. Gagne, 104 N.H. 14, 177 A.2d 599 (1962); In re Estate of Evans, 28 Wis. 2d 97, 135 N.W.2d 832 (1965). There are a few jurisdictions in which conservatorship includes care of the person. CA. Prob. Code § 1701 (West Supp. 1977); Minn. Stat. Ann. § 525.54 (West 1975); Miss. Code Ann. § 93-13-251 (1973). In those states which predicate appointment of a conservator upon the proposed conservatee's inability to manage his own affairs, however, see note 7 supra, the power of the conservator generally will be limited to the conservatee's property and not include his person. See Filip v. Gagne, 104 N.H. 14, 177 A.2d 599 (1962) (conservatorship limited to estate of ward); Ariz. Rev. Stat. § 14-5101(3) (1975) (conservatorship proceeding defined in terms of management of estate only); Colo. Rev. Stat. § 15-14-101(3) (1974) (protective proceeding limited to care and protection of proposed conservatee's estate); N.D. Cent. Code § 30.1-26-01(2) (1976) (conservatorship statute applicable only when there is need to manage estate of proposed conservatee). See generally Alexander, Surrogate Management of the Property of the Aged, 21 Syracuse L. Rev. 87 (1969); Comment, Conservatorship: Present Practice and Uniform Probate Code Compared, 5 Real Prop., Prob. & Tr. J. 507 (1970).

as a means of avoiding the stigma which attends such an adjudication. 13

The notion of a conservatorship is not new. As early as the 1890's several states enacted what were in essence conservatorship statutes. In 1895, Pennsylvania passed "[a]n act [f]or the protection of persons unable to care for their own property," referred to as the "weak-minded persons" act.14 This legislation permitted the court of common pleas to appoint a "guardian for the estate" of a person incapable of managing his own property due to weakness of mind. Similar to a modern conservatorship, no adjudication of incompetency was necessary for the appointment of the "guardian."15

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13 See Board of Regents State Univs. v. Davis, 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975); In re Emerson, 73 Misc. 2d 322, 341 N.Y.S.2d 390 (Sup. Ct. N.Y. County 1973); In re Estate of Evans, 28 Wis. 2d 97, 135 N.W.2d 832 (1965). Illustrative of the preference for a conservatorship is the New York committeeship statute which provides:

Prior to the appointment of a committee . . . it shall be the duty of the court to consider whether the interests sought to be protected could best be served by the appointment of a conservator. The court shall not make a finding that a person is incompetent or is a patient who is unable adequately to conduct his personal or business affairs unless the court first determines that it would not be in such person's best interest to treat him as suffering substantial impairment under article seventy-seven [conservatorship provisions] of this chapter.

N.Y. MENTAL HYG. LAW § 78.02 (McKinney 1976). See generally Effland, supra note 1, at 376-77.

In addition to the humiliation and anguish that may be generated by an incompetence proceeding, there is also the matter of cost. It has been estimated that, if the party under a disability has assets of any consequence, the cost of an incompetence proceeding, including expenses occasioned by the appointment of a guardian ad litem, may run in excess of $10,000. See Engel, Estate Planning for the Handicapped, 111 TR. & EST. 782, 782 (1972).


15 Id. See In re Hoffman's Estate, 209 Pa. 357, 58 A. 665 (1904); cf. In re Bryden's Estate, 211 Pa. 633, 61 A. 250 (1905) (mem.) (discussion of 1901 Pa. Laws 574, Act of June 19, 1901, Pub. L. No. 282, which is similar to 1895 Pa. Laws, Act of June 25, 1895, Pub. L. No. 220). In the 1895 act there was a limiting provision which distinguished that legislation from current conservatorship statutes. Section 5 of the act provided that, upon a finding of inability to care for his property, the conservatee became legally incapable of executing any written
Soon after the action of the Pennsylvania legislature, Massachusetts in 1898 enacted a statute providing for the appointment of a conservator for persons of advanced age who are incapable of managing their property. At that time, advanced age was the only ground for appointment of a conservator in Massachusetts; presently, that state also permits a conservator to be appointed for a person debilitated by "mental weakness" or "physical incapacity." Other states which adopted conservatorship legislation in this early period are Colorado in 1893, New Hampshire in 1899, and Maine in 1911.

Although modern conservatorship statutes vary greatly, the gist of their provisions is similar. If advanced age, mental weakness, or physical incapacity renders an individual incapable of managing his instrument or making a gift. For a discussion of the current contractual capacity of conservators, see notes 62-67 and accompanying text infra.
own property, then a court may be petitioned to appoint a conservator of such person's property. In most jurisdictions, the petition may be filed by either the disabled person or by one or more of his friends or relatives. Creditors of the proposed conservatee are prohibited from filing such a petition in California, while several other jurisdictions allow the petition to be filed by anyone who has an interest in the management of the property. Under Connecticut law, the proposed conservatee may not file the petition, but New Hampshire, Wisconsin, Vermont, and Maine permit filing only by the proposed conservatee. Depending on the jurisdiction, the petition is either filed in the court of chancery or the probate court of the county in which the disabled individual resides.

The conservatorship statutes normally prescribe that a judicial hearing be conducted upon notice to the proposed conservatee. Several jurisdictions impose the additional requirement that notice be furnished to the spouse, “descendants, ascendants and next of kin” of the proposed conservatee, except where the proposed conservator or the proposed conservatee is the spouse or descendant of the proposed conservatee. In California, the petition may be filed by either the disabled person or by one or more of his friends or relatives. In most jurisdictions, the petition may be filed by either the disabled person or by one or more of his friends or relatives. Creditors of the proposed conservatee are prohibited from filing such a petition in California, while several other jurisdictions allow the petition to be filed by anyone who has an interest in the management of the property. Under Connecticut law, the proposed conservatee may not file the petition, but New Hampshire, Wisconsin, Vermont, and Maine permit filing only by the proposed conservatee. Depending on the jurisdiction, the petition is either filed in the court of chancery or the probate court of the county in which the disabled individual resides.

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vatee is the petitioner.36 Departing from the practice of most other states, New Hampshire allows the appointment to be made “without notice or public hearing.”37 At the hearing, the allegedly disabled person is presumed able to manage and care for his property, and the burden of proof is on the petitioner to demonstrate otherwise.38 To carry this burden, the petitioner also must show that


38 In addition to a deprivation of legal rights, the appointment of a conservator may have an adverse psychological impact upon the conservatee. See Regan, Protective Services for the Elderly: Commitment, Guardianship, and Alternatives, 13 WM. & MARY L. REV. 569, 601-05 (1972). For this reason, courts place a very heavy burden on the petitioner to prove the proposed conservatee's inability to carry on his own affairs: “Proof of mental competency must possess such strength and clarity as to lead incontestably to but one conclusion . . . that respondent is mentally incompetent.” In re Myers’ Estate, 395 Pa. 459, 462, 150 A.2d 525, 527 (1959).

In New York, the court must be “satisfied by clear and convincing proof of the need” for a conservator before it may appoint one. N.Y. Mental Hyg. Law § 77.01 (McKinney 1976). A California court, on the other hand, may appoint a conservator upon finding “sufficient evidence” that the subject of the proceeding is “substantially unable to manage his own financial resources.” Cal. Prob. Code § 1751 (Supp. 1977).

A medical examination of the proposed conservatee is a required element of protective proceedings in Mississippi and Tennessee. See Miss. Code Ann. § 93-13-255 (1972); Tenn. Code Ann. § 34-1010 (Supp. 1976). The statutes of these states direct that

at least two (2) reputable physicians, who are duly authorized to practice medicine in [the] state, and who shall have had at least three (3) years, [sic] actual practice, each of whom shall be required to make a personal physical and mental examination of the subject party, and each of said physicians shall make in writing a certificate of the result of such examination, which certificate shall be filed with the clerk of the court and become a part of the record of the case. Said physicians may also be examined orally at the hearing.

Id. The Uniform Probate Code empowers the court, in its discretion, to order a medical examination of the subject. Uniform Probate Code § 5-407(c). Strict compliance with the statutory requirements concerning medical examinations usually is necessary. See, e.g., Ex parte Martin, 248 Mich. 512, 227 N.W. 754 (1929) (statutory procedure for the determination of competency must be strictly followed).

When it appears that the conservatorship is no longer necessary, either because the conservatee has died, regained the ability to manage his own property, or for any other good cause, the court may discharge the conservator. See, e.g., Md. Est. & Trusts Code Ann. §§ 13-220 to -221 (1974). Under § 5-430 of the Uniform Probate Code, the conservatee, conservator “or any other interested person may petition the court to terminate the conservatorship.” Should the court decide that the “disability has ceased,” title to the assets under the conservatorship are returned to the former conservatee subject to expenses of administration and transfer. Uniform Prob. Code § 5-430. Other grounds for termination of the conservatorship include resignation or removal of the conservator, an adjudication that the conservatee is
the infirmity is causally related to the conservatee’s inability to manage his property. An improvident business transaction or generosity in the disposition of one’s property, in itself, does not justify the appointment of a conservator. At the conclusion of the hearing, the court, in its discretion, may appoint a conservator if it is satisfied that the best interests of the disabled person will be served. 

Temporary conservators or guardians ad litem may be named in several jurisdictions at any stage of the protective proceedings to represent individuals whose capacity is at issue. The duties of these fiduciaries generally are determined by the court and include only those necessary for the temporary maintenance of the conservatee’s property. It has been held that the duties of a guardian ad litem “extend to investigation and reporting the status of matters incompetent, and depletion of the assets of the conservatee’s estate. See, e.g., Okla. Stat. Ann. tit. 58, § 890.6 (West Supp. 1977-1978).
dealing with the interests of the person for whom he was appointed, . . . prosecuting or defending an action in behalf of such person," and acting as protector of his rights and interests. In determining the need for a guardian ad litem, a court should evaluate whether the proposed conservatee is aware of the nature of the proceeding and whether he has the capacity to choose and consult with counsel intelligently in the conduct of the litigation.

Most conservatorship statutes have left the selection of the conservator to the discretion of the court. The court's main concern in choosing a conservator is that the best interests of the conservatee be served. Consequently, the judge hearing the matter generally appoints a relative of the conservatee, on the theory that such a person is most concerned with the welfare of the conservatee. The courts will not, however, appoint a relative or any other person nominated as conservator who has interests adverse to that of the debilitated individual. In some jurisdictions, priorities and preferences in the appointment of conservators are established by statute. Illustrative of such legislation is Section 5-410 of the Uniform Probate Code which prescribes an order of priority that may be departed from by the court for good cause.

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44 In re Young, 79 Misc. 2d 208, 209, 359 N.Y.S.2d 854, 856 (Dutchess County Ct. 1974). While enumerating several permissible powers of the guardian ad litem, the Young court also noted that such a fiduciary is not entitled to manage generally the assets or property of the proposed conservatee. Id. at 209, 359 N.Y.S.2d at 856.

45 Cf. State v. Vanderburgh Circuit Court, 246 Ind. 139, 203 N.E.2d 525 (1965) (law should be liberally construed in guardianship proceedings on behalf of alleged incompetent unable to present his own defense or to authorize a law firm to do so); In re Leary's Appeal, 272 Minn. 34, 136 N.W.2d 552 (1966) (probate court may appoint a guardian ad litem in adult commitment proceeding to protect the rights of the adult).


49 See, e.g., In re Guardianship of Malnick, 180 Neb. 748, 145 N.W.2d 339 (1966) (substantial interest of daughter in transactions of incompetent mother made her unsuitable as guardian); In re Estate of Gorman, 77 Misc. 2d 564, 354 N.Y.S.2d 578 (Sup. Ct. Onondaga County 1974) (son denied conservator status where situation was such that any expenditure made by son would deplete his inheritance).


51 UNIFORM PROBATE CODE § 5-410 states:
Before a conservator undertakes the performance of his duties, he often must furnish a bond conditioned on the faithful discharge of his obligations.52 While the amount of the bond generally is left to the court’s discretion,53 the provisions of the Uniform Probate Code are somewhat less flexible.54 A conservator has the same basic powers and duties as the guardian of a minor or committee of an incompetent,55 except as to the custody of the person. Often in-

(a) The Court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(2) an individual or corporation nominated by the protected person if he is 14 or more years of age and has, in the opinion of the Court, sufficient mental capacity to make an intelligent choice;

(3) the spouse of the protected person;

(4) an adult child of the protected person;

(5) a parent of the protected person, or a person nominated by the will of a deceased parent;

(6) any relative of the protected person with whom he has resided for more than 6 months prior to the filing of the petition;

(7) a person nominated by the person who is caring for him or paying benefits to him.

(b) A person in priorities (1), (3), (4), (5), or (6) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the Court is to select the one who is best qualified of those willing to serve. The Court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.


54 Uniform Probate Code § 5-411 provides:

The Court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus one year’s estimated income minus the value of securities deposited under arrangements requiring an order of the Court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without Court authorization. The Court in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

cluded among these functions is an obligation to "provide for the maintenance, support, and personal well-being of the conservatee and then for the maintenance and support of persons legally dependent upon the conservatee" to the extent that funds are available from the estate. In addition, anyone who renders services to the estate may be compensated from the assets of the estate, and the conservator is entitled to reasonable compensation for his services. Some jurisdictions permit the appointing court to enlarge or restrict the conservator's powers, in which case the court may tailor the powers of the conservator to the condition and needs of the particular conservatee.

Conservatorship statutes normally provide that the

statutory scheme typifies that of many other states. N.Y. MENTAL HYG. LAW § 78.15 (McKinney 1976), subjects the committee to the direction and control of the court, id., allows the committee to make reasonable expenditures for necessities of the incompetent, id. § 78.15(b), permits investment of surplus funds, id. § 78.15(c), restricts the power of the committee to deal in real property without court direction, id. § 78.15(d), allows the committee to maintain any judicial proceeding which the incompetent might have maintained were he competent, id. § 78.15(e), and, where the incompetent holds real property, requires the committee to record notification that the ward has been adjudged incompetent, id. § 78.15(f).

See N.Y. MENTAL HYG. LAW § 77.21 (McKinney 1976). See also In re Groebe, 49 N.J. Super. 111, 139 A.2d 317 (1958) (estate of an incompetent used to support an indigent sister). In Rosendorf v. Toomey, 349 A.2d 694 (D.C. App. 1975), the court held that since the conservator's obligation is to conserve the estate for the use of the conservatee and not to maximize it for potential heirs, the children of the disabled person may not challenge expenditures for his living expenses as excessive. Id. at 699-701.

Payments to third parties for services performed on behalf of the estate must be reasonable. Upon petition, a court will review these payments and allow or disallow them accordingly. See, e.g., In re Rich, 337 A.2d 764 (D.C. App. 1975); Tobin v. Security Trust Co., 21 App. Div. 2d 743, 250 N.Y.S.2d 110 (4th Dep't 1964) (mem.); Whitmarsh v. McGair, 156 A.2d 83 (R.I. 1959).

See, e.g., UNIFORM PROBATE CODE § 5-414 which provides that, unless otherwise compensated for his services, the conservator appointed in a protective proceeding is "entitled to reasonable compensation from the estate."

As observed in a Comment to the Uniform Probate Code:

It [is thus] possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales and mortgages of land, only with special Court authorization. In the latter case, a conservator would be in much the position of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the provisions for protection of third parties have full effect. The Veterans Administration may insist that, when it is paying benefits to a minor or disabled, the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act and require the conservator to file annual accounts.

[Under the Uniform Probate Code.] [t]he Court may not only limit the powers of the conservator but may expand his powers so as to make it possible for him to act as the Court itself might act.

UNIFORM PROBATE CODE § 5-426, Comment.
"[a]ppointment of a conservator [may] not be used as evidence of the competency or incompetency of the conservatee," nor may the conservatee "be deprived of any civil right solely by reason of the appointment." Jurisdictions vary as to the effect of the appointment of a conservator upon the conservatee's power to contract. In New York, contracts, conveyances, or dispositions of the conservatee, except those made by will,61 are voidable at the option of the conservator.62 The statutes of Tennessee and Mississippi stipulate that "[s]o long as there is a duly appointed conservator, the conservatee is limited in his or her contractual powers and contractual obligations to the same extent as a minor."63 In Delaware, from the time of appointment, a person whose property is under the control of a fiduciary has no capacity to enter into contracts with respect to such property.64 Case law in Massachusetts65 and statutes in Oklahoma66 and the District of Columbia67 establish that all contracts made by the conservatee, except those involving necessities, are void.

This summary indicates quite clearly that the law governing conservatorships is fragmentary and that a coherent national pattern has not yet emerged. It also reveals that the major thrust of conservator statutes is the protection of the conservatee's assets. This orientation, when coupled with the fact that appointment of a

60 N.Y. MENTAL HYG. LAW § 77.25(b) (McKinney 1976); id. § 77.25(a). The appointment of a conservator does not constitute a determination that the conservatee is insane or mentally incompetent. In re Marriage of Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973). Nonetheless, the conservatee's legal rights are limited following the appointment. Thus, a conservatee, acting alone and without the approval of the probate court or the conservator, cannot execute a valid conveyance of conservatorship property by deed of gift. Place v. Trent, 27 Cal. App. 3d 526, 103 Cal. Rptr. 841 (1972). See notes 62-67 and accompanying text infra.

61 A conservatee possessing the requisite testamentary capacity has unlimited power to dispose of his property by will. N.Y. MENTAL HYG. LAW § 77.25(c) (McKinney 1976).

62 In contrast to contracts made by a conservatee, which are voidable in the conservator's discretion, instruments executed by an adjudicated incompetent generally are void ab initio. See, e.g., Weinberg v. Weinberg, 255 App. Div. 306, 8 N.Y.S.2d 341 (4th Dep't 1938); Gramatan Nat'l Bank & Trust Co. v. Lavine, 99 N.Y.S.2d 868 (Syracuse Municipal Ct. 1950).

63 Miss. CODE ANN. § 93-13-261 (1972); Tenn. CODE ANN. § 34-1014 (Supp. 1976).


65 See Belluci v. Foss, 244 Mass. 401, 138 N.E. 551 (1923). See also Chandler v. Warlick, 321 S.W.2d 897 (Tex. Ct. App. 1958) (medical services including nursing and other usual services rendered person of unsound mind constitute necessities); In re Guardianship of Haye, 8 Wis. 2d 32, 98 N.W.2d 430 (1959) (where attorney filed petition for reexamination of client's medical condition three months after prior examination such legal services were not necessities).


conservator cannot be equated with an adjudication of incompetency, may well lead courts to conclude that a conservator is not authorized to represent the conservatee in various recurring situations or proceedings, such as a will contest or an action challenging the propriety of a trustee's conduct. Since the appointment of a conservator may reduce greatly the likelihood that a guardian or a committee will ever be appointed, such limitations upon the conservator's power may prove problematical.

THE "SUBSTITUTION OF JUDGMENT" DOCTRINE

In recent years, the question has arisen whether a fiduciary may engage in estate planning for, or dispose of the assets of, the conservatee or incompetent via inter vivos transfers. There exists a variety of situations which may present such an issue. For instance, the fiduciary may desire to make gratuitous transfers to the natural objects of the conservatee's or incompetent's bounty (with or without the recipients being in dire need). Similarly, the fiduciary may wish to execute a will or a codicil on behalf of a conservatee or incompetent, or wish to alter a Totten trust, joint bank account, or insurance policy beneficiary designation so as to affect the ultimate disposition of the funds. Most recently, questions have arisen as to whether a fiduciary has authority to donate organs on behalf of the incompetent. 


The rights of the guardian or committee of an incompetent with respect to a Totten trust have been litigated extensively. See, e.g., In re Sabot, 28 Misc. 2d 265, 212 N.Y.S.2d 842 (Sup. Ct. Queens County 1961) (Totten trust funds may be used to pay incompetent's bills where alternative is sale of income-producing realty); In re Biskur, 184 Misc. 239, 55 N.Y.S.2d 662 (Sup. Ct. Kings County 1944) (committee entitled to commission on restoration of Totten trust fund to former incompetent); Wheatherly v. Byrd, 552 S.W.2d 573 (Tex. Ct. App. 1977) (guardian who was also beneficiary of trust permitted to revoke). Whether such fiduciaries are empowered to terminate a Totten trust, revoking the rights of the beneficiary thereunder, turns on the financial status of the incompetent. It uniformly has been held that where there are sufficient funds to care for the incompetent's needs, the committee may not revoke the trust. See Simmons v. First Fed. Sav. & Loan, 132 F. Supp. 370 (D.D.C. 1955); In re Sabot, 28 Misc. 2d 265, 212 N.Y.S.2d 842 (Sup. Ct. Queens County 1961); In re Estate of Rasmussen, 147 Misc. 564, 284 N.Y.S. 231 (Sur. Ct. Kings County 1933) (committee not incompetent's alter ego). When money is required for the benefit of the incompetent himself, however, the guardian may terminate the Totten trust. Rickel v. Peck, 211 Minn. 576, 2 N.W.2d 140 (1942); Brooklyn Trust Co. v. Smart, 161 Misc. 857, 293 N.Y.S. 823 (Sup. Ct. Kings County 1937); cf. In re Cuen, 142 Cal. App. 2d 258, 298 P.2d 545 (2d Dist. 1956) (the court must determine whether trusts should be terminated or real property sold). See generally Note, Illinois Conservator's Right to Invade Joint Savings Account, 48 CHI.-KENT L. REV. 230 (1971).
person whom he represents, or recommend that no extraordinary measures be taken to prolong the life of that person. The foregoing issues are usually grouped under the legal heading of the "substitution of judgment" doctrine.

Origin and Development of the Doctrine

In the typical case, the fiduciary seeking to act for a disabled person applies to the appropriate court for permission to make the distribution or change in question. The court, in turn, usually makes its determination based upon two criteria: whether the disabled party needs the property for his own support and maintenance, and whether he would be likely to make the transfer himself if he were capable of doing so. Many of the earlier cases focused on the needs of the recipient as a basis for the transfer. It was not entirely clear whether a disposition of a debilitated individual's property could be effected for the sole purpose of avoiding excessive estate taxes. The first reported case involving a guardian's petition for permission to make lifetime gifts from the estate of an incompetent in order to effectuate a tax saving was Bullock's Estate. There the court rejected an estate plan designed to minimize the estate tax "bite," suggesting that tax avoidance was not a proper motive for permitting an inter vivos gift.

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70 See, e.g., Robertson, Organ Donations by Incompetents and the Substituted Judgment Doctrine, 76 Colum. L. Rev. 48 (1976).
73 See, e.g., In re Bond, 198 Misc. 256, 257, 98 N.Y.S.2d 81, 82 (Sup. Ct. Steuben County 1950); In re Estate of Battin, 171 Misc. 145, 146, 11 N.Y.S.2d 591, 593 (Sup. Ct. Oneida County 1939); In re Tash, 126 Misc. 764, 765, 214 N.Y.S. 631, 632 (Sup. Ct. N.Y. County 1926). As pointed out in Battin, the recipient's lack of financial resources is relevant in determining whether the disabled party, if competent, would have made the transfer himself. 171 Misc. at 146-47, 11 N.Y.S.2d at 893. Allowances have been denied because the recipient was able to adequately support himself without such funds. See, e.g., In re Rogers' Estate, 96 N.J. Eq. 6, 125 A. 318 (1924); In re Ivory, 146 Misc. 803, 263 N.Y.S. 795 (Sup. Ct. Jefferson County 1933).
75 Id. at 685. Because there existed a remote possibility that the incompetent would recover, the court denied his wife and two children payments designed to reduce their inheri-
The earliest case to approve of such a plan was In re Carson, wherein a New York court sanctioned a gift to an incompetent’s son solely on the ground that tax advantages would accrue to the estate. Shortly thereafter, a Delaware case, In re duPont, independently reached a similar result. In duPont, an 86 year old ward who was permanently disabled both mentally and physically possessed an estate valued at $176,000,000. Applying the substitution of judgment doctrine, the court allowed a transfer of $36,000,000 to the ward’s children and grandchildren, even though they were not in need. Although substantial tax savings were realized, this was not the only ground on which the court based its decision. Another important factor was that the gift paralleled the testamentary plan of the incompetent’s will.

The only remaining jurisdiction specifically to reject the substitution of judgment doctrine as a technique for reducing estate taxes is Texas. In In re Estate of Neal, the Texas Court of Appeals denied an application to transfer trust property to the incompetent’s heirs, even though approval of the transfer would have duplicated the testamentary plan of the incompetent and reduced the tax liability of his estate. On the other hand, the most liberal approach to the doctrine in a situation involving only tax motives is illustrated by the case of In re Christiansen. Significantly, the court in that land-

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77 Id. at 546, 241 N.Y.S.2d at 290. In upholding the gift, the court alluded to the probable desire of the incompetent to minimize the tax loss incurred by the estate. Id.
79 Id. at 303, 194 A.2d at 310.
80 Id. at 315, 194 A.2d at 317. See generally 14 CORNELL L.Q. 89 (1928); 41 HARV. L. REV. 402 (1928).
81 41 Del. Ch. at 315, 194 A.2d at 317.
82 Id. at 304-05, 194 A.2d at 311. Besides the incompetent’s will, other documents were introduced which evidenced several efforts by the ward to avoid taxes through distribution of his assets. In addition, the ward had made substantial gifts in the past to family members. Id. From these facts the court concluded that the incompetent would have made the disputed gifts to obtain a tax savings. Id. at 306, 194 A.2d at 312.
84 Id. at 499. The incompetent was a 96-year old widow with an estate of $2,400,000. Prior to her disability, she had made gifts to the prospective donees that were similar to those proposed by the guardians. No change in the incompetent’s standard of living would have resulted had the guardian’s plans been carried out. Id. at 497-98. Reasoning that the existing statutory provisions governing the administration of incompetent’s estates were exclusive, the court concluded that the silence of the legislature with respect to the substitution of judgment doctrine indicated an intent to prohibit employment of that doctrine. Id. at 502.
mark decision adopted an objective standard for determining whether the disabled party would be likely, if competent, to make the proposed transfer:

[T]he courts of [California], in probate proceedings for the administration of the estates of insane or incompetent persons, have power and authority to determine whether to authorize transfers of the property of the incompetent for the purpose of avoiding unnecessary estate or inheritance taxes or expenses of administration, and to authorize such action where it appears from all the circumstances that the ward, if sane, as a reasonably prudent man, would so plan his estate, there being no substantial evidence of a contrary intent.\(^{38}\)

In reaching this conclusion, the court rejected the contention that such a transfer is consistent with due process requirements only if a finding is made, under a subjective standard, that the incompetent himself would have effected the transaction.\(^{37}\) The Christiansen decision also deemphasized the need to duplicate existing estate plans,\(^{38}\) indicating instead that "discrepancies between gift and inheritance need not be fatal . . . ."\(^{39}\) To provide guidance for the proper exercise of judicial discretion, the court enumerated the following factors to be considered in evaluating the fiduciary's application: the permanency of condition; the needs of the ward; devolution of property; and donative intent.\(^{40}\)

Although there is a clear trend toward judicial recognition of the substitution of judgment doctrine,\(^{41}\) not all requests for its appli-

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\(^{38}\) Id. at 424, 56 Cal. Rptr. at 522-23.
\(^{36}\) 248 Cal. App. 2d at 427, 56 Cal. Rptr. at 524.
\(^{39}\) Id. Employing similar reasoning, the court in In re Myles, 57 Misc. 2d 101, 101-02, 291 N.Y.S.2d 71, 72 (Sup. Ct. Westchester County 1968), approved $500,000 gifts to the son and daughter of an 86-year-old incompetent, notwithstanding a will provision authorizing gifts to these children only if they survived the mother. The court acknowledged, however, that while the testamentary scheme of an incompetent is not necessarily determinative, it normally should be given great weight. Id. at 103, 291 N.Y.S.2d at 74.
\(^{40}\) 248 Cal. App. 2d at 424-27, 56 Cal. Rptr. at 523-24. While noting that as a general rule a gift or transfer only may be approved upon proof that the incompetent's condition is incurable, the court concluded that the stringency of this requirement bears an inverse relationship to the frequency with which the incompetent made such gifts. The needs of the incompetent, including payment of the latter's debts and obligations, are of primary importance. Id. at 425, 56 Cal. Rptr. at 523. Only after the incompetent's wants for the foreseeable future have been provided for may consideration be given to the transfer of funds. Id. The donative intent requirement is satisfied by proof of a relationship of sufficient intimacy between the incompetent and the prospective donee so as to render the latter the natural object of the incompetent's largesse "by any objective test." Id. at 427, 56 Cal. Rptr. at 524.
\(^{41}\) See, e.g., In re Morris, 111 N.H. 287, 281 A.2d 156 (1971); In re Kenan, 261 N.C. 1,
cation will be approved routinely. In one New York case, *In re Turner*, the court refused to permit substituted judgment where the proposed action was found to be in conflict with the disabled person's testamentary scheme. *Turner* involved the petition of a wife and three minor children of an incompetent for gifts which would have depleted the estate by about 5% annually. The incompetent's will, executed prior to the onset of his disability, directed in effect that no part of his estate be distributed to any child until the child had attained the age of 25 years. The requested gifts, therefore, would have been inconsistent with the testamentary plan of the incompetent. A court need not accept or reject outright the application presented by the individual seeking to invoke the substitution of judgment doctrine. Rather than approve a requested lump sum gift to relatives, for instance, the court in its discretion may order that the distribution be made in monthly installments. Moreover, the decree granting a distribution may be fashioned so as to permit a review of its appropriateness upon application by an interested party.

*The Need For Legislative Guidance*

As the substitution of judgment doctrine has evolved essentially on a case-by-case basis, there remain a number of unresolved substantive issues concerning its applicability. Foremost among these are the uncertainty surrounding the standard to be applied in determining which transfers the disabled party would have been likely to make had he been competent, and the weight to be given

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134 S.E.2d 85 (1964); Mcnds v. Dugger, 176 Tenn. 550, 144 S.W.2d 761 (1940); notes 71-73, 76-82, 85-90 and accompanying text supra.


Id. at 156, 305 N.Y.S.2d at 391.

See *In re Estate of Fairbairn*, 56 App. Div. 2d 259, 392 N.Y.S.2d 152 (4th Dep't 1977). In *Fairbairn*, the petitioners, two needy sisters of the incompetent, each sought an outright $200,000 inter vivos gift from the incompetent's estate. *Id.* at 260, 392 N.Y.S.2d at 154. To establish the incompetent's intent, petitioners introduced a will executed by the incompetent naming the petitioners as residuary legatees. *Id.* at 261, 392 N.Y.S.2d at 155. The appellate division directed the committee to pay petitioners a monthly income, rather than a lump sum payment, reasoning that the petitioners were not accustomed to managing large sums of money and might be easily victimized or otherwise led to dissipate the payment. *Id.* at 264-65, 392 N.Y.S.2d at 157. Moreover, the *Fairbairn* court noted, while tax considerations militated in favor of approving such an inter vivos gift in the past, recent amendments to the Internal Revenue Code have eliminated the tax advantages heretofore obtained by employing inter vivos rather than testamentary dispositions. *Id.* at 263-65, 392 N.Y.S.2d at 156-57.

Id.

Id.
the disabled party's testamentary intent. In addition, the extent of
the disability needed to trigger the doctrine, i.e., incurable insanity,
curable insanity, or mere incapacity to manage one's property, is
unsettled. Procedural uncertainties in this area also abound. Thus,
questions such as who may petition the court, which court is the
proper forum, which persons are entitled to notice, what should the
petition allege, and what findings should the court be required to
make often have no definitive answer. As a result, a need for legisla-
tion exists.

Legislatures have begun to address some of these problem
areas. In 1969, Massachusetts enacted a statute which allows a pro-
bate court, upon petition by an incompetent's guardian, to approve
an estate plan designed to produce tax savings.98 The statute re-
quires that the plan be consistent with the intention of the incompe-
tent, insofar as it may be ascertained.99 Although challenged on
constitutional grounds, this legislation was upheld in the case of
Strange v. Powers,100 wherein the court found that application of
the statute did not result in a "deprivation of property without due
process."101 Statutory provisions in North Carolina permit gifts to
relatives from the estate of an incompetent.102 These gifts may be
made only from surplus income and only where the ward is incura-
bly incompetent.103 Should the ward have any issue, he must be
intestate for a distribution to be proper.104 Differing circumstances
determine which relatives are permissible donees, but in all situa-
tions the gifts are deemed to be advancements.105 The statute also
authorizes gifts for religious, charitable or educational purposes,106
which may be drawn from either income or principal. Finally, the
trustee is permitted to surrender the right to revoke a trust created
by an incompetent and to make a gift of the reserved life estate of
the disabled person for certain benevolent purposes.107

ch. 201, § 38 (West 1958)).
101 Id. at 135, 260 N.E.2d at 711.
103 Id. § 35-28.
104 Id. § 35-20.
105 Id. §§ 35-19 to 35-22. In many jurisdictions certain circumstances result in an inter-
vivos transfer by the decedent being deemed an advancement of the transferee's intestate or
ch. 196, §§ 3-8 (West 1958); N.Y. Est., Powers & Trusts Law § 2-1.5 (McKinney 1967).
107 Id. § 35-29.11 to 35-29.16.
The Uniform Probate Code has adopted a comprehensive approach to the substitution of judgment doctrine by conferring on the court all powers which the "protected person" could exercise on his own behalf if he were of full capacity, except the power to make a will. Nine jurisdictions have thus far adopted the Code.

Recent Legislative Developments

The substitution of judgment doctrine recently received the endorsement of the New York State Bar Association's Trusts and Estates Law Committee, which formulated a new Article 78-A for inclusion in the Mental Hygiene Law. The proposed statute would permit a conservator or the committee of an incompetent, with court approval, to create an estate plan for the "purpose of minimizing current or prospective state or federal" taxes. The memoran-

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108 Uniform Probate Code § 5-408.
109 See note 23 supra.
110 The proposed Article 78-A of the Mental Hygiene Law provided:
§ 78.51 Proceeding for court approval of estate plan.
The court in its order granting conservatorship or committeeship, or at any time during the conservatorship or committeeship upon petition of the conservator or committee, and after notice to persons who have appeared in the original proceeding and to such other interested persons as the court may direct and hearing on said petition, may authorize the conservator or committee to apply such funds as are not required for the conservatee's or incompetent's own maintenance or support or personal well-being or for the maintenance and support of persons legally dependent upon the conservatee or incompetent, towards the establishment of an estate plan for the purpose of minimizing current or prospective state or federal income, estate and inheritance taxes in the conservatee's or incompetent's estate or for gifts to such relatives, friends or charities as would be likely recipients of donations from the conservatee or incompetent.
§ 78.52 Contents of petition.
The petition shall be verified and shall state facts showing:
1. (a) The conservatee or incompetent does not have sufficient capacity to establish such an estate plan for himself or herself; or (b) if the conservatee has such capacity he or she consents to the application.
2. The general physical condition and life expectancy of the conservatee or incompetent.
3. The financial needs of the conservatee or incompetent including a statement of funds presently and prospectively required to provide for his or her maintenance, support and personal well-being.
4. The financial obligations of the conservatee or incompetent, including his or her obligation to provide maintenance and support of legal dependents or other persons in accordance with a court order.
5. The extent of the conservatee's or incompetent's property and estate, including the nature of his or her assets and the present and prospective income producing capacity of such assets.
6. Any patterns of disposition of property by the conservatee or incompetent, including gifts or provisions of a will.
dum in support of the proposal indicated that the legislation was "considered desirable to call attention to the possibility of sophisticated estate planning for conservatees and incompetents, to define an appropriate procedure for court approval of such plans, and to establish uniform guidelines for the exercise of judicial discretion."110 Unfortunately, the recommendation failed of passage during the 1976 legislative session, as the press of other matters kept it in committee. Nevertheless, that same legislature did enact a statute authorizing both the committee of an incompetent and a conservator to renounce a testamentary disposition or a distribution in intestacy.112 This provision establishes a form of substitution of judgment, insofar as it authorizes the fiduciary to determine whether the testamentary disposition or intestate share should be added to the assets of the conservatee or incompetent, or disclaimed so they might pass to third parties.113 Passage of this statute would appear to foreshadow the ultimate enactment of plenary subtitu-

7. Persons and organizations who would be natural objects of the conservatee’s or incompetent’s bounty, or who would be affected by the proposed disposition, their relation to the conservatee or incompetent and their need, if any, for the proposed disposition.

8. The proposed estate plan, including estimated tax savings.

§ 78.53 Presumptions.

The conservatee or incompetent shall be rebuttably presumed (1) to favor reduction in the incidence of or postment of the application of the various forms of taxation and (2) to favor disposition of his property and estate in accordance with an estate plan that a reasonable person in the same circumstances would be likely to establish.

§ 78.54 Form of estate plan.

The court may approve any estate plan which the conservatee or incompetent would be likely to establish for himself if he or she had the capacity to do so, including but not limited to gifts, the establishment of revocable or irrevocable trusts, exercise of powers of or rights to election and renunciation of dispositions.

§ 78.55 Order.

The court may approve a proposed estate plan only upon finding:

1. That the conservatee or incompetent would be likely to establish such a plan if he or she had sufficient capacity to do so.

2. That the proposed plan does not adversely affect conservatee’s or incompetent’s present or prospective maintenance, support or personal well-being.

Estate Planning Committee, Trusts and Estates Section, New York State Bar Association, Proposed Legislation adding Article 78-A to the Mental Hygiene Law for Court Approval of Estate Plans for Conservatees or Incompetents (January 1976) [hereinafter cited as Proposed Article 78-A].

It should be noted that some of the conservatorship statutes already make provision for payments to persons financially dependent upon the conservatee. See, e.g., N.Y. MENTAL HYG. LAW § 77.21 (McKinney 1976); UNIFORM PROBATE CODE § 5-425.

110 Proposed Article 78-A, supra note 110, Commentary at 1.


113 See id.
tion of judgment legislation as proposed by the New York State Bar Association.

**JURISPRUDENTIAL CONSIDERATIONS CONCERNING THE ROLE OF THE CONSERVATOR AND THE ADOPTION OF THE SUBSTITUTION OF JUDGMENT DOCTRINE**

Legislatures and courts have had extensive experience with the powers and duties of a guardian and committee of an incompetent. The office or function of conservator, however, has been in existence for a relatively short period of time and in a comparatively few states. Moreover, the legislation and modicum of case law in this area have focused upon preservation of the assets of the conservatee. As conservatorship statutes multiply, and attorneys become more accustomed to employing this device, myriad questions will be presented as to the authority of the conservator to represent the conservatee in specific recurring situations and proceedings. For instance, statutes often confer substantive rights upon or authorize certain steps to be taken by an individual, a guardian, or the committee of an incompetent. In applying such a provision, an issue is likely to arise concerning whether a conservator may be equated with a guardian or committee. In other instances, where legislation confers certain rights or immunities upon an incompetent, the question will be whether a conservatee may be equated with an adjudicated incompetent.

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114 See note 8 supra.
115 See note 9 supra.
116 See notes 14-22 and accompanying text supra.
117 See note 11 and accompanying text supra.
118 A review of the comprehensive New York Estates, Powers and Trusts Law (EPTL) reveals the following inconsistencies in the treatment of minors, conservatees, and adjudicated incompetents:

EPTL § 1-2.7—Fiduciary broadly defined to include, *inter alia*, a committee, conservator, or guardian.

EPTL § 1-2.13—The term personal representative defined in such a way as to exclude, *inter alia*, a committee, conservator, or guardian.

EPTL § 2-1.11(c)—Personal representative of a beneficiary, a committee, guardian of the property, and conservator authorized to disclaim an intestate share, devise, or bequest, under certain conditions, with court approval.

EPTL § 3-3.5(b)(2)—"In terrorem" clause aimed at those who object to probate of a will is ineffective against minors and incompetents.

EPTL § 3-3.10(b)—Personal representative of a beneficiary, guardian of the property, and committee of an incompetent authorized to disclaim testamentary share with court approval. This section will be superseded by the terms of EPTL 2-1.11, effective August 11th, 1978.

EPTL § 3-4.4—Sale by a committee of assets specifically devised or bequeathed by a
testator who later becomes incompetent does not work an ademption to the extent the sale proceeds can be traced.

EPTL § 4-1.1(a)(9)—Intestate distributions limited to descendants of a common grandparent, except in the case of a minor or incompetent, whose statutory distributees are enlarged to include descendants of a common great-grandparent.

EPTL § 5-1.1(d)(4)—The right of election is personal to decedent's surviving spouse, except that such election may be made by the guardian of the property of the spouse, or the committee of an incompetent spouse, when authorized by the court having jurisdiction of such fiduciaries.

EPTL § 5-3.3(a)(4)—Right to contest disposition of more than one-half of the testator's estate in favor of charity is personal. The right to contest is extended to the guardian of the property or committee of an incompetent, however, when authorized by the court having jurisdiction over the fiduciary.

EPTL § 6-2.2(c)—Disposition in favor of two or more executors, trustees, or guardians creates a joint tenancy.

EPTL § 7-1.5(b)—Beneficiary of a spendthrift trust may transfer income in excess of ten thousand dollars per annum to specified relatives, their committee, custodian, or the guardian of the property of a minor.

EPTL § 7-4.1—Under the New York Uniform Gifts to Minors Act certain types of gifts to minors may be effectuated by delivering the property to the guardian of the minor.

EPTL § 7-4.2—Rights, powers, duties, and authority of a guardian of an infant beneficiary restricted as to property received under the New York Uniform Gifts to Minors Act.

EPTL § 7-4.3(c)—The parent or guardian of a minor may petition to have the court direct the custodian to pay over custodial property to a minor over the age of 14, or apply the same for the child's support, education, and maintenance.

EPTL § 7-4.4(f)—Custodian compensated for his services is subject to the same liabilities as the guardian of the estate of a minor, with certain exceptions.

EPTL § 7-4.6(d)—If a custodian dies or becomes legally incapacitated, and the beneficiary is still under 21 years of age, the guardian of the minor shall become successor custodian.

EPTL § 7-4.7(a)—A minor, if he has attained 14 years of age, or the legal representative of the minor, is authorized to petition the court for an accounting by a custodian.

EPTL § 7-4.8—A will, trust, or other dispositive instrument may authorize or direct a fiduciary acting thereunder to effect distribution to a custodian as authorized by the provisions governing gifts to minors.

EPTL § 7-4.9(h)—Unless the context otherwise requires, for the purposes of the New York Uniform Gifts to Minors Act, a guardian means the general guardian, guardian, tutor, conservator, or curator of the property or estate appointed or qualified by an appropriate court.

EPTL § 7-5.3(b)—On death of the depositor, balance on deposit in a Totten trust account may be paid to parent or guardian of the property if the beneficiary is under 18. Payment must be made to the guardian of the property, if the amount involved exceeds one thousand dollars.

EPTL § 8-1.1(h)—Certain sales, mortgages, and leases of property limited in favor of a charity are validated, as against minors, incompetents, absentees, and persons not in being. Before making a final order or decree, the court shall appoint a guardian ad litem or committee, where the minor or incompetent is in need of the same.

EPTL § 9-2.2(a)—Beneficiary without other sufficient means to support himself, his guardian or committee may petition court for application of income accumulation to needs of such beneficiary.

EPTL § 10-6.4(b)—Where the consent of multiple parties to the exercise of a power of appointment is required, the consent of all competent parties is sufficient if one or more of the parties has become incompetent.

EPTL § 10-6.7—Where a power of appointment is exercisable by two or more persons, all must consent except where one or more of the donees dies or becomes incompetent.

EPTL § 10-6.8(a)—The exercise of an imperative power of appointment devolves upon the court, in the event the sole donee of the power is adjudicated incompetent.
In attempting to fit the conservator into some rational statutory pattern, several broad jurisprudential questions must be answered: Should the authority of the conservator to act in any given situation be determined by the courts with little or no legislative direction? Should the legislatures of the various states pass blanket measures empowering a conservator to act on behalf of a conservatee for the purpose of effectuating any of the latter's statutory or common law rights? Should a statute to the opposite effect be enacted? Should piecemeal legislation be adopted granting the conservator authority to act in certain instances and expressly denying it in other situations? Each of the alternative approaches to a solution of these problems will be considered in turn.

Defining the Role of the Conservator via the Judicial Process

Case-by-case development of the role of the conservator, without the aid of legislation, would appear to be the least satisfactory approach to the problem. In any given case, the court would have to evaluate not only the wisdom of allowing a conservator to act, but also whether the legislature intended to confer upon a conservator the authority at issue. The latter inquiry would prove fruitless in most instances. The conservator device is of recent origin relative to most other substantive and procedural laws. Accordingly, the legislative history of a particular statute is not likely to allude to the existence of a conservator, much less clarify his power to enforce rights created by that legislation. Defining the role of the conservator by the judicial process would also lead to needless uncertainty and litigation, inasmuch as conservators might be reluctant to act in any given situation without the aid of a court decree enumerating

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EPTL § 11-2.2(a)(8)—A person or fiduciary holding funds for investment within the meaning of this section includes a personal representative, trustee, guardian, a donee of a power during minority, and committee of the property of an incompetent person.

119 The jurisprudential problem in the conservatorship area is not unlike the problem that faced the legislature when it was called upon to determine the most efficacious manner for reducing the age of majority from twenty-one to eighteen. The deep concern over the impact of this statutory modification was evidenced by the legislative activity that occurred during the two and one-half years preceding the enactment of the final legislation in 1974. Initially, legislators undertook an exhaustive study of more than 2200 statutory provisions to explore the effect of the proposed changes. At the same time, an omnibus bill modifying New York's entire statutory scheme was introduced and rejected. Ultimately, 53 individual statutes were amended. Recommendation of the Law Revision Commission to the Legislature Relating to Reduction of the Age of Majority From Twenty-One to Eighteen Years of Age, [1974] N.Y. LAW REV. COMM'N REP., reprinted in part in [1974] N.Y. LAWS 1888 (McKinney). See generally chs. 889-940 [1974] N.Y. LAWS 1375 (McKinney).
their precise authority. In the absence of any controlling legislative history, a court would be free to fashion a rationale and ultimate decision in any particular factual setting. This could lead to a lack of consistency both within a state and from state to state.

Legislative Approaches to the Conservator Problem

Several factors militate in favor of extending to a conservator the same broad power possessed by the committee. The appointment of a conservator, for instance, makes it quite unlikely that the conservatee will later be adjudged incompetent and have a committee appointed. Should the conservator's power be any less extensive than that of the committee, rights conferred upon an incompetent may never be extended to a conservatee. Such a result would be particularly harsh in instances where the conservatee is physically or mentally impaired to the same extent as an adjudicated incompetent. Accordingly, it would appear that blanket legislation restricting the powers and functions of the conservator would be unwise. Thus, the choice narrows down to passing a blanket measure expanding such powers and functions, or determining, on a statute-by-statute basis whether a conservator should be permitted to represent the conservatee. It is the author's view that it would be pre-

120 Time may be a critical factor in these cases since many elections must be made within six months of death or within six months of the appointment of the personal representative. See, e.g., N.Y. Est., Powers & Trusts Law §§ 5-1.1(a), 5-3.3(a)(5), (6) (McKinney 1967 & Supp. 1976). If it is belatedly held that a conservator could have filed various elections on behalf of a conservatee but he had not done so, the result may be a malpractice suit or an action to surcharge the fiduciary. Further, the underlying proceedings themselves may be defective if the effect of such a holding is to make the conservator a necessary party and he was not served with process.

121 N.Y. Est., Powers & Trusts Law § 3-4.4 (McKinney 1967) provides that the sale by a committee of an item specifically bequeathed by the incompetent does not result in an ademption of the bequest if the proceeds can be traced. The reasoning underlying this section appears equally applicable to a conservatorship situation, yet the statute does not expressly apply to conservators. Nonetheless, in In re Barnwell, 88 Misc. 2d 856, 389 N.Y.S.2d 282 (Sur. Ct. Erie County 1976), the Surrogate held that § 3-4.4 is broad enough to cover a situation wherein a conservator sold a parcel of land which specifically had been devised by the conservatee to her niece. The devisee was held entitled to any proceeds of the sale that could be traced. Id. at 860, 389 N.Y.S.2d at 285.

It may well be that the solution to the overall problem lies in combining the functions of a conservator with that of other fiduciaries charged with the task of caring for the person of the disabled party. The Uniform Probate Code conservator provisions more closely approach this ideal than does the New York Mental Hygiene Law. Compare Uniform Probate Code §§ 5-424, 5-425, with N.Y. Mental HYG. Law §§ 77.19, .21, 78.15 (McKinney 1976). California statutory provisions, however, are the most advanced in this respect. See generally Jones, Probate Code Conservatorships: A Legislative Grant of New Procedural Protections, 8 PAC. L.J. 73 (1977) [hereinafter cited as Probate Code Conservatorships].
ferable to revamp entirely the conservator's role, especially in view of the fact that conservators may replace committees in all but the most extreme cases. As the substitution of judgment doctrine receives acceptance in an ever-increasing number of jurisdictions, the legislatures will have to grapple with the question whether this doctrine should be applicable to conservators or be restricted to committees of adjudicated incompetents. In opposition to such an expansion of the conservator's power it may be argued that the appointment of a committee is predicated upon a finding that the disabled individual is utterly incapable of managing his affairs, whereas the appointment of a conservator carries with it no conclusion as to the conservatee's mental capacity. This line of reasoning thus questions whether a conservator should be afforded plenary power over the affairs of a conservatee, as the latter may be able to make his own rational judgments with respect to certain matters. Nevertheless, it would appear that there is little to be lost in allowing the conservator to act in all instances, upon notice to the conservatee; in the event that the conservatee objects to the position taken by the conservator, a hearing should be held. Once the substitution of judgment doctrine is accepted, there is no sound reason to limit its applicability to the estates of adjudicated incompetents. Despite the adjudication, the incompetent may execute a valid will, if he possesses sufficient testamentary capacity. While such an

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122 In recent years growing concern has been expressed as to whether statutes dealing with allegedly incompetent or disabled persons meet due process requirements both with respect to the incarceration of such persons and the dispositions of their assets. See Kadish, Case Study in the Signification of Procedural Due Process — Institutionalizing the Mentally Ill, 9 WEST. POL. Q. 93 (1956) [hereinafter cited as Signification of Procedural Due Process]; Note, Due Process Rights of Mentally Ill Parents as Nonconsensual Adoptions, 30 Ind. L.J. 431 (1955) [hereinafter cited as Due Process Rights]. These questions may have even greater bearing in the conservatorship area since the conservatee may be a person in full charge of his mental faculties, and capable of responding in a meaningful way. For a detailed discussion of this problematic area, see Probate Code Conservatorships, supra note 121; Signification of Procedural Due Process, supra; Due Process Rights, supra.

123 Testamentary capacity exists when a testator possesses a sufficiently sound mind and memory "to comprehend the scope and meaning of the provisions of his will, the nature, extent and condition of his property, and his relation to the persons who ordinarily would be the natural objects of his bounty." 2 COMMITTEE ON PATTERN JURY INSTRUCTIONS ASSOCIATION OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 7:48 at 1183 (1968) [hereinafter cited as N.Y. PATTERN JURY INSTRUCTIONS]; N.Y. Est., POWERS & TRUSTS LAW § 3-1.1 (McKinney 1967); see In re Estate of Lockwood, 254 Cal. App. 2d 309, 62 Cal. Rptr. 230 (1967); In re Sprenger's Estate, 337 Mich. 514, 60 N.W.2d 436 (1953); In re Horton's Will, 26 Misc. 2d 483, 203 N.Y.S.2d 978 (Sur. Ct. Suffolk County 1960); Woody v. Taylor, 114 Va. 737, 77 S.E. 498 (1913). See also CAL. PROB. CODE § 20 (West 1977); MICH. COMP. LAWS ANN. § 702.1 (1968); VA. CODE § 64.1-46 to -47 (1973). Neither an excellent memory nor a high degree of intelligence is required for testamentary capacity. Thus, it consistently has
adjudication renders it more difficult to establish capacity as to a will executed thereafter, it does not rule out capacity as a matter of law. Thus, the adjudicated incompetent and the conservatee are similarly situated with respect to estate planning in that both may have capacity to make a will. Both should be subjected to the same rule of law and afforded an opportunity to be heard upon the question whether a fiduciary may dispose of some of their assets or otherwise engage in estate planning on their behalf.

**Ethical Considerations in Handling the Affairs of Persons Under a Disability**

The lack of coherency in the law governing conservatorships is mirrored by the almost total absence of ethical rulings to guide the fiduciary in administering the estate of a disabled person. Yet, two questions having ethical dimensions frequently are encountered in this area. The first issue concerns whether a committee or a conservator should have physical possession of the last will and testament of the incapacitated person. Under the traditional view, which has been held that an adjudication of incompetency does not preclude the execution of a valid will if the incompetent possessed the requisite testamentary capacity. See, e.g., Eyber v. Dominion Nat'l Bank, 249 F. Supp. 531 (W.D. Va. 1966); In re Nelson's Estate, 227 Cal. App. 2d 42, 38 Cal. Rptr. 459 (1964); In re Vallender's Estate, 310 Mich. 359, 17 N.W.2d 213 (1945); In re Signorelli, 46 Misc. 2d 849, 260 N.Y.S.2d 889 (Sur. Ct. Erie County 1965). Inquiry into the testator's capacity is focused on the time of execution; a subsequent adjudication of incompetency has no impact on an otherwise valid will. See, e.g., In re Morgan's Estate, 225 Cal. App. 2d 156, 37 Cal. Rptr. 160 (1964); In re Powers' Estate, 375 Mich. 150, 134 N.W.2d 148 (1965); In re Alexieff's Will, 94 N.Y.S.2d 32 (Sur. Ct. Westchester County 1949); Western State Hosp. v. Wininger, 196 Va. 300, 83 S.E.2d 446 (1954).

An incompetent suffering from insane delusions also may execute a valid will if the delusions do not affect the will-making process. N.Y. PATTERN JURY INSTRUCTIONS, supra note 123, § 7:49, at 1191-92. In addition, it uniformly has been held that illogical reasoning, beliefs predicated on prejudice, and personal eccentricities are insufficient as a matter of law to destroy testamentary capacity. See, e.g., In re Estate of Wynne, 239 Cal. App. 2d 369, 48 Cal. Rptr. 656 (1966); In re Balk's Estate, 298 Mich. 303, 298 N.W. 779 (1941); Dobie v. Armstrong, 160 N.Y. 584, 55 N.E. 302 (1899); Tate v. Chumbley, 190 Va. 480, 57 S.E.2d 151 (1950). See generally 12 SYRACUSE L. REV. 282 (1960).

Even the will of a testator who is without capacity may be valid if it was executed during a lucid interval. A lucid interval is a period of time during which an incompetent who had lacked the ability to comprehend the consequences of his conduct possesses sufficient capacity to execute a valid will. Such interval need not be of any specific duration and may lapse after completion of the will without affecting the document's validity. See N.Y. PATTERN JURY INSTRUCTIONS, supra note 123, § 7:50, at 1195. Lucid intervals are most frequently encountered in instances of disease remission and senile dementia. See In re Worrell's Estate, 53 Cal. App. 2d 243, 127 P.2d 593 (Dist. Ct. App. 1942); In re Walker's Estate, 270 Mich. 33, 258 N.W. 206 (1935); In re Martin, 82 Misc. 574, 144 N.Y.S. 174 (Sup. Ct. N.Y. County 1913); In re Snelling, 78 Hun. 211, 28 N.Y.S. 942 (2d Dep't), aff'd, 145 N.Y. 599, 40 N.E. 165 (1894); Western State Hosp. v. Wininger, 196 Va. 300, 83 S.E.2d 446 (1954).
cused upon the attorney-client privilege, a negative response might be indicated.\(^1\) Considerations of confidentiality point in the same direction, especially if the committee or conservator is a family member or other person who has an interest in the will’s provisions. Recent legislation in the ademption area, however, appears to evince a legislative judgment that the fiduciary should not be permitted unwittingly to dismember the testamentary scheme of the incompetent or conservatee by the random sale of assets.\(^2\) By requiring the person in possession of a will to surrender it to the committee or the conservator of the testator, this legislative policy would be promoted. Armed with a knowledge of the will’s content, the fiduciary could sell the assets in the reverse order of their importance to the testator. A fiduciary will have a similar need to be familiar with other dispositive instruments in jurisdictions recognizing the substitution of judgment doctrine.\(^3\) In addition to the information provided by the will, a committee or a conservator who is selling off assets to sustain the incapacitated party or engaging in estate planning for such person needs guidelines so as to avoid various subtle forms of self-dealing.\(^4\)

The second ethical question arises daily in handling the affairs of persons who apply for benefits under federal, state, or local programs, namely to what extent may such claimants engage in dona-

\(^{1}\) Courts disagree concerning whether a conservator or a committee is entitled to a copy of the conservatee’s or incompetent’s will. See, e.g., Price v. Williams, 393 F.2d 348 (D.C. Cir. 1968) (entitled to a copy of will); Vigne v. Superior Ct., 37 Cal. 2d 346, 99 P.2d 589 (1940) (not entitled to a copy of will); Mastick v. Superior Ct., 94 Cal. 347, 29 P. 869 (1892) (will need not be given to committee); In re Jessen’s Estate, 37 App. Div. 2d 408, 326 N.Y.S.2d 915 (1st Dep’t 1971) (will required to be filed with Surrogate’s Court not given to committee); Pound v. Faust, 90 Wash. 117, 155 P. 776 (1916) (need not give copy of will). See generally O’Brien, Re-Evaluation of a Conservator’s Right to See the Wills of his Ward Held by a Third Person, 54 Ill. Bar J. 128 (1965); Fleming, Right of Conservator to Recover Will of His Ward from Third Person, 50 Ill. S.B.J. 314 (1961). It should be noted that UNIFORM PROBATE CODE § 5-427 specifically authorizes the conservator to examine a copy of the conservatee’s will.

\(^{2}\) Fiduciaries acting pursuant to the substitution of judgment doctrine also would have to be given authority over various other financial transactions involving the incapacitated party, such as insurance policies, pension plans, and trusts.

\(^{3}\) N.Y. Est., POWERS & TRUSTS LAW § 10-10.1 (McKinney 1967) specifically provides, for example, that a fiduciary cannot act alone in exercising a power of appointment in his own favor. In such a situation the court must appoint a co-fiduciary. See id. Similar legislation would appear to be necessary in the case of conservators and committees, especially where the fiduciaries are disposing of the assets of the incapacitated party pursuant to the substitution of judgment doctrine. In the absence of such a statute, the fiduciary may be able to protect himself by securing advance approval of a proposed transaction from the appropriate court. See, e.g., In re Scarborough Properties Corp, 25 N.Y.2d 553, 255 N.E.2d 761, 307 N.Y.S.2d 641 (1969).
tive transfers in the months and years immediately preceding their entry into a publicly funded program. For instance, an elderly couple may own a home as tenants by the entirety or have their life savings deposited in a joint savings account. If one of the parties becomes incapacitated or terminally ill, may the couple dispose of some or all of their assets, in trust or otherwise, to their offspring in the period preceding the application to become eligible for medical or other public benefits? If not, what is the duration of the prohibited period and should it be tied in any way to whether the donor in question knew or should have known that ultimately he would need the assets for his own care and maintenance? Despite the pervasive nature of these issues, there is a dearth of relevant authority. The rapid growth of the senior citizen population and public benefit programs, however, would appear to enhance the need for a unified and comprehensive approach to such questions. Fiduciaries who are engaging in estate planning under the substitution of judgment doctrine will have to grapple with these issues, especially where depletion of the taxable estate through a series of inter vivos gifts is contemplated.

**Conclusion**

The conservatorship statutes enacted to date have provided a worthwhile alternative to incompetency proceedings and have satisfied the needs of persons who are competent but not able to perform the task of managing their own assets. The property orientation of existing conservator statutes, however, casts doubt upon the conservator's authority to appear in various legal proceedings and to make certain decisions on behalf of the conservatee. Broad-based legislation equating the authority of the conservator with that of a committee or guardian of the person is recommended to remedy this situation. Such legislation will ensure that a conservatee's rights are not jeopardized by the conservator's lack of power to act in certain instances. Any possibility of overlapping authority or abuse of power may be counteracted by the appropriate court in the order appointing the conservator. In addition to expanding the role of the conservator, the ethical and public policy which abound in this field should be considered systematically and brought abreast of the times.
APPENDIX I

DECISIONS CONCERNING THE SUBSTITUTION OF JUDGMENT DOCTRINE

GIFTS AND ALLOWANCES

In re Estate of Fairbairn, 56 App. Div. 2d 259, 392 N.Y.S.2d 152 (4th Dep't 1977)

Facts and Holding
Incompetent, 81 years old, with estate of $750,000. Two sisters petitioned for gift of $200,000 each. It was alleged that incompetent would have made this gift if she were competent and that the funds were needed. Sisters were residual legatees under the will of incompetent. Court awarded each sister $12,000 per annum.

Rationale
Court's primary duty is to protect the incompetent's estate. Invasion of the estate permitted upon a showing of the proposed donee's need and evidence that the incompetent would have concurred, if sane. Award provides for welfare of sisters without significantly depleting incompetent's estate.


Facts and Holding
Incompetent, 85 years old with estate in excess of $700,000. Guardian and living heirs seek gift of $100,000 to heirs, principally to reduce death taxes. Granted.

Rationale
The remaining assets of the estate would meet the needs of the incompetent, the donees were natural objects of incompetent's bounty, and the transfer would benefit the estate by reducing taxes. There existed no substantial evidence that a reasonably prudent person, in financial position of incompetent, would not make proposed gift to save death taxes.


Facts and Holding
Guardians of incompetent, 80 years old, with an estate of $160,000 sought authority to make gifts totalling $42,000 to incompetent's four children to obtain a tax saving. Remanded for a factual hearing.

Rationale
Although the court found that it had power to authorize gifts from the estate of a ward, it expressed no opinion on the merits of the specific proposed gift.

Facts and Holding

Estate of 87-year-old incompetent produced income well in excess of that required for incompetent’s support. Conservator sought approval for gifts to relatives to obtain tax benefit for estate. Granted.

Rationale

The gifts would clearly result in a tax advantage to the incompetent’s estate. Such an estate planning device should not be denied to an individual merely because of his incompetence.


Facts and Holding

Son and daughter of 86-year-old incompetent, with approval of guardian, sought gifts totalling one-half the value of incompetent’s estate. Mother was alleged to be “incurable,” but no evidence as to condition was offered. Decision reserved pending plenary hearings.

Rationale

While the court accepted the substitution of judgment doctrine, lack of evidence of incompetent’s medical condition and probable intent were deemed crucial.


Facts and holding

Incompetent with an estate valued at $298,000 had no will. Application of guardian to make gifts of $3,000 each to children and grandchildren for tax purposes granted.

Rationale

The gifts produced a tax savings for incompetent’s estate. The court noted that the donees were natural objects of incompetent’s bounty.


Facts and Holding

To minimize death taxes, the incompetent, age 96, had made prior substantial gifts to legatees. Guardian sought permission to make gift of $1,500,000 to incompetent’s residuary legatees. Denied.

Rationale

The court held there is no common law right to make such a gift and found that the applicable statute does not authorize depletion of a ward’s estate in this manner. The court, therefore, refused to adopt the substitution of judgment doctrine.

**Facts and Holding**

An incompetent, 84 years of age, had an estate worth $2,178,000. Guardian sought authorization to make a gift of $760,000 to children and grandchildren provided for in incompetent's will. Granted with slight modification in shares.

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**In re Kenan**, 261 N.C. 1, 134 S.E.2d 85 (1964).

**Facts and Holding**

Trustee of incompetent applied for authority to make gifts of $731,000 from income, $100,000 from principal, and to surrender incompetent's right to receive $300,000 annual income from inter vivos trust. Disabled person previously had made gifts totalling approximately $8,000 annually. Application denied.

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**In re duPont**, 41 Del. Ch. 300, 194 A.2d 309 (Ch. 1963).

**Facts and Holding**

86-year-old incompetent with estate valued at $176,000,000, producing $800,000 after-tax annual income. Guardians applied for authority to make gifts to children and grandchildren totalling $36,000,000 to ease tax burden. Granted.

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**Facts and Holding**

Motion to vacate order authorizing committee of incompetent to make gift of portion of corpus from incompetent's estate to next of kin for tax purposes. Denied.

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**Rationale**

The Court utilized substitution of judgment doctrine to authorize gifts of principal.

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**Rationale**

Court found that prior to the appointment of the trustee, Mrs. Kenan had been aware of tax burden and despite advice of others had made no effort to reduce it. Therefore, it was not shown that incompetent would, if competent, have made such gifts.

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**Rationale**

Gifts were consistent with incompetent's testamentary plan, which was designed prior to incompetence and would result in tax savings while leaving income adequate for care and support of incompetent.

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**Rationale**

In view of tax benefits and other advantages, court found that gifts would, in all probability, have been made by incompetent were he of sound mind.

**Facts and Holding**

Guardian appealed from an order granting gift of $125 from estate of incompetent for maintenance of granddaughter. Reversed.

**Rationale**

Court found no statute or other authority permitting such a gift.

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**Facts and Holding**

Guardian sought to make gift to wife and two daughters of incompetent for the purpose of reducing estate tax upon death of incompetent.

**Rationale**

Tax reduction is not a sufficient legal ground for distribution of incompetent's estate while he is alive; allowance for support of wife and children, however, is permissible.

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**Facts and Holding**

Guardian committee petitioned for authority to make gifts for support of daughter, two adopted daughters, sister, and three aged women, as well as contributions to charitable organizations. The incompetent had effected transfers to all of these beneficiaries while he was competent. Granted.

**Rationale**

Court satisfied that incompetent would have provided for support of these persons if he were of sound mind.

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**Facts and Holding**

Incompetent had an estate of $300,000. His wife and three children petitioned for allowance of $3,000 per annum for purpose of reducing estate taxes. Denied.

**Rationale**

Petitioners failed to establish that incompetent, if competent, would have made such gifts.

**Facts and Holding**
Daughter-in-law and grandson of incompetent sought allowances. Allowance granted to grandson but denied to daughter-in-law.

**Rationale**
No showing that incompetent, if competent, would have granted allowance to daughter-in-law. Incompetent probably would have provided for education of grandson.


**Facts and Holding**
Sister of incompetent and successor committee of his property applied for allowance to support sister and an invalid brother. Incompetent's estate had $1,183 of annual income. Monthly allowance of $100 granted.

**Rationale**
Notwithstanding the traditional reluctance to invade incompetent's estate, the court concluded that incompetent, if of sound mind, would have provided petitioners with assistance.


**Facts and Holding**
Incompetent lived with her daughter. Prior to incompetence, she contributed to household expenses. Court below granted continuance of contribution after incompetence. Affirmed.

**Rationale**
Incompetent, if of sound mind, would have aided her daughter. Court may grant an allowance to the next of kin from the surplus income of the incompetent. The incompetent's income was sufficient to permit continuation of allowance.

In re Beilstein's Estate, 145 Ohio St. 397, 62 N.E.2d 205 (1945).

**Facts and Holding**
Incompetent whose estate was worth $400,000, previously had provided a trust fund for his daughter. Former wife request- ed additional payment for benefit of child, now 26 years old. Allowance of $250 per month denied.

**Rationale**
In absence of legal obligation to support, or evidence that incompetent, if of sound mind, would have provided support, court has no power to withdraw funds from incompetent's estate.
In re Brice's Guardianship, 233 Iowa 183, 8 N.W.2d 576 (1943).

Facts and Holding
Incompetent, 81 years old, had an estate of $1,105,000. Nephew received $250 per month from estate for support of himself and his wife. Incompetent had supported nephew prior to insanity. Gift upheld.

Rationale
This gift would not impair support of incompetent. Evidence indicated that, if sane, incompetent would have provided allowance for nephew. Iowa statute empowered probate court to make such a gift.


Facts and Holding
Incompetent received monthly pension of $26, of which $20 was used for his care. Petition for monthly allowance for maintenance and education of his minor child denied.

Rationale
Although the court has power to order such a grant, paramount duty under the circumstances is to conserve the small amount of income for the incompetent's needs.

Mondo v. Dugger, 176 Tenn. 550, 144 S.W.2d 761 (1940).

Facts and Holding
Incompetent had estate of $37,000. Brothers and sisters each sought $25 per annum for support. Incompetent had made no such support payments prior to insanity. Denied.

Rationale
Although a probate court has power to authorize awards, prior to his insanity incompetent had indicated no intention to make such allowances. Contributions must be in accordance with the probable wishes of incompetent.


Facts and Holding
83-year-old incompetent with personal property valued at $80,000, annual income of $3,350, and expenditures of $7,500 per annum for medical expenses. Two nieces sought an allowance out of corpus of assets. Granted to niece with close relationship.

Rationale
As a result of close ties between incompetent and niece prior to incompetency, it may be inferred that the incompetent, if sane, would have provided for the niece.
**Kemp v. Arnold, 234 Mo. App. 154, 113 S.W.2d 143 (1938).**

**Facts and Holding**
Guardian petitioned for allowance of $35 per month from incompetent's estate for support of incompetent's mother. Prior to his insanity, incompetent had made similar payments. Court held that probate court has power to grant such gifts. Remanded for evidentiary findings.

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**Kelley's Estate, 34 Pa. D. & C. 166 (1938).**

**Facts and Holding**
Incompetent had an estate of $26,000. His guardian petitioned for an allowance to incompetent's mother who was 76 years old and had no means of support. Granted.

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**In re Calasantra, 154 Misc. 498, 278 N.Y.S. 263 (Chautauqua County Ct. 1935).**

**Facts and Holding**
The sister of incompetent war veteran, joined by the incompetent's committee, sought an allowance to support herself and her eight children. The estate consisted of $34,000 in assets producing an annual income of $1,000. Monthly allowance of $20 granted.

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**In re Johnson, 111 N.J. Eq. 268, 162 A. 96 (1932).**

**Facts and Holding**
A 63-year-old incompetent had been incapacitated for more than 50 years. His estate, valued at $226,000, produced yearly income in excess of $12,000 with yearly expenses of $2,500. A niece and a nephew petitioned for support. Denied.

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**Rationale**
A statute permitted probate court to order gifts for support of family. The term "family" should be construed liberally to include the mother. Upon remand, gift may be permitted if it is found that incompetent would have made such an allowance if he were sane.

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**Rationale**
Statute empowered court to grant allowances to members of incompetent's family. A family consisted of all who are blood relatives including the mother. The estate was sufficient in this case to permit an allowance.

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**Rationale**
The question whether incompetent, if of sound mind, would have provided such assistance was resolved in petitioner's favor. The minimal cost of caring for the incompetent was noted by the court.

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**Rationale**
A statutory provision directed that needy parents be supported. Aside from this mandate, allowances were granted only in extenuating circumstances. There was no showing that incompetent would have made the transfer if sane, and no extreme situation justifying transfer was established.
In re Flagler, 130 Misc. 554, 224 N.Y.S. 27 (Sup. Ct. N.S. County 1926).

Facts and Holding
Petitioner, an 85-year-old second cousin of incompetent with little means of support, requested a $200 monthly allowance from incompetent's estate. Incompetent's annual income was in excess of $200,000. Granted.

Rationale
The decision was predicated on the small allowance requested, the age of the petitioner, and the probability that incompetent, if sane, would have granted the allowance. The court indicated that the evidence of incompetent's propensity to give such a gift need not be demonstrated beyond a reasonable doubt.


Facts and Holding
Guardian sought to make monthly allowance to incompetent's father and to pay a debt owed to the father. The father had been dependent on the incompetent prior to the disability. Granted.

Rationale
A father deemed a member of an incompetent's family and as such was entitled to support. The court noted that a statutory duty existed to support members of an incompetent's family.

Ex parte Phillips, 130 Miss. 682, 94 So. 840 (1923).

Facts and Holding
A guardian, who was the mother of incompetent, sought an allowance of $25 per month. Prior to his insanity, incompetent had been living with his mother and contributing to her support. Granted.

Rationale
The mother in this instance was a member of the ward's family and entitled to support by statute.


Facts and Holding
Prior to incompetence, incompetent paid quarterly allowance to a nephew. Nephew's petition for continuance of contributions denied.

Rationale
Since statutory provisions do not grant discretionary power, the court may only approve allowances to pay, inter alia, the incompetent's own expenses and debts. No substitution of judgment was allowed.
In re Kernochan, 84 Misc. 565, 146 N.Y.S. 1026 (Sup. Ct. N.Y. County).

Facts and Holding
The nephew of an incompetent sought an annual allowance to pursue his career in music, which allowance was opposed by the committee of incompetent. Incompetent's surplus income amounted to $100,000 per annum. Allowance denied.

Rationale
Before an allowance will be made from the estate of an incompetent to a person whom the incompetent owes no duty of support, it must be shown that the incompetent would have made such a grant if he were sane. The applicant failed to make such a showing and did not establish his need. The value of the estate is not a controlling factor.

REVOCATION OF TOTTEN TRUST

In re Cianfrocco, 28 Misc. 2d 86, 208 N.Y.S.2d 71 (Sup. Ct. N.Y. County 1960).

Facts and Holding
Committee sought to revoke Totten trust account containing $4,700 in order to pay incompetent's hospital bills. Granted.

Rationale
The fact demonstrated the necessity of revocation in order to care for incompetent.

INSURANCE POLICY — CHANGE OF BENEFICIARY

In re Estate of Wainman, 121 Misc. 318, 200 N.Y.S. 893 (Sup. Ct. Oneida County 1923).

Facts and Holding
The Committee of incompetent sought to change the beneficiary of incompetent's insurance policy to pay for the debts and support of incompetent. Denied.

Rationale
Despite the duty to attend to incompetent's wants and comforts, the committee may not vitiate an act of incompetent which was performed while the latter was competent.
MISCELLANEOUS

In re Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (1975).

Facts and Holding

Lower court refused to order the transplant of a kidney from incompetent to his sister, holding that it was without power to do so. Affirmed.

Rationale

There was no evidence that any interest of ward would be served by the transplant and no statutory authority existed which sanctioned a kidney transplant or any other surgical procedure on a living person.


Facts and Holding

Incompetent’s brother was in need of a kidney transplant and incompetent was the only family member medically acceptable. The family and the health department approved of incompetent as the donor. Transplant approved.

Rationale

The risk to the donor was found to be slight in light of modern medical technology. The court also noted a lower court finding that the operation would be in donor’s interest as a family member and that incompetent, if of sound mind, probably would have consented to the transplant.
Substitution of Judgment Doctrine

American Bar Association Committee on Legal Services for the Elderly and Their Estates, Substitution of Judgment Doctrine and Making of Gifts from an Incompetent's Estate, 7 REAL PROP. PROB. & TR. J. 479 (1972).

Carrington, The Application of Lunatics' Estates for the Benefit of Dependent Relatives, 2 VA. L. REV. 204 (1914).


Comment, Planning Incompetents' Estates Via Inter Vivos Distributions, 11 VILL. L. REV. 150 (1965).

Estate Planning for the Elderly


2 COMMITTEE ON PATTERN JURY INSTRUCTIONS ASSOCIATION OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS — CIVIL 1162-1227 (1968).


Baldwin, Planning for the Financial and Legal Management of the Affairs of An Incompetent Family Member, 2 EST. PLAN. 130 (1975).


Fraser, Guardianship of the Person, 45 IOWA L. REV. 239 (1960).
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