#30.300 10/27/77

Memorandum 77-75

Subject: Study 30.300 - Guardianship-Conservatorship Revision (Plan for Disposition of Assets of Conservatee)

The Commission requested that the staff prepare a memorandum on the "doctrine of substituted judgment."

Gifts of Principal of Conservatorship Estate

In Estate of Christiansen, 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (1967), the Court of Appeal adopted the "doctrine of substituted judgment" pursuant to which a guardian of an adult incompetent person may make gifts from the principal of the estate to carry out the presumed donative intent of the ward. A copy of the Christiansen case is attached to this memorandum as Exhibit 1. In Conservatorship of Wemyss, 20 Cal. App.3d 877, 880, 98 Cal. Rptr. 85, 87 (1971), it was held that conservators have similar though not identical authority, the significant difference being that the conservatee may have the mental capacity to express preferences concerning gifts. A copy of the Wemyss case is attached as Exhibit 5.

The Christiansen case enunciated guiding principles for determining whether to apply the doctrine. These are set forth on pages 422 to 428 of the Christiansen case (Exhibit 1) and are paraphrased as follows:

1. The purpose of the gift must be to carry out an estate plan such as a reasonably prudent person would do, there being no substantial evidence of the ward's contrary intent. 248 Cal. App.2d at 424.

2. No gift should be authorized for tax savings alone unless there is no probability of the ward's recovery. However, if the gift is to continue a past practice of the ward when competent, the necessity for showing that the condition is permanent is less. Id. at 424-26.

3. There must be sufficient principal remaining after the gift to produce the income required for (1) the maximum foreseeable needs of the ward, (2) payment of the ward's debts, and (3) support of those legally entitled to support from the ward. A margin of safety should be allowed for economic fluctuation. Id. at 425.

4. Some weight should be given to the manner in which the ward's property would devolve on the ward's death. Id. at 426-27.

5. The prospective donees should have such a relationship to the ward that they would be natural objects of the ward's bounty, applying an objective test. Id. at 427.

6. These criteria are not absolute, and the determination whether to authorize the gift must be made by the court based on all the circumstances. Id. at 424-25.

In 1972, the Section of Real Property, Probate and Trust Law of the American Bar Association published a survey of the law in 32 states on the doctrine of substituted judgment. Substitution of Judgment Doctrine and Making of Gifts From An Incompetent's Estate, 7 Real Property, Probate and Trust Journal 479 (1972). A copy of this survey is attached to this memorandum as Exhibit 2. See particularly pages 482 to 493 for the survey results. See also Annot., 24 A.L.R.3d 863 (1969). It appears from the survey that a number of states have a statutory statement of the doctrine in one form or another. Massachusetts has a fairly detailed provision, a copy of which is attached to this memorandum as Exhibit 3.

The Uniform Probate Code provides broadly that:

> . . . the Court has, for the benefit of the [protected] person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to power to make gifts . . . . [Section 5-408.]

If the proposed gift exceeds 20 percent of one year's income, the court must find, after notice and hearing, "that it is in the best interests of the protected person, and that he is either incapable of consenting or has consented to the proposed exercise of power." Id. Also, under the Uniform Probate Code:

> . . . a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 percent of the income from the estate. [Section 5-425.]

These Uniform Probate Code provisions are, in effect, an incorporation of the doctrine of substituted judgment. 7 Real Property, Probate and Trust Journal, supra at 493-94. It was the State Bar's view that the 20 percent limit contained in the Uniform Probate Code provisions is

arbitrary and "substantially limits" the doctrine as it now exists in California. State Bar of California, The Uniform Probate Code: Analysis and Critique 178 (1973).

The 1975 Conference of Delegates of the State Bar recommended codification of the doctrine of substituted judgment. The recommendation was referred to a conference committee which approved the recommendation, with a small minority dissenting on the ground that the proposed legislation was unnecessary. The conference committee proposal entailed two virtually identical sections, one to be added to Division 4 and the other to Division 5 of the Probate Code. The text of one of these sections is reproduced as Exhibit 4 to this memorandum. However, the proposal was ultimately disapproved by the State Bar Committee on Probate and Trust Law because it was viewed as potentially restrictive. The committee's report argued:

> Since California already has the doctrine, since it is recognized by the courts, and since the courts have in no way limited the application of the doctrine, why not leave it to be developed, as it has, in the courts. Why now start trying to codify it, singling out factors that must be considered rather than leaving the principle flexible so that the practitioner can develop whatever factors he finds have been enunciated in this area anywhere in the country in any particular case. The Committee readily agreed that it would not be possible to reduce to statute the discretion and flexibility of the Christiansen doctrine . . . .

The proposal thus did not become part of the State Bar's legislative program.

Other Estate Planning Devices

The State Bar Conference Committee draft (Exhibit 4) authorizes the court to approve a plan for the disposition of assets for the conservatee, including "elections, disclaimers, [and] exercises of powers of appointment . . . ." These are all estate planning devices that affect the estate of, and may have tax consequences for, the conservatee.

The election problem arises in connection with a will which leaves community property in trust, including the community property interest of the surviving spouse, and contains a provision that, if the surviving spouse elects to take his or her statutory share of the community property, he or she will forfeit benefits under the will (sometimes called a

"widow's election" or a "forced election"). Brawerman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting § 8.7, at 229 (Cal. Cont. Ed. Bar 1965). Although it is not clear under California law whether a conservator may make such an election for an incompetent surviving spouse, it has been argued that a conservator ought to be able to do so. See W. Johnstone & G. Zillgitt, California Conservatorships § 5.72, at 216-17 (Cal. Cont. Ed. Bar 1968).

Disclaimers are authorized by Probate Code Sections 190-190.10, which allow beneficiaries to disclaim inter vivos gifts (outright or in trust), powers of appointment, and interests passing by will or by intestate succession, thereby avoiding inheritance taxation. G. Hemmerling, California Will Drafting Supplement § 14.23, at 115 (Cal. Cont. Ed. Bar 1976). Probate Code Section 190.2 provides:

> A disclaimer on behalf of an infant, incompetent, conservatee or decedent shall be made by the guardian of the estate of the infant, the guardian of the estate of the incompetent, the conservator of the estate of the conservatee, or the personal representative of the decedent.

However, the section contains no guidelines for determining when a conservator should make a disclaimer for the conservatee and does not address the question of whether court approval is required.

The authority of a conservator to exercise a power of appointment on behalf of the conservatee is not clear, but it has been said that "a conservator attempting to exercise a power should seek court authority." W. Johnstone & G. Zillgitt, supra § 1.26, at 13. It is the prevailing American rule that a guardian may exercise a power of appointment for a ward unless a contrary intention appears in the instrument creating the power. 39 Am. Jur.2d Guardian and Ward § 104 (1968). If the power permits the conservatee to appoint to himself or herself, an appointment to a third person will affect the conservatorship estate. See California Will Drafting §§ 13.22-13.24, at 466 (Cal. Cont. Ed. Bar 1965) (tax consequences). Yet there are no standards for determining when a conservator should exercise or release a power of appointment.

Finally, the law is unclear whether a conservator may revoke a revocable trust created by the conservatee while competent, even with court authority. W. Johnstone, G. Zillgitt, & M. Levine, California

Conservatorships Supplement § 5.72a, at 58 (Cal. Cont. Ed. Bar 1976); Drafting California Revocable Inter Vivos Trusts § 5.9, at 141 (Cal. Cont. Ed. Bar 1972). However, there is a "strong argument" in favor of giving the conservator such power. W. Johnstone, G. Zillgitt, & M. Levine, supra. If the power is to be statutorily conferred on the conservator, standards for its exercise should be provided and the power of the conservator to surrender the right to revoke should be dealt with in some fashion.

Since the foregoing actions may reduce or have tax consequences for the conservatee's estate, they each potentially involve the doctrine of substituted judgment. See, e.g., Estate of Christiansen, 248 Cal. App.2d 398, 418, 56 Cal. Rptr. 505, 518-19 (1967). The staff draft follows the State Bar draft (Exhibit 4) in including these actions, with the addition of the reference to revocable trusts, to give the conservator the ability to undertake complete estate planning on behalf of the conservatee.

Policy Questions Presented

1. Should the doctrine of substituted judgment be codified, or should it be left to case law development?

There is some value in having the Commission's recommended legislation be a complete statement of the law of guardianship and conservatorship. Moreover, as the foregoing discussion indicates, the law is unclear regarding elections, powers of appointment, and revocable trusts. On the other hand, there is risk that codification will freeze the doctrine and inhibit its evolution. This risk may be minimized by drafting a section which gives the court broad discretion in applying the doctrine.

2. Is the staff draft a satisfactory statement of the doctrine?

The staff draft purports to codify the Christiansen case as it concerns gifts of principal from the conservatorship estate, adds the other estate planning devices discussed above, and includes some factors mentioned in the Wemyss case. The section should go in the chapter on powers and duties of guardians and conservators of the estate but should be limited to conservatorships. Both Section 5-425 of the Uniform Probate Code and the State Bar draft are limited to adults, and under the Commission's recommendation there will no longer be guardianships for adults.

Staff Draft

§ 2515. Plan for distribution of assets of conservatee

2515. (a) The conservator or other interested person may file a petition for approval of a proposed plan for the disposition of assets of the conservatee. The plan may include, but is not limited to, elections to take under or against a will, disclaimers, exercises or releases of powers of appointment, revocations of revocable trusts, surrenders of the right to revoke revocable trusts, and gifts of income or principal of the estate outright or in trust. The plan may be for the benefit of prospective legatees, devisees, or heirs apparent of the conservatee, family members of the conservatee, other persons, charities, or other entities, public or private. The court may approve, modify and approve, or disapprove the proposed plan and may direct the conservator to transfer or dispose of assets in accordance with the approved plan.

(b) A plan may be approved under subdivision (a) only if the principal remaining after the disposition of assets pursuant to the plan is sufficient to produce the income required for the maximum foreseeable needs of the conservatee and the support of those legally entitled to support from the conservatee, taking into account age, physical condition, standards of living, and all other relevant circumstances.

(c) In determining whether to approve a plan under subdivision (a), the court shall take into consideration all of the relevant circumstances, including but not limited to:

(1) The probability of the conservatee's recovery of sufficient mental competence to make a disposition of the estate.

(2) The past donative practices and conduct and traits of the conservatee.

(3) The relationship and intimacy of the prospective donees with the conservatee and their standards of living and the extent to which they would be objects of the conservatee's bounty by objective test based on such relationship, intimacy, and standards of living.

(4) The wishes of the conservatee and the manner in which the estate would devolve upon the conservatee's death, including the dispositions to be made under the conservatee's will and other dispositive documents, if any, taking into account the age and the mental and physical condition of the conservatee.

(5) The value, liquidity, and productiveness of the estate.

(6) The prospective minimization of income, estate or inheritance taxes, and expenses of administration, and the likelihood from all of the circumstances that the conservatee as a reasonably prudent person would establish such a plan, if the conservatee had the mental competence to do so.

(d) Notice of the hearing on the petition shall be given for the period, in the manner, and to the persons provided in Chapter 3 (commencing with Section 1460) of Part 1, to the persons required to be named in a petition for the appointment of a conservator, and to such other persons as the court may order.

(e) Nothing in this section imposes any duty on the conservator to propose or establish a plan for the disposition of the conservatee's assets pursuant to this section.

Comment. Section 2515 is new and codifies the doctrine of substituted judgment. See Estate of Christiansen, 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (1967); Conservatorship of Wemyss, 20 Cal. App.3d 877, 98 Cal. Rptr. 85 (1971). An estate plan pursuant to this section may include not only gifts of principal or income of the conservatorship estate, but also elections, disclaimers, exercises or releases of powers of appointment, and revocations or surrenders of the right to revoke revocable trusts, since these are all estate planning devices and may have tax consequences for the conservatorship estate. See, e.g., Brawerman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting § 8.7, at 229 (Cal. Cont. Ed. Bar 1965); G. Hemmerling, California Will Drafting Supplement § 14.23, at 115 (Cal. Cont. Ed Bar 1976).

In the case of gifts of income from the conservatorship estate, Section 2515 supplements Section 2514 which authorizes gifts of surplus income to the "next of kin" of the conservatee under certain circumstances. Gifts of surplus income under Section 2515 is not limited to next of kin.

Note. The staff has not attempted to duplicate in the Comment the elaborate discussion in the Christiansen case.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

[Civ. No. 23345. First Dist., Div. One. Feb. 8, 1967.]

Estate of MARGARET CHRISTIANSEN, an Incompetent Person. HARRY CHRISTIANSEN, as Guardian, etc., Petitioner and Respondent, v. HARRY CHRISTIANSEN, Individually, Claimant and Appellant.

[1a, 1b] **Guardian and Ward—Actions by or Against Guardian—Review.**—The appellate court will entertain an appeal taken in his individual capacity by the guardian of an incompetent's estate, where the aims of the appointment of a guardian ad litem—to procure proper representation of the ward's interests and to prevent a collusive judgment—have been attained by the guardian's retention of independent counsel to represent the guardianship estate on appeal. The real party in interest is the incompetent, and the general guardian, or, if appointed, a guardian ad litem merely appears for him.

[2] **Id.—Actions by or Against Guardian—Review: Appeal and Error—Judgments and Orders Appealable.**—The order of the trial court in response to a petition for instructions (Prob. Code, § 1516) is an appealable order (Prob. Code, § 1630).

[3] **Id.—Actions by or Against Guardian—Review.**—On petition for instructions by the guardian of the estate of an incompetent seeking authorization to make gifts to the prospective heirs of the incompetent to save taxes, the appellate court will assume that the court determined as a matter of law that it had no discretion to exercise, where no findings on the factual issues were incorporated in the order appealed from.

[4] **Insane and Incompetent Persons—Guardianship—Powers and Duties of Guardian.**—The courts have power and authority to authorize gifts from the principal of an incompetent's estate under the general equitable powers of the court sitting in the exercise of its jurisdiction over the estates of incompetents; and the criteria necessary for the proper exercise of the discretion of the trial court should first be applied by that court.

[5] **Id. — Guardianship — Powers and Duties of Guardian.** — The provisions of Prob. Code, § 1558, authorizing the courts to order the guardian of an insane or incompetent person to distribute surplus income to the ward's next of kin under

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[1] See Cal.Jur.2d, Insane and Incompetent Persons, §§ 75, 87; Am.Jur., Guardian and Ward (1st ed § 77).

McK. Dig. References: [1, 3] Guardian and Ward, § 90; [2] Guardian and Ward, § 90; Appeal and Error, § 24; [4, 5, 7-9] Insane and Incompetent Persons, § 39; [6] Guardian and Ward, § 55(1).

specified circumstances, do not preclude the courts from exercising the substituted judgment doctrine in situations not covered by that section.

[6] **Guardian and Ward—Powers, Duties, and Liabilities—Custody and Control of Estate.**—Prob. Code, §§ 1502 and 1503, prescribing the guardian's duties in management of his ward's estate, set forth the state's solicitude for the needs of the ward and his family, which needs must be satisfied before the doctrine of substituted judgment can be applied; but those sections do not purport to define what should be done with excess income, or principal in excess of that necessary to produce the income necessary for the basic needs of the ward and his family.

[7] **Insane and Incompetent Persons—Guardianship—Powers and Duties of Guardian.**—In probate proceedings for the administration of the estates of insane or incompetent persons, the courts have power and authority to determine whether to authorize transfers of the incompetent's property to avoid 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.

[8] **Id.—Guardianship—Powers and Duties of Guardian.**—In probate proceedings for the administration of the estates of insane or incompetent persons, the needs of the ward are of paramount importance in the court's determination of whether to authorize transfers of the ward's property to avoid unnecessary taxes or expenses of administration; no thought can be given to transfers for any purpose until the ward's debts are paid and the obligations for the support of the ward and those members of his family who are entitled to support from his estate, in an amount not disproportionate to the value of his estate, are satisfied. If there is surplus income and principal in excess of that necessary to produce the income required for the ward's maximum foreseeable needs, a margin of safety for economic fluctuation must also be considered.

[9] **Id.—Guardianship—Powers and Duties of Guardian.**—In probate proceedings for the administration of the estates of insane or incompetent persons, the court should not authorize any transfers of the ward's property for tax saving purposes alone unless there is no probability of the incompetent's recovery, and, even absent a showing of former practice or conduct, there must be some showing of the relationship and intimacy of the prospective donees with the incompetent to show that they would be objects of the incompetent's bounty by any objective test.

APPEAL from an order of the Superior Court of Santa Clara County denying a guardian authorization to make gifts from the estate of an incompetent. Gerald S. Chargin, Judge. Reversed with directions.

Lakin, Spears & Gullixson and Conrad F. Gullixson for Claimant and Appellant.

Herrick, Gross & Mansfield and Richard G. Mansfield for Petitioner and Respondent.

SIMS, J.—Harry Christiansen, as a son and one of the prospective heirs of Margaret Christiansen, an incompetent, has appealed personally from an adverse order entered upon a petition for instructions which he filed as guardian of her estate. By the petition he sought authorization, as guardian, to make gifts to the children and grandchildren of the incompetent "to cut down on the burden of excessive taxes against the estate and to permit the enjoyment of property of the incompetent by her family during her lifetime."

Parties to the Appeal

[1a] Before considering the appeal on the merits, this court raised the question of the propriety of entertaining an appeal in which the appellant and the respondent appeared to be the same party, albeit in different capacities. (See *Byrne* v. *Byrne* (1892) 94 Cal. 576, 579-580 [29 P. 1115, 30 P. 196]; 2 Witkin, California Procedure (1954) Pleading, § 24, p. 1000; *Tate* v. *Tate* (1950) 190 Tenn. 39, 40 and 42-44 [227 S.W.2d 50, 51-52]; Comment (1965) 11 Villanova L.Rev. 150 at pp. 156-157; and Note (1964) 52 Cal.L.Rev. 192 at pp. 195-196.)

There have been filed with the court, and the record is deemed augmented by, copies of a petition and order which reflect that the guardian was authorized to retain independent counsel to represent the guardianship estate on this appeal. This counsel has appeared and filed an informative brief which zealously advocates the propriety of the order of the lower court.

In *Byrne* it was recognized on rehearing that the plaintiff could sue personally on her claims against the estate, even though she was administratrix, if she made all heirs and creditors of the estate parties (94 Cal. at pp. 580-581; and see *Keyes* v. *Hurlbert* (1941) 43 Cal.App.2d 497, 501-503 [111 P.2d 447]).

In *Haberly* v. *Haberly* (1915) 27 Cal.App. 139 [149 P. 53], the same individual represented his incompetent mother as guardian and the estate of his deceased brother as administrator. As guardian he presented his mother's claim against the estate and it was rejected by the judge in the probate proceedings. He then filed suit, and when the residuary legatee of the state successfully demurred to the complaint, a guardian ad litem was appointed for the claimant mother. The legatee asserted that the case was still "one in effect wherein the same person was appearing as both plaintiff and defendant." The court ruled: "It is the rule ordinarily, and for reasons that are obvious, that courts will not entertain jurisdiction of an action where the plaintiff and defendant are in fact one and the same person; but the rule has no application to the facts of the present case. The claim of the plaintiff against the estate of . . . deceased, having been rejected by the court in which the estate was pending, relegated her to an action upon the claim; and she could not be deprived of that remedy merely because the guardian of her person and estate happened to be at the same time the administrator of the estate of the deceased. The suggestion that a guardian *ad litem* be appointed for the purpose of bringing suit was apparently made in good faith, and it does not appear here that the action was instituted for the purpose of procuring a collusive judgment. That the action was defended in good faith is evidenced by the vigorous defense interposed by the counsel who, nominally representing [the administrator], in fact appeared in and defended the action as the attorney for the residuary legatee under the will of the deceased, who was the one person most interested in the defense of the action." (27 Cal.App. at p. 141.)

[2] The order of the trial court in response to a petition for instructions (Prob. Code, § 1516) is an appealable order. (Prob. Code, § 1630; and see *Stratton* v. *Superior Court* (1948) 87 Cal.App.2d 809, 812 [197 P.2d 821]; and cf. *Estate of Charters* (1956) 46 Cal.2d 227, 234 [293 P.2d 778] and *Estate of Ferrall* (1948) 33 Cal.2d 202, 204 [200 P.2d 1, 6 A.L.R.2d 142], construing Prob. Code, §§ 1120 and 1240 in regard to appeal from an order instructing a trustee; and *Estate of Putnam* (1959) 175 Cal.App.2d 781, 783-784 [346 P.2d 841], construing §§ 1120 and 588 in regard to appeal from an order instructing an executor or administrator.) **[1b]** The foregoing authorities make it clear that the representative—the guardian in this case—may institute an

appeal from the failure to grant the relief where it appears that the estate will be adversely affected by the ruling of the trial court. In such event, it is conceivable that there could be no representation of any possible alternative interest of the estate. Here the appeal is by an individual who is allegedly aggrieved by the failure to grant the authorization which the guardian requested. The doctrine which is recognized in *Byrne* precludes that same individual from acting as the representative of the estate of the incompetent, where, according to the decision of the lower court, the estate has an interest adverse to that asserted by him on the appeal.

The record now reflects that this objection has been recognized and met. There has been no substitution of representatives, as suggested in *Byrne* prior to rehearing (94 Cal. at p. 580), nor has a guardian ad litem been appointed to represent the incompetent in this matter, as was done in *Haberly* (27 Cal.App. at p. 141). Nevertheless the appointment of independent counsel would appear to permit the nominal continuance of the litigation in the name of the ward's estate, with the son, as guardian, as the respondent. The litigation was so continued in *Haberly*. There the attorney for the residuary legatee represented the interest of the estate, and the court noted that the litigation was then only nominally in the name of the individual who had a possible adverse interest.

The real party in interest is the incompetent, and the general guardian, or, if appointed, a guardian ad litem merely appears for him. (See Code Civ. Proc., § 372; Prob. Code, § 1501; *Fox* v. *Minor* (1897) 32 Cal. 111, 116-119 [91 Am.Dec. 566]; *Siegal* v. *Superior Court* (1962) 203 Cal.App.2d 22, 24-25 [21 Cal.Rptr. 348]; and 2 Witkin, *op. cit.*, Pleading, § 26, p. 1003.) In *Fox* v. *Minor*, the court noted: "executors and administrators are strictly and technically representatives of the deceased, while guardians are not technically representatives of anybody. They simply stand in the position of protectors. The guardian is the counsel assigned by operation of law to conduct the suit." (32 Cal. at p. 117; and see *O'Shea* v. *Wilkinson* (1892) 95 Cal. 454, 456 [30 P. 588].)

Prudence might have dictated the appointment of a guardian ad litem to represent the interests of the incompetent in resisting the appeal, taken in his individual capacity, by the same person who was her general guardian. Nevertheless, since the aims of such appointment—to procure proper representation of the interests of the ward and to prevent a

collusive judgment — have been attained, the procedure followed is approved, and the appeal will be entertained.

Statement of Facts

On July 10, 1943, Margaret Christiansen was admitted to Agnews State Hospital and five days later she was adjudged insane and ordered committed. On March 13, 1952, after proceedings regularly taken to that end, appellant was appointed the guardian of her estate.

In August 1954 her husband, the father of appellant died. A thorough search was made for any will he might have left, and it was determined that, although he had gone through the paperwork of preparing a will, he had never executed it. According to the inventory and appraisement filed in the guardianship proceedings, the incompetent, after her husband's death, had an estate consisting of real property, stocks and bonds, cash, and personal property appraised at $166,420.19 as of November 3, 1955.

The incompetent was released from the hospital on an indefinite leave of absence December 11, 1963, and was placed in the home of her son Robert in Palo Alto.

On July 8, 1965, appellant, as guardian, filed his petition for authorization to make gifts from the guardianship estate of $3,000 per year, over a period of three years, to each of three children and seven grandchildren of the incompetent. This petition was accompanied by documents entitled "Assent to Lifetime Gift Program" executed by the incompetent's daughter and other son, individually and for their respective minor children, and by her three adult grandchildren. In open court the petition was amended to limit the application to a one-year program.

At the hearing on the petition October 6, 1965, evidence was produced which established, in addition to the facts set forth above, the following:

The incompetent attained 73 years on September 2, 1965. A medical examination later that month reflected that her health was very good for her age, that she had slight high blood pressure, but nothing that was unusual. She ate well, was happy, had no problems, and appeared in excellent health.

A psychiatrist testified that he had reviewed the records at the state hospital and had examined the incompetent on September 20, 1965. He diagnosed her condition as a severe and chronic schizophrenic reaction of the paranoid type. He found she was delusional and hallucinating and that her

insight and her judgment with regard to her own life and person was virtually nil. There was no indication in the hospital records that she was ever free from obvious gross psychiatric manifestations throughout a period of over twenty years. In his opinion her recovery was highly unlikely. He stated that the recovery rate of people who have been ill as long as she had, particularly in her age group, is fractional and so small that it is hard to document any cases where it has occurred.

During the 10 years since the inventory was filed her estate had increased to a value of $298,784.87, as of April 30, 1965. The net income in 1964 after taxes was slightly over $9,000. The overall annual expense of her support and maintenance was less than $5,000, and consisted principally of $300 per month paid to her son Robert for her food, lodging, and minor purchases. It was acknowledged that this son's health was poor,[1] that there was a possibility that the mother would not be able to continue in his home, and that she would have to be placed in a rest home, or nursing home or hospital, at a cost of from $400 to $550 per month. In the petition it was alleged that the total amount necessary for her care, comfort and maintenance probably would not exceed $8,000 per year, even if the medical expenses increased.

In the search for the father's will the children looked in all the private papers in the home and at his office. They communicated with his attorneys as well as banks and other organizations with which he did business or had social connections. Although apprised at the time of the importance of a will of the mother, no such instrument has ever been found.

In the event of her death intestate, those entitled to her estate would be determined by the provisions of section 222 of the Probate Code.[2] The record reflects that the incompetent's children consisted of a son who died as an infant without issue, the petitioner, aged 51 at the time of the hearing, a son Robert,[3] and daughter Anna Marion Heryford aged 42 who had emigrated to Australia. The grandchildren consisted of the adult son and daughter of petitioner, an adult son, and a

[1]According to the uncontradicted statement of appellant, this son died December 17, 1965.

[2]Probate Code section 222 provides: "If the decedent leaves no surviving spouse, but leaves issue, the whole estate goes to such issue; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation."

[3]See footnote 1.

minor son and daughter of Robert, and two minor daughters of Mrs. Heryford.

It is not asserted that any payments are necessary for the comfortable and suitable support, maintenance and education of any of the proposed distributees as members of the family of the ward. (Cf. Prob. Code, § 1502; *Guardianship of Talbot* (1958) 156 Cal.App.2d 816, 820-821 [320 P.2d 20]; and *Gaskins* v. *Security-First Nat. Bank* (1939) 30 Cal.App.2d 409, 415 [86 P.2d 681].)

The evidence does reflect that, prior to the mother's incompetency, the family had a close and affectionate domestic life. Following her incompetency, she was brought home for holiday visits and manifested that she liked to be with the family. She was supplied with funds by her husband, and later by the guardian, and would shop with her daughters-in-law for Christmas and birthday presents for members of the family.

The guardian testified that the estate and inheritance taxes on the value of the estate would approximate $78,000, or $80,000; and that if $30,000 were given away, as proposed, and the incompetent survived a period of three years, there would be a tax saving of approximately $10,000 or $11,000.

Ruling of the Trial Court

After receiving this evidence the court entered an order instructing the guardian not to make gifts from the principal of the incompetent's estate. It did, however, by separate order, authorize the payment of $1,250 to each of the adult children of the incompetent, or a total of $3,750, from the surplus income of the estate. No appeal has been taken from this second order, which was apparently predicated upon the provisions of section 1558 of the Probate Code.[4]

[4]Probate Code section 1558 provides in part: "On the application of the guardian or next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward, or any part of such surplus income, to the next of kin whom the ward would, in the judgment of the court, have aided, if said ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court, but the court shall give consideration to the amount of surplus income available after due provision has been made for the proper support and maintenance of the ward, to the circumstances and condition of life to which the ward and said next of kin have been accustomed and to the amount which the ward would, in the judgment of the court, have allowed said next of kin, had said ward been of sound mind."

In the order denying the authority to make gifts from the principal of the estate the court found: "that the Court does not have power and authority under California law to authorize gifts from the principal of the guardianship estate for the purposes as set forth in the petition."

In rendering his oral decision, the judge not only alluded to lack of power and authority, but also pointed out that there was a possibility that the incompetent might recover, that she might have left a will, that there was nothing to show that, if competent, she would have made a gift to anyone in contradistinction to entertaining a desire to retain possession and control of her property despite the tax consequences, that a severe economic depression might render the remaining estate inadequate for her support, and that the court was charged with the duty of conserving the incompetent's estate for her benefit, and was under no obligation to concern itself with the tax consequences to the beneficiaries in the event of her death.

Questions Presented

[3] The remarks of the trial judge lend themselves to the interpretation that if the trial court did have the power and authority to authorize gifts from the principal of the incompetent's estate, it would have exercised its discretion on the facts to deny the authorization. However, no findings on the factual issues were incorporated into the order from which this appeal has been taken. It will be assumed, therefore, that the court determined as a matter of law that it had no discretion to exercise. (Cf. *Guardianship of Cookingham* (1955) 45 Cal.2d 367, 375-376 [289 P.2d 16]; and see as to effect of the judge's opinings *Union Sugar Co.* v. *Hollister Estate Co.* (1935) 3 Cal.2d 740, 749-751 [47 P.2d 273]; and *Bailey* v. *Fosca Oil Co.* (1960) 180 Cal.App.2d 289, 293-295 [4 Cal. Rptr. 474].) Furthermore, the criteria for the exercise of such authority, if it does in fact exist, are interrelated with the questions which are posed in resolving the question of the existence of such power. Therefore, any discussion of the proper exercise of discretion cannot be disassociated from an examination of the principles upon which the right to make gifts or advancements has been authorized.

[4] The questions presented therefore may be summarized as follows: Do California courts have power and authority to authorize gifts from the principal of an incompetent's estate, and if so, what factors determine whether such authority should be granted?

An examination of existing precedents leads to the conclusion that the power and authority exist under the general equitable powers of the court sitting in the exercise of its jurisdiction over the estates of incompetents; and that the criteria necessary for the proper exercise of the discretion of the trial court should first be applied by that court.

The Power to Authorize Gifts From the Principal of an Incompetent's Estate

It is generally stated: "Neither a general guardian nor a court has the power to dispose of a ward's property by way of gift." (39 C.J.S., Guardian and Ward, § 79, p. 123; and see 44 *id.*, Insane Persons, § 81, p. 191; 25 Am.Jur., Guardian and Ward, § 79, p. 52; *Harris* v. *Harris,* (1962) 57 Cal.2d 367, 370 [19 Cal.Rptr. 793, 369 P.2d 481]; and *Guardianship of Hall* (1947) 31 Cal.2d 157, 168 [187 P.2d 396].)

If there is any warrant for so disposing of the ward's property, it must be found in the application of what is sometimes referred to as the doctrine of substituted judgment. The existence and source of the doctrine have been recognized in this state as follows: "Brief reference to the historic development of this branch of the law reveals that the authority of the courts to make allowances from an incompetent's estate is the logical outgrowth of their wide powers in the disposition and management of such person's property. The doctrine is well established in England, since the decision of Lord Eldon in *Ex parte Whitbread, in the Matter of Hinde,* 2 Merivale 99 [35 Eng. Reprint 878], decided in 1816, that the chancellor may, under proper circumstances, grant to needy relatives part of the surplus income of an incompetent. In approving such payments, the court will act with reference to the incompetent and for his benefit as it is probable that he would have acted for himself, if he were of sound mind." (*Guardianship of Hudelson* (1941) 18 Cal.2d 401, 403-404 [115 P.2d 805].)[5]

[5]The application of this doctrine has been a persistent source of comment. The interested reader is referred to the following: Thompson & Hale, *The Surplus Income of a Lunatic* (1895) 8 Harv.L.Rev. 472; Carrington, *The Application of Lunatics' Estates for the Benefit of Dependent Relatives* (1914) 2 Va.L.Rev. 204; Note (1928) 14 Cornell L.Q. 89; Note (1928) 41 Harv.L.Rev. 402; Note (1929) 13 Minn.L.Rev. 152; Note (1928) 77 Pa.L.Rev. 136; Note (1928) 37 Yale L.J. 525; Comment (1929) 17 Cal.L.Rev. 181; Note (1940) 54 Harv.L.Rev. 143; Note (1942) 15 So.Cal.L.Rev. 265; Comment (1943) 28 Iowa L.Rev. 703; 25 Am.Jur., Guardian and Ward, § 79, p. 52; Annotations (1896) 54 A.L.R. 297, 298-301; (1929) 59 A.L.R. 653, 653 and 659-664; (1946) 160 A.L.R. 1435, 1436-1438 and 1442-1445; (1965) 99 A.L.R.2d 946, 946-948; and see Notes 10 and 11, *infra.*

[5] It is asserted, on behalf of the ward's estate, that the general equitable doctrine has no place in the jurisprudence of this state because the provisions of section 1558 of the Probate Code (fn. 4, *supra*) expressly authorize and delimit the exercise of the power to utilize the income or principal of the estate of an insane or incompetent person for payments other than for the support and maintenance of the ward and his family as provided in sections 1502[6] and 1530[7] of that code. (See Note (1964) 24 Md.L.Rev. 332, 338.)

Some jurisdictions have held or suggested that the statutory provisions governing the administration of an incompetent's estate are controlling, and in such proceedings preclude the exercise of general equitable jurisdiction, as was the practice of the chancery court under the common law. (*In re Guardianship of Estate of Neal* (1966, Tex.Civ.App.) 406 S.W.2d 496, 501-503; *Kelly* v. *Scott* (1958) 215 Md. 530 [137 A.2d 704]; *Bullock Estate* (1957) 10 Pa.D.&.C.2d 682, 684-685 [44 Del.Co.Rep. 171, 173] [but cf. *Hambleton's Appeal* (1883) 102 Pa.St. 50]; *Binney* v. *Rhode Island Hospital Trust Co.* (1920) 43 R.I. 222, 239-242 [210 A. 615, 622-623]; *Lewis* v. *Moody* (1924) 149 Tenn. 687 [261 S.W. 673] [cf. *Monds* v. *Dugger* (1940) 176 Tenn. 550 [144 S.W.2d 761] construing subsequently adopted statute].)

In this state it has been said: "Guardianship matters are special proceedings, and the validity of orders must be determined from a consideration of the governing statutes. [Citations.]" (*Guardianship of Kentera* (1953) 41 Cal.2d 639, 642 [262 P.2d 317].) General equitable considerations will not override the statutory directions which cover the matter of the

[6]Probate Code, section 1502, provides, in relevant part, as follows: "Every guardian of an estate must manage it frugally and without waste, and apply the income, as far as may be necessary, to the comfortable and suitable support, maintenance and education of the ward and his family, if any; and if the income is insufficient for that purpose, he may sell or mortgage or give a deed of trust upon any of the property, as hereinafter provided."

[7]Probate Code, section 1530, provides: "If the income of an estate under guardianship is insufficient for the support, maintenance and education of the ward or of such members of his family as he is legally obligated to support and maintain, including his care, treatment and support, if confined in a State hospital for the insane, or if the personal estate and the income from the real estate is insufficient to pay his debts, or if it is for the advantage, benefit, and best interests of the estate or ward or of such members of his family as he is legally bound to support and maintain, his guardian may sell any of his real or personal property, or mortgage or give a deed of trust upon any of his real property for any of such purposes, subject to authorization, confirmation or direction by the court as hereinafter provided."

appointment of a guardian. (*Guardianship of Salter* (1904) 142 Cal. 412, 413 [76 P. 51].) Guardianship proceedings, which historically were within the equitable jurisdiction of the chancellor, are, in this state "in *probate.*" (*Sullivan* v. *Dunne* (1926) 198 Cal. 183, 189 [244 P. 343].) "It is settled law in this state that probate proceedings are special in their nature and purely statutory in their origin. [Citations.]" (*In re Bundy* (1919) 44 Cal.App. 466, 468 [186 P. 811].)

Nevertheless, the foregoing cases recognize an analogy between the statutory scheme and the discretion vested in the chancellor (*Sullivan*, 198 Cal. at p. 189; and see *Guardianship of Reynolds* (1943) 60 Cal.App.2d 669, 673-675 [141 P.2d 498]). For example, since a jury trial was not a matter of right in such matters at common law, it can only be had where expressly authorized by the Probate Code. (*Bundy*, 44 Cal. App. at pp. 470-471.)

In *Guardianship of Hudelson, supra,* 18 Cal.2d 401, it was contended that the provisions of section 1558 precluded the court from conditioning an allowance made thereunder by a provision that the amounts paid to the petitioning adult daughter should constitute an advance on any inheritance she might receive upon the death of her father, the incompetent ward. In the course of upholding the condition, the court reviewed the English and American precedents and concluded, "that the courts, in the course of their administration of the estates of incompetents and independent of any statutory authority, have exercised jurisdiction to grant allowances with or without conditions, as the facts warranted." (18 Cal.2d at p. 406.)

The court then turned to the contention made by petitioners and stated: "this rigid interpretation of the scope of the statute is not reasonable in view of the broad terms in which this section is couched, demonstrating that the purpose of this enactment was to supplement and confirm the inherent jurisdiction of the court, acting in equity, to exercise full control over incompetents and their property. In addition, the statute set up a standard for the guidance of the court in its ruling upon an application for aid to next of kin of the ward: To pay and distribute any part of the 'surplus income' of the incompetent not needed for his support and maintenance, to the next of kin whom the ward would, 'in the judgment of the court,' have aided, if said ward had been of sound mind. In so doing the court acts for the incompetent in reference to his estate as it supposes the incompetent would have acted if he

had been of sound mind, which principle coincides with the doctrine of both the English and American authorities, as reference to the above discussed cases will indicate. It reasonably follows that the court in making allowances may attach conditions if it finds that the ward, had he the capacity to act, would have imposed them. If this were not possible, the court in many instances would be constrained to refuse the application for payments rather than grant it without terms. The statute's endorsement of a policy of flexible procedure, resting in the sound discretion of the court, permits recourse to principles of equity responsive to the interests of both the ward and next of kin." (*Id.*, pp. 406-407.)

The foregoing specifically recognizes that the statutory scheme should be interpreted "to supplement and confirm the inherent jurisdiction of the court, acting in equity, to exercise full control over incompetents and their property." (*Id.*, p. 406; see Note (1942) 15 So.Cal.L.Rev. 265, 266.) It does not, however, directly answer the question of whether the statute precludes the exercise of any inherent jurisdiction to authorize payments or distributions, which, in the judgment of the court, the ward would have himself made had he been of sound mind, if such payment or distribution is to be made from other than "surplus income" or to other than one falling in the category of "next of kin."

That such general jurisdiction exists is suggested by two subsequent opinions of the Supreme Court In *Guardianship of Hall, supra,* 31 Cal.2d 157, an appeal from an order overruling objections to a guardian's account, the following appears: "Appellants specify as their third point on appeal their objection to allowances made in the account for 'gifts,' in the amount of several hundred dollars from the estate's funds, to individuals, to charities and to a political organization. While appellants argue that 'neither the general guardian nor a court has the power to dispose of the ward's property by way of a gift' (39 C.J.S. 123, § 79), such rigid principle has its exception where allowances from the surplus income of the estate are sought as 'donations for charitable and religious purposes' and with the object of 'carrying out the presumed wishes of' the incompetent person (25 Am.Jur. 52, § 79; *In re Brice's Guardianship,* 233 Iowa 183 [8 N.W.2d 576, 579]). However, such exception does not aid respondent where it not only appears that no previous court authorization for the 'gifts' was obtained, but, in addition, none would seem proper in view of her failure to offer sufficient support-

ing evidence therefor in the light of the noted limitations governing the propriety of such allowances. So to this extent also the account requires further examination." (31 Cal.2d at pp. 167-168.) The fact that the court sent the matter back for further examination suggests that if evidence were introduced to show the presumed wishes of the ward, the guardian would be allowed gifts made for carrying out that object.

The same principle has been more recently recognized in *Harris* v. *Harris, supra,* 57 Cal.2d 367, 370. The majority of the court found that gifts by the guardian, apparently of principal, could not be confirmed because there was no court permission before or after making the contested gifts, and because there was no evidence to show that the ward would have approved the gifts, had she been competent. (57 Cal.2d at p. 371.)

From the foregoing it is concluded that the provisions of section 1558 do not preclude the courts of this state from exercising the substituted judgment doctrine in situations not covered by that section.

[6] It is also contended that the statutory scheme embodied in sections 1502 and 1530 of the code (see fns. 6 and 7, *supra*) prevents any disposition of the income or principal of the ward's estate other than as expressly (§ 1558) provided to the contrary. These sections set forth the state's solicitude for needs of the ward and his family which, in any event, must be satisfied before the doctrine of substituted judgment can be applied. They do not purport to define what should be done with excess income, or principal in excess of that necessary to produce the income necessary for these basic needs. In fact, similar provisions, formerly embodied in the Code of Civil Procedure (§§ 1770 and 1777) did not preclude an allowance to an adult child. (*Estate of Lynch* (1894) 5 Cof.Prob. 279, 281.) As hereinafter discussed, there may be occasions when the mandate to manage the estate "frugally and without waste" dictates that resort should be had to the doctrine.

Section 1516 of the Probate Code, under which these proceedings are being prosecuted, provides in part: "*In all cases where no other or no different procedure is provided by statute,* the court on petition of the guardian, . . . may from time to time instruct the guardian as to the administration of the ward's estate and the *disposition,* management, care, protection or preservation of the estate or any property thereof." (Italics added.) This language appears to contem-

plate that there are situations for which no provision is made in the statutory scheme, and that such situations may include those involving a disposition of the ward's property. (Cf. the provisions of Prob. Code, §§ 588, 1120 and 1860.)[8] In *Estate of Traung* (1962) 207 Cal.App.2d 818 [24 Cal.Rptr. 872], this court held that the broad jurisdiction conferred by section 1120 gave the probate court the same power to authorize or direct a deviation from the terms of a trust as a court exercising general equitable jurisdiction would have. (207 Cal.App. 2d at pp. 827-829.) Similarly section 1559 gives the probate court the power to consider matters affecting the estate of the incompetent which are not expressly covered by the statutory scheme.

This conclusion is further indicated by the nature of the cases to which the court referred, apparently with approval, in the *Hall* and *Harris* decisions. *In re Guardianship of Brice* (1943) 233 Iowa 183 [8 N.W.2d 576] stands for the proposition that general powers of management conferred by statute embrace the question of whether payments should be made to a needy relative of the incompetent who was not legally entitled to support. (233 Iowa at pp. 186-188, 8 N.W.2d at pp. 578, 579.)

The factors to be considered were set forth as follows: "In determining whether the incompetent, if sane, would contribute to the support of a relative to whom he owes no duty of support, the court will consider the needs of the relative, the relationship and intimacy which he bore to the incompetent prior to the adjudication of incapacity, the present and probable future requirements of the incompetent himself, whether others are dependent upon him for support and the extent of such dependency, the size and condition of the estate —giving to these and any other pertinent matters such weight as the incompetent, if sane, probably would have given. *In re Fleming's Estate,* 173 Misc. 851 [19 N.Y.S.2d 234, 236], and cases cited." (233 Iowa at p. 187, 8 N.W.2d at p. 579.)

The opinion acknowledged: "It is true the evidence does not disclose the exact amount contributed by [the ward] while sane for the support of the applicant and his family. And there is no way of knowing just how much the ward would

[8]It is unnecessary to determine herein whether similar considerations would apply to a conservatorship under division 5 (§§ 1701-2207) of the Probate Code. "The mere fact that a conservator is appointed is not a determination that the conservatee is in any wise 'insane or incompetent.' (Cf. Prob. Code, § 1751; L.A. Bar Bulletin, Vol. 33, No. 1, p. 15.)" (*Schuck* v. *Myers* (1965) 233 Cal.App.2d 151, 154 [43 Cal.Rptr. 215].)

now contribute if insanity had not overtaken him"; and concluded: "However, if the probate court had authority to act in the matter, it had at least some discretion in determining the amount to be paid." (233 Iowa at p. 189, 8 N.W.2d at p. 579.)

In response to the contention that the payment of the allowance might involve an invasion of the principal of the ward's estate, the Iowa decision indicated that, on the facts, it was probable that the payments could be made out of surplus income without resort to principal, and also stated: "In most of the cases where allowances from guardianship funds have been authorized for the support of one whom there is no legal duty to support it is probably true that the payments could be made from surplus income. The more recent authorities, however, apparently do not limit the payments which may be authorized to those that can be made out of surplus income. The controlling principle is that the court will act with reference to the incompetent and for his benefit as he would probably have acted if sane. *In re Fleming's Estate,* 173 Misc. 851 [19 N.Y.S.2d 234], holds that such payments may be made even though resort to the principal is necessary. However, payments to one holding no legal obligation against the incompetent should not be authorized unless adequate provision has first been made for the ward." (233 Iowa at p. 189, 8 N.W.2d at p. 580.)

In *Matter of Flagler* (1928) 248 N.Y. 415 [162 N.E. 471, 59 A.L.R. 649] (and see Notes & Comment (1928) 14 Cornell L.Q. 89; Note (1928) 41 Harv.L.Rev. 402; and Note (1929) 17 Cal.L.Rev. 175), the court overruled the decision of the Appellate Division ((1928) 223 App.Div. 1 [227 N.Y.Supp. 318]), which had set aside an allowance granted by the trial court ((1927) 130 Misc. 375 [224 N.Y.Supp. 30]), on the grounds that convincing proof had not been given to show that the incompetent person, if sane, would have made the allowance requested. The Court of Appeals modified the findings of the Appellate Division to provide for an allowance in an amount which the highest court thought proper.

The Court of Appeals acknowledged the propriety of the rule of law relied upon by the intermediate court, and stated: "If [the ward] to-day could decide upon the disposition of the income of her great estate, moral or charitable considerations would dictate her decision only to the extent that she felt their force. Her great affluence might impel her to relieve the distress of her cousin; the law would not compel her to do

so if she decided otherwise. The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incompetent. In reaching decision it may give to moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them. Allowances for the support of collateral relatives of the incompetent have been made 'upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind.' (*Matter of Lord*, 227 N.Y. 145 [124 N.E. 727].)" (248 N.Y. at pp. 418-419, 162 N.E. at pp. 471-472, 59 A.L.R. at p. 651.)

In ruling on the sufficiency of the evidence, however, the court did not depend upon a subjective intent of the incompetent as manifested by her actions while sane, but acknowledged: "Conflicting inferences might be drawn from the evidence as to [the ward's] spirit of charity and generosity." After reviewing the situation it concluded: "Few would so act ["refuse all help"] under the circumstances here disclosed; the evidence does not justify a finding that [the ward], if sane, might have been among the few." (248 N.Y. at p. 419, 162 N.E. at p. 472, 59 A.L.R. at pp. 651-652.) In short, although the court cannot substitute its own generous impulses, it may free the ward from any disapprobation for abnormal selfishness unless such trait is established.

In *In re Johnson* (1932) 111 N.J.Eq. 268 [162 A. 96], the court recognized the doctrine of substituted judgment and found it applicable in New Jersey. (111 N.J.Eq. at p. 270, 162 A. at p. 96.) It then reviewed the English and American cases. The decision relied principally on the analysis in *Binney* v. *Rhode Island Hospital Trust Co., supra*, 43 R.I. 222, 231-238 [110 A. 615, 619-622], where, as an alternative ground of decision, the Rhode Island court had found the evidence insufficient to support an allowance under the doctrine, and came to the same conclusion on the case before it. (111 N.J.Eq. at p. 276, 162 A. at p. 99; but cf. *Potter* v. *Berry* (1895) 53 N.J.Eq. 151 [32 A. 259].)[9]

In re Fleming's Estate (1940) 173 Misc. 851 [19 N.Y.S.2d 234], which, as noted above, was extensively relied upon by

[9]Recognition of the doctrine of substituted judgment in other jurisdictions is evidenced by the following cases: *In re Buckley's Estate* (1951) 330 Mich. 102, 105-109 [47 N.W.2d 33, 35-37]; *Sheneman* v. *Manring* (1940) 152 Kan. 780 [107 P.2d 741, 743-744]; *In re De Nisson's Guardianship* (1938) 197 Wash. 265, 275 [84 P.2d 1024, 1028]; *State* ex rel. *Kemp* v. *Arnold* (1938) 234 Mo.App. 154, 161 [113 S.W.2d 143, 147].

the Iowa court in the *Bricc* case, is the principal authority which has come to grips with the question of applying the substituted judgment doctrine to a gift or allowance from the principal of the ward's estate. Its holding that such an allowance may be authorized where the evidence leads to the conclusion that the ward would have so acted if competent, has been criticized (Note (1940) 54 Harv.L.Rev. 143). Nevertheless, it has not only been approved in *Brice, supra*, but has been followed in New York. (*In re Bond* (1950) 198 Misc. 256, 258 [98 N.Y.S.2d 81, 83]), and Delaware (*In re du Pont* (1963) 41 Del.Ch. 300, 312 [194 A.2d 309, 316]; but cf. *In re Schwartz* (1943) 27 Del.Ch. 223, 225-231 [34 A.2d 275, 276-279].)

The effect of the application of the rules, as developed in New York, on the incidence of taxes measured by the value of the property transferred, has been a subject of judicial scrutiny. (*City Bank Farmers Trust Co.* v. *McGowan* (1945) 323 U.S. 594 [89 L.Ed. 483, 65 S.Ct. 496]; same case (2d Cir. 1944) 142 F.2d 599, and (W.D. N.Y. 1942) 43 F.Supp. 790; *City Bank Farmers Trust Co.* v. *Hoey* (2d Cir. 1939) 101 F.2d 9; same case (S.D.N.Y. 1938) 23 F.Supp. 831; and see also *Farwell* v. *Commissioner of Internal Revenue* (2d Cir. 1930) 38 F.2d 791.)

With the development of estate planning, applications similar to that presented here have come to the attention of the courts in other jurisdictions. *Bullock Estate, supra,* 10 Pa. D.&.C.2d 682 [44 Del.Co.Rep. 171], is a case where the court rejected an application by the incompetent's wife, who was also named as the sole beneficiary in his will, for payments to herself and their two daughters for the purpose of reducing the inheritance and estate taxes which would become due on the death of the ward. The court rejected the application, not only for lack of statutory authority, as noted above, but also on the following grounds: "Notwithstanding the unlikelihood of the mental recovery of the incompetent, and notwithstanding the unlikelihood that he will not in the future write a new Will, neither possibility may be entirely excluded. Furthermore, it is within the realm of possibility that one or both of the daughters, as well as the wife, may predecease the incompetent, which event would effect a change in the parties who would inherit the estate of the incompetent upon his death. In any event, incompetence is not the legal equivalent of death, and tax avoidance is not a sufficient legal ground for the intestate distribution of any part of an incompetent's estate

while he is putatively testate and actually alive." (10 Pa. D.&C.2d at p. 685, 44 Del.Co.Rep. at p. 173.)

In re Carson (1962) 39 Misc.2d 544 [241 N.Y.S.2d 288], involved a motion by the executors of the deceased incompetent's estate to set aside an order, obtained six days prior to her death, which authorized a gift of a portion of the incompetent's estate to her son and daughter who constituted the next of kin, the only known relatives and the principal legatees under the incompetent's last will and testament. The authorization for the transfer concededly was sought for "advantages to be realized by the estate in the form of savings both as to anticipated taxes and administration expenses in the event that death ensued within a short time." It was further demonstrated that there was ample estate remaining to provide for the ward in the event her death did not follow as quickly as had been predicted by her doctors.

The court set aside the gift to the daughter on the guardian's cross-motion to amend because, under the terms of the will, she was not to receive her share of the incompetent's estate until she attained a certain age. In upholding the gift to the son the court stated: "Such conclusion is fortified not alone by the savings which can be effected but by the further consideration that to do otherwise would result in a loss to the two principal objects of the decedent's bounty and a gain only to the executors in the form of increased commissions and the respective federal and state governments in the form of increased taxes.

"To say this incompetent, if sane, would not have given the same direction this court gave would completely overlook the underlying motive for the very instrument which gave life to these executors.

"To do otherwise wuld lead to a result increasing estate costs to a point hardly consistent with our modern concept of estate planning for tax and other legitimate estate benefits.

"To argue that the executors' motion should be granted because the cases submitted by the committee involved 'gifts' made 'to persons in need and to whom the incompetent, if competent, would have felt a moral or legal obligation to assist in their time of need' overlooks the important fact that even in those cases the court's authority to make the directions given is derived from the general equitable power of this court and its function of guardianship of incompetents.

"It seems irreconcilable that a principle which can sustain a 'gift' to persons to whom the incompetent had only a moral

obligation lacks the vitality necessary to sustain the directions given for the benefit of children of the incompetent and the incompetent's estate.

"To confine the power within the narrow limits suggested would establish a frontier of legal thinking which would stifle and restrict the ingenuity of the bar to expand to new frontiers within the purview of the broad equitable principles involved.

"The fact that the principle is invoked in this and other areas as suggested in the memorandum of law submitted with the original application defeats the argument for its limited application.

"Counsel for the committee, it seems, should be complimented for his ingenuity in utilizing the broad equity powers of this court to blend with current and new situations created by our ever increasing tax structure to the further benefit of the incompetent's estate." (39 Misc.2d pp. 546-547, 241 N.Y.S.2d at pp. 290-291.)

In re duPont, supra, 41 Del.Ch. 300 [194 A.2d 309][10] reviews the English and American cases, distinguishes and limits *In re Schwartz, supra,* 27 Del.Ch. 223 [34 A.2d 275], and concludes that the Delaware chancery court "is empowered to invoke the so-called substitution of judgment doctrine" to grant authorization to the guardian to make gifts of the incompetent's assets to his children and grandchildren by way of an *inter vivos* trust. The facts on which the application was granted are summarized by the court as follows: "The guardians assert that the distribution sought to be made here, if carried into effect during the ward's life, will result in a tax saving of at least sixteen million dollars and will ultimately enlarge by that amount the dollar size of the ward's estate passing to the beneficiaries designated in his will. The proposed scheme of distribution in substance duplicates the ward's testamentary plan, the purpose being to follow as nearly as possible what the ward would presumably have done had he been capable of managing his own affairs. The guardians have offered substantial and convincing proof that the ward in fact intended to make such distributions prior to his incompetency. Furthermore, the property remaining in the guardians' hands after the proposed distribution

[10]See the following comments: Note (1964) 52 Cal.L.Rev. 192; Note (1964) 24 Md.L.Rev. 332; Note (1964) 62 Mich.L.Rev. 1471; Comment (1964) 112 U. Pa.L.Rev. 1083.

was shown to be more than sufficient to administer the balance of his estate and to maintain him in the manner in which he was accustomed to live." (41 Del.Ch. at p. 315, 194 A.2d at p. 317.)

In re Trusteeship of Kenan (1964) 262 N.C. 627 [138 S.E. 2d 547], and same case (1964) 261 N.C. 1 [134 S.E.2d 85, 99 A.L.R.2d 934][11] were cases involving applications, pursuant to North Carolina statutes, for authorization to make charitable gifts (1) from current income, (2) from corpus, and (3) by surrendering the right to revoke an *inter vivos* trust which the incompetent had created, and donating the life estate she had reserved in that trust. In the first appeal, in an opinion in which four of seven justices joined, the court summarized the tax considerations as follows: "The amounts proposed to be given from the current income would largely be offset by a reduction in income taxes. The net cost would still leave Mrs. Kenan with ample income for her own needs. She has no financial (legal) obligation which would be adversely affected. The gift from the principal and the taxes to be paid from the principal for the privilege of surrendering the life income from the trust estate, while large when considered as individual items, are relatively small in relation to the total of Mrs. Kenan's estate. If the gifts are authorized, there will be a substantial saving in estate taxes." (261 N.C. at p. 9, 134 S.E.2d at p. 91.) The court examined the English and American authorities in support of its conclusion: "A court may authorize a fiduciary to make a gift of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, at a hearing of which interested parties have notice, that the lunatic, if then of sound mind, would make the gift." (261 N.C. at p. 9, 134 S.E.2d at p. 91.) The opinion appears to suggest that, unless this test was satisfied, and presumably the court incorporated it into the interpretation of the statute, there would be an unconstitutional taking of property without due process of law. (261 N.C. at pp. 7-8, 134 S.E.2d at pp. 90-91.) The court concluded that the requirement it established had not been met. The opinion recites: "The language in which the court phrases its findings of facts and its legal conclusions is, we think, significant. They amount only to this: The cost to Mrs. Kenan of making the gifts is, when considered with the size of her income and the

[11]See the following comments: Note (1964) 9 Utah L.Rev. 464; Note (1965) 78 Harv.L.Rev. 1483; Note (1965) 43 N.C. L.Rev. 616; Note (1964) 9 Vill. L.Rev. 522; Comment (1965) 11 Vill. L.Rev. 150; and Comment (1965) 67 W.Va. L.Rev. 320.

principal of her estate, insignificant; and the trustee, not Mrs. Kenan or the court, has concluded that it is wise *and consistent with the desires of Sarah Graham Kenan, if she were competent*. The legal conclusion that it is reasonable to assume that Mrs. Kenan, if competent, 'and heeding sound advice,' would make the gifts is not supported by the findings of fact. If it be said that although stated as a conclusion of law this is in reality a finding of fact, we find no evidence to support such a finding." (261 N.C. at p. 9, 134 S.E.2d at p. 94.)

On the second appeal, after further hearing on amended petitions as suggested in the first decision, the writer of the original opinion and four associates, including the three who dissented on the original appeal, joined in approving the authorization. The opinion adheres to the rule established on the first appeal, rejects the contention that any attempt to ascertain the intent of the incompetent is by its nature speculative, asserts that lack of benefit to the incompetent herself is no bar so long as there is no prejudice to her, and finds that the evidence on the second hearing was sufficient to sustain findings that she would make the gifts and take the action which had been proposed. From special findings it appears this evidence consisted of a showing that she formerly had been advised while sane, and would have been advised by her advisors and relatives, to follow this program and would have followed that advice.

In re Guardianship of Estate of Neal, supra (Tex.Civ. App.) 406 S.W.2d 496, is a case in which the petitioners sought authorization for a transfer to those who were her heirs, in trust, in the same manner as the incompetent had provided in her will for the disposition of the residue of her estate. The trial court found as a fact "that considering all the facts and circumstances, a prudent man owning and managing the Ward's estate would make the proposed gift," but denied the application for lack of express or implied authority "for a Guardian to make a gift of the Ward's property for the primary purpose of minimizing estate taxes." The appellate court rejected the contention that the proposed gift was authorized by a general statute which provided in part: "It is the duty of the guardian of the estate to take care of and manage such estate as a prudent man would manage his own property." It held that other statutory provisions which expressly provided for charitable contributions out of income under certain conditions, and which provided for the support of his family, "when necessary" limited the powers of the

court, and precluded application of the doctrine of substitution of judgment as applied in *duPont, Carson* and *Kenan.*

Before evaluating the various arguments for and against authorizing transfers of an incompetent's property for the purpose of tax avoidance, it is important to determine the basis on which the court, in the exercise of its equitable powers, shall determine what the ward would himself have done, if sane. The first *Kenan* case, *supra,* suggests that it would be unconstitutional to apply an objective test, that is, to determine what a reasonably prudent person would do, and then to authorize action accordingly. It required what has been termed a "subjective standard" or a determination of what the incompetent would do from evidence of his prior conduct or practice. In the second *Kenan* case the application of this doctrine appears to be strained, in that the desired conclusion was obtained with evidence, not of a pattern of gifts or of methodical estate planning while sane, but in spite of the absence of those factors, on testimony that she had taken and would, if sane, take the advice of the witnesses who would recommend the program. In *duPont* there was clear evidence of the incompetent's prior intent to make *inter vivos* gifts of his property to avoid excessive estate and inheritance taxes.

The continuing pattern theory furnishes a convenient category into which to place the cases where authority has been granted to continue gifts to charities or to individuals to whom the incompetent owed no duty of support. It is generally criticized.[12] It can never be applied in the case of a congenital incompetent. If there is a gradual onset of insanity or senility it is difficult to determine what pattern represented the incompetent's sane intent. In the very nature of things time creates changes in the needs of friends and relatives or in affluence of the incompetent or in other circumstances which could not be foreseen in the sane period of the incompetent's life. No precedent based on the experience of the incompetent may exist, yet common human experience may offer a ready answer to the selection of a course that would be followed by a reasonable man.

In this case, and presumably in many others where there is a long period of incompetency, there is no evidence of any past conduct or practice which throws light one way or an,

[12]See Note, *supra,* 11 Vill. L.Rev. 150, 155; Note, *supra,* 78 Harv. L.Rev. 1483, 1485; Note, *supra,* 9 Utah L.Rev. 464, 467-468; Comment, *supra,* 17 Cal.L.Rev. 175, 183; Note, *supra,* 14 Cornell L.Q. 89, 90.

other on what the action of the particular incompetent would be. In the absence of such evidence would it, as suggested in the first *Kenan* case, be unconstitutional to authorize a transfer of the incompetent's property for the purpose of effecting savings in taxes and administrative costs? It is generally concluded that those cases which interpret *Ex parte Whitbread* (1816) 2 Meriv. 99, 35 Eng.Reprint 878, as requiring evidence of past conduct or practice have given the principle enunciated too narrow a construction.[13] Lord Eldon referred to "that which it is probable the lunatic himself would have done" (2 Meriv. at p. 103, 35 Eng.Reprint at p. 879) as noted and relied upon in the first *Kenan* case (261 N.C. at pp. 9-10, 134 S.E.2d at p. 92) and quoted in this state in *Guardianship of Hudelson* (18 Cal.2d at p. 404). He also stated: "The court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, *applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it,* in case he had been capable." (2 Meriv. at pp. 102-103, 35 Eng.Reprint at p. 879; italics added.)

The gift or transfer of principal is the most obvious example of a transfer of property in derogation of the enjoyment of the property by the ward if he recovers, or, on the ward's death, of the expectancy of an heir, legatee or devisee if he was not the recipient. The same may be said, however, for surplus income which, if not transferred, would otherwise accumulate for benefit of ward, or those who would take on his death. It is perhaps significant that in the numerous cases which have countenanced the latter transfers, there is little or no mention of the constitutional point.[14]

Section 1558 of the Probate Code (fn. 4, *supra*) relies upon "the judgment of the court" to determine "the next of kin

[13]See Notes and Comment, Note 12 and Note, *supra*, 9 Vill. L.Rev. 522, 524-525; In Thompson & Hale, *The Surplus Income of a Lunatic* (1895) 8 Harv.L.Rev. 472 at p. 473, the authors suggest the true rule to be: "Where there is no evidence of any settled intention of the lunatic before his insanity in regard to the matter, or of any intention formed during his rational moments, the court will presume that were the lunatic sane he would act in the matter as any reasonable and ordinarily generous man would act under the same circumstances."

[14]*In re Guardianship of Brice* (1943) 233 Iowa 183 [8 N.W.2d 576], is a case where the constitutional point was raised and denied consideration because it was not presented in the lower court (*id.*, at p. 186, 8 N.W. 2d at p. 578.)

whom the ward would, . . . have aided, if said ward had been of sound mind" and "the amount which the ward would, . . . have allowed said next of kin, had said ward been of sound mind." If the *Kenan* suggestion is correct, this section, contrary to its obvious intent, would have to be narrowly limited to cases where there was proof of prior practice or conduct, or founder on the shoals of unconstitutionality.

Finally, it should be noted that there are other aspects of the administration of the estates of incompetents where following the guide line of an administration which is reasonable and prudent may impinge upon the expectations of the ward, in the event of recovery, or of those who will succeed to his estate on his death. A question may arise as to whether the guardian of the incompetent should intervene to assert the ward's interest against the will of a spouse. (Cf. *In re Brindle's Estate* (1948) 360 Pa. 53 [60 A.2d 1], with *In re Harris* (1945) 351 Pa. 368 [41 A.2d 715]; and *In re Rieley's Estate* (Prob. Ct. Ohio 1963) 194 N.E.2d 918, with *Ambrose* v. *Rugg* (1931) 123 Ohio St. 433 [175 N.E. 691, 74 A.L.R. 449].) In *Harris* and *Rieley*, where the courts decided against intervention because, in each case, the ward was already provided for adequately, tax burdens were mentioned as a factor. In *Rieley*, the court said: "In the opinion of the Court, what is best for [the ward] is to carry out the plan made by himself and his wife as to the disposition of her property and not make an election for him which would violate what any person of common sense and sound mind and judgment would do under the same circumstances [to avoid "being subjected to double taxation"]." (194 N.E.2d at p. 921.)

Other examples are noted by Fratcher, *Powers and Duties of Guardians of Property* (1960) 45 Iowa L.Rev. 264 at pp. 317-320. If subjective intent were the sole consideration in managing the estate, the ward, who upon recovery could show that his guardian knew of his affinity for speculative investments, would have cause for complaint if circumstances had greatly enhanced the value of such investments held by him at the time of his incompetency, but which had been sold by the guardian for reinvestment of the proceeds in more prudent but less volatile enterprises.

Whether termed a liberal subjective rule or an objective rule tempered and supplemented by evidence of the incompetent's former practices and conduct, the commentators are practically all in agreement that, as suggested 70 years ago (see fn. 13, *supra*), the guardian should be authorized to act

as a reasonable and prudent man would act under the same circumstances, unless there is evidence of any settled intention of the incompetent, formed while sane, to the contrary.[15]

The ghost of constitutional violation is exorcised by established precedents, and by the existence of general equitable powers of the court to do what is best for the ward's interest. The narrow view set forth in *Hilton* v. *Odell-Arney* (1954) 72 Wyo. 389 [265 P.2d 747, 43 A.L.R.2d 1429] is rejected. There the court stated: "In the American Law of Guardianship, by Woerner, at page 454, the author says:

"'. . . Hence, it is held, both in England and America, that the guardian of a person of unsound mind should, in the management of his estate, attend solely and entirely to the interests of the owner, without looking to the interest of those who, upon his death, may have eventual rights of succession . . . .'

"So also is it true that in the management of a ward's estate the comfort or benefit to relatives during the life of the ward should be given no more consideration than is given to their interest in eventual succession to the estate upon the ward's death, unless such comfort or benefit is identified or interwoven with the welfare and interest of the ward." (72 Wyo. 389 at p. 408 [165 P.2d at p. 754, 43 A.L.R.2d at p. 947].

To refuse to permit the management of the incompetent's estate in the manner that a reasonable and prudent man would manage his estate may, in many cases, lead to the improbable conclusion that it was the intent of the incompetent to enrich the taxing authorities rather than the natural or declared objects of his bounty.

The problem is not one of absolutes, but one of weighing many factors, hereinafter pointed out, in order to determine the proper course for the particular incompetent's estate. So long as the action authorized serves the basic aims which can be attributed to the incompetent, neither he nor others should be in a position to subsequently complain.

Over fifty years ago in an article in support of the principle that there was adequate authority to apply lunatics' estates for the benefit of dependent relatives, the commentator said: "It is respectfully suggested that the courts do not need any statutory authority in the administration of lunatics' estates in this respect. Courts of chancery have existed as separate institutions since the reign of Edward III, and their evolution

[15]See commentaries fns. 12 and 13, *supra*.

is one of the most interesting features of legal history. They have been the main channels through which advancing ethical conceptions have flowed into our legal system. The body of the law which has been developed through the judicial determination of actual controversies is vastly superior in quality to the body of law made by legislatures, and particularly is this true in regard to matters of equitable jurisdiction. A court of equity has the power, without the aid of statute, to devote itself to the continuous transmutation of the fundamental principles of right, justice and mercy into rules of law whereby the legal system under which we live responds to all the requirements of our complex social organization." (Carrington, *The Application of Lunatics' Estates for the Benefit of Dependent Relatives* (1914) 2 Va.L.Rev. 204, 211.) The same thought is echoed more recently, as quoted above from *In re Carson* (39 Misc.2d p. 547, 241 N.Y.S.2d at p. 291) in its application to the problems of estate and inheritance taxes which may be levied upon incompetents' estates in the absence of proper estate planning. (See also, Fratcher, *op. cit.*, 45 Iowa L.Rev. 264 at p. 335, and comments fns. 10 and 11.)

[7] It is concluded that the courts of this state, 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.

Criteria for Authorization

(a) Permanency of condition: It is generally stated that the proof must show that the insanity is incurable before the court can authorize a gift or transfer. Such was the fact in each of the cases in which the issue of tax avoidance was raised. The evidence appears to establish this factor in the instant case, and it is unnecessary to determine whether it would be an indispensable condition in every case. The question of whether gifts can be made in accord with the natural or intended devolution of the incompetent's property, discussed *infra*, is dependent on the absence of the initiation of a new plan by a recovered incompetent. It may be noted that there is no such requirement for a transfer of surplus income under the provisions of section 1558 of the Probate Code (see

fn. 4). The necessity for permanency of condition may also vary in inverse proportion to the sufficiency of the evidence of the practice or custom of the incompetent, i.e., keeping up an established weekly contribution to a church or a planned series of gifts for tax avoidance. (See Comment, *supra*, 17 Cal.L.Rev. 175 at p. 177, fn. 11.)

[8] (b) Needs of the ward: The payment of the ward's debts and the satisfaction of the obligations for the support of the ward and those who, as members of his family, are entitled to support from his estate, in an amount not disproportionate to the value of his estate and his station in life, are paramount. (See Prob. Code, §§ 1501 and 1502.) No thought can be given to transfers for any purpose until these obligations are met. Where, as was shown in this case, there is surplus income, and principal in excess of that necessary to produce the income required for the ward's maximum forseeable needs, considerations must also be given to a margin of safety for economic fluctuation.

A Texas statute which permits charitable contributions by the guardian requires that the ward have a net income of $25,000 before a gift can be made. (V.A.T.S., Prob. Code, § 398 as referred to in *In re Guardianship of Estate of Neal, supra*, 406 S.W.2d 496, 501.) The North Carolina enabling acts which were considered in *Kenan* (134 S.E.2d at p. 85) require that the income remaining after the proposed gifts be in excess of twice the sum expended for maintenance during the preceding five years. (North Carolina P.L. 1963, chs. 111-113; G.S. §§ 35-2, 35-29.1 to 35-29.16.) The foregoing statutes deal with the power to authorize general charitable gifts, irrespective of the ward's prior practice, and are apparently designed to prevent uneconomic accumulation of income and to promote the disbursement for charity of sums which otherwise would go for taxes.

Section 1558 provides no requirement of accumulating a contingency fund from any of the income remaining after provision for the proper support and maintenance of the ward.

Here again it is difficult to lay down absolute standards. The shorter the life expectancy of the ward, the less need there may be to provide for contingencies. Nevertheless, consideration must be given to the possibility both of increased expense and of reduced earnings on the invested principal.

The evidence here permits findings that there is little margin of safety in the amount by which the income exceeded the

possible maximum. Under these circumstances the court's discretion, if exercised, in refusing to disturb the principal, and in limiting any transfers to surplus income, would not be disturbed. On the other hand, the record reflects that the income was 180 percent of the actual expense. Events which have occurred since the hearing (see fn. 1) may enable more definite computation of the former figure.

It is urged that since the precedents presented in favor of authorization of transfers for estate planning involve estates in which not only the principal, but also the income, is measured in millions of dollars, that the showing herein is unworthy of any consideration. This is a demonstrably false approach. If the principal of estate planning for incompetents is proper for the duPonts and the Kenans it is proper for the smallest estate which finds itself in circumstances where it is prudent to do so. In fact, the tax savings by use of the gift tax exclusions alone, may be relatively more important to the donor and to the recipient of the gift than a vastly greater sum to one whose wealth and income exceeds what he can possibly need or spend.

It has been asserted (see Comment, *supra,* 11 Vill. L.Rev. 150 at p. 156) that establishment of this authorization will lead to looting of the estates of incompetents under the guise of tax saving. Such a contention uncharitably and erroneously assumes that the courts will not properly exercise discretion to protect the paramount interest of the ward. There is no more reason to fear the application of this principle than there is to fear that conferring discretion on a trustee to use principal for the life tenant, when needed, will lead to looting of a trust.

[9] (c) Devolution of the property: Since on recovery the incompetent would be free to make or change his will, no transfers should be authorized for tax saving purposes alone unless there is no probability of this eventuality.

This case demonstrates that the heirs (or the devisees or legatees who will take if there is a will) cannot be determined until the incompetent's death. The surplus income awarded to son Robert, now deceased, if accumulated and held, would have gone to such of his children as survived the incompetent. If the gifts prayed for had been made, various shares of the incompetent's estate would have gone to the three branches of the family in different proportions than they would take in the event of the incompetent's death intestate.

Where there is a will, the incompetent has furnished evi-

dence of the objects of his bounty, and the manner in which he wishes them to share in his estate. The gift program preempts the natural course of events, but it is sometimes possible to gain the same results by a transfer in trust as in *duPont*. Where the testator's wish demonstrates that a legacy is to be delayed, it may be given effect by denial of the gift, as in the case of that to the daughter in *Carson*.

In the instant case the discrepancies between gift and inheritance need not necessarily be fatal if all other circumstances were present. In the exercise of its discretion the court could accept or reject the proposition that the members of the first generation were not only the natural, but the actual, objects of the incompetent's bounty. If the latter, they should be able to waive their rights to equal shares of any amount properly available for distribution to them, and consent to its distribution to the second generation in any shares they desired. No one of the latter, as the recipient of not only the bounty of his grandmother, but also of the waivers of heirs apparent, could be heard to complain over a discrepancy between what he received as a gift and what he otherwise might have inherited. Furthermore, it is not unreasonable that a grandmother, financially able to do so, would make gifts to her grandchildren as well as her children. On the other hand, in the absence of such consent, or intent, it would appear that the gifts would have to go to the branches of the family in the shares in which they would inherit.

(d) Donative intent: Even in the absence of a showing of former practice or conduct, there must be, as there is evidence of here, some showing of the relationship and intimacy of the prospective donees with the incompetent in order to show that they would be objects of the incompetent's bounty by any objective test. Here again the matter is relative, and dependent on reasonable standards. It is not likely that an incompetent would provide for a divorced daughter-in-law whom he never knew, and the fact that his total net estate on his death would be enhanced by a gift to her is of no consequence. On the other hand, it may be inferred that he would, if sane, have reasonable concern in her son as his grandson. A gift to him would be proper. (See *In re Schley* (1951) 201 Misc. 522 [107 N.Y.S.2d 884], affd. (1952) without opinion 279 App. Div. 1084 [113 N.Y.S.2d 448].)

There was sufficient evidence here to permit exercise of discretion to find that those proposed to be benefited would be objects of the incompetent's bounty if she were sane.

The sum and substance of weighing these factors is to determine whether the incompetent as a reasonably prudent aged lady would make the gifts proposed so as to pass a greater share of her estate to her descendents. There is sufficient evidence to support, without requiring, the exercise of the lower court's discretion to find that the children and grandchildren would be the natural objects of her bounty, that she would deem it to her advantage to make the gifts to effect the proposed tax savings if she could afford to do so without prejudice to her own welfare, and that she would have no hesitancy because there might be some difference between the shares given and the shares that would be received had the same amount of property passed by intestacy.

The evidence that of the $9,000 income, possibly $8,000 might be needed for her support, would indicate that it would be prudent to retain the capital which produces the $9,000 and not impair it. On the other hand, if the income were almost double the foreseeable needs of the incompetent it cannot be said as a matter of law that it would be an abuse of discretion to make any gift from principal, no matter how small.

In view of the nature of the order of the lower court, the absence of findings of fact on the essential issues and the concededly changed condition of the incompetent, the matter should be returned to the trial court, with leave to appellant to file an amended petition if so advised, and for further hearing and decision on the merits.

The order is reversed and the case is remanded, with leave to appellant to file an amended petition, and for further hearing and decision on the merits. Let costs on appeal be taxed to respondent's estate.

Molinari, P. J., concurred.

EXHIBIT 2

SUBSTITUTION OF JUDGMENT DOCTRINE AND MAKING OF GIFTS FROM AN INCOMPETENT'S ESTATE

A destitute spinster named Jayne
Had a brother, quite rich though insane.
On petition, the court
Decreed her support
Be paid from her sibling's demesne.
Anon.

I. Introduction

To be declared judicially incompetent usually involves a complex and expensive procedure, and thus a significant number of legally declared incompetents have substantial means. In many instances the high cost of care is more than met by the income of the incompetent's estate, and the balance of such income, as well as capital appreciation, is merely accumulated, to be subjected to income taxes immediately and later to estate taxes. Just as a competent person of means will often engage in estate planning and make inter vivos gifts, particularly to reduce taxes, committees, guardians and conservators have often attempted to provide their wards with like services.

In addition, there are many situations where persons to whom an incompetent may well have made gifts or for whom he would in all probability have provided support from his excess funds are not adequately provided for. In some cases the potential donees are charities for whom the ward had shown an inclination to provide funds, and which could benefit from tax free gifts of some of the incompetent's funds that would otherwise have been siphoned away by income taxes. Yet the incompetent, by definition, is unable to handle his assets in any reasonable manner and thus cannot make valid gifts.

II. Judicial Power

The Fifth Amendment to the Constitution would presumably prohibit a court from summarily making gifts of an incompetent's property. However, courts which supervise the conduct of committees and guardians of incompetents have the power to do for the welfare of the ward that which the ward could do for himself if he were competent.[1]

In numerous jurisdictions it has long been recognized that a court of equity, in an appropriate case and in the exercise of its sound discretion, may permit or direct the person in whose care an incompetent has been placed to use part of the incompetent's estate for the benefit of persons other than the incompetent. Such persons need not be dependent upon the incompetent, and the incompetent is not required to have the legal obligation to support such donees; in fact, such donees have frequently been charities. The rationale behind such decisions is that the court is merely substituting

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*Report of Committee on Legal Services for the Elderly and Their Estates.

[1]*See, e.g.*, Strange v. Powers, 260 N.E.2d 704 (Mass. 1970).

its judgment for that of the ward, the latter being incompetent to exercise any judgment, and thus doing what the ward would have done had he been able to do so. These equitable principles have come to be known as the Substitution of Judgment Doctrine.

Although many states have statutes authorizing the courts to apply the Substitution of Judgment Doctrine, it appears that courts of equity are already possessed of such power under the common law.

> . . . the courts do not need any statutory authority in the administration of lunatics' estates in this respect. A court of equity has the power, without the aid of statute, to devote itself to the continuous transmutation of the fundamental principles of right, justice and mercy into rules of law whereby the legal system under which we live responds to all the requirements of our complex social organization.[2]

In the early days of the application of the Substitution of Judgment Doctrine by American courts the use of the incompetent's funds was usually limited to excess income.

> . . . In emphasizing one proposition all the authorities are agreed . . . that before any portion of his income can be devoted to other purposes, the ward himself must be provided with every comfort that he requires or to which he has become accustomed. There must be no economizing for the purpose of making an allowance to needy relatives, or in order to save something for the next of kin. But when the ward has been liberally provided for, if there is still a surplus of income, allowances may, under certain circumstances, be made to the lunatic's relatives and to certain other persons.[3]

More recent cases have also permitted the invasion of the principal of an incompetent's estate in selected instances. Nevertheless, it is not for the court merely to dispense the incompetent's funds unless the judge finds that the incompetent himself might well have made like expenditures.

> Before an allowance may be granted from an incompetent's estate to one to whom the incompetent owes no duty of support, it must be established that the incompetent, if sane, would make the allowance. The proof required is that the incompetent should have known the applicant, and should have indicated while sane, by acts or words, that he or she had such an intention to support the applicant; or that such facts and circumstances be made to appear as would show beyond a reasonable doubt that the incompetent, if sane, would assume such a burden. The courts are required to scrutinize the evidence submitted upon such an application with caution, recognizing that such applications should be narrowed and discouraged rather than extended or encouraged. There must exist a real need or a necessity upon the part of the applicant to be provided for, the court being mindful that it does nothing wantonly or unnecessarily; and, finally, it is not the duty of the court to deal benevolently or charitably with the property of the incompetent.[4]

In England, since the reign of Edward I (1272-1307) the lands and tenements of a lunatic have been under the control of the King, who was to

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[2]Carrington, *The Application of Lunatics' Estates for the Benefit of Dependent Relatives*, 2 VA. L. REV. 204 (1914).
[3]Thompson and Hale, *The Surplus Income of a Lunatic*, 8 HARV. L. REV. 472 (1895).
[4]*In re* Kernochan, 84 Misc. 565, 146 N.Y. Supp. 1026 (Sup. Ct. 1914).

"find them their Necessaries".[5] The King delegated his power to the Lord Chancellor, but the statute permitted the use of only the profits (income) while expressly forbidding the alienation of the corpus of the ward's estate.

In *Ex parte Whitbread*,[6] the court applied the Substitution of Judgment Doctrine and held that it had the power to make an allowance to the relatives of the incompetent out of his estate and to determine the extent and allocation of such allowance in the court's discretion. Lord Chancellor Eldon held:

> . . . the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of his next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons . . . . So also, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him . . . but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die tomorrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the lunatic.
>
> The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the meantime in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.

Following the holding in *Ex parte Whitbread* subsequent English cases have applied the Substitution of Judgment Doctrine, as have the courts of numerous American jurisdictions. Within limitations, the courts have applied the doctrine in favor of an incompetent's adopted children,[7] parents,[8] siblings,[9] nieces and nephews,[10] cousins,[11] a servant,[12] a woman with whom

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[5] *See* Statute *De Praerogativa Regis*, 17 Edw. I; Stat. I, Chs. 9 & 10, ALEXANDER'S BRITISH STATUTES 219-20.

[6] 2 Merivale 99, 35 Eng. Rep. 878 (1816).

[7] *In re* Heeney, 2 Barb. Ch. 326 (N.Y. 1847).

[8] State *ex rel.* Kemp v. Arnold, 234 Mo. App. 154, 113 S.W.2d 143 (1938); O'Connor's Estate, 6 Pa. D. & C. 789 (1925); Seley v. Howell, 115 Tex. 583, 285 S.W. 815 (Tex. Ct. Com. App. 1926); *Ex parte* Phillips, 130 Miss. 682, 94 So. 840 (1922). *Contra*, Lewis v. Moody, 149 Tenn. 687, 261 S.W. 673 (1923).

[9] City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594 (1945); *In re* Calasantra, 154 Misc. 493, 278 N.Y.S. 263 (Co. Ct. 1935); *In re* Battin, 171 Misc. 145, 11 N.Y.S.2d 891 (Sup. Ct. 1939); Patrick v. Branch Bkg. & Tr. Co., 216 N.C. 525, 5 S.E.2d 724 (1939).

[10] *Ex parte* Whitbread, 2 Merivale 99, 35 Eng. Rep. 878 (1816); *In re* Fleming, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940); *In re* Brice, 233 Iowa 1[illegible], 8 N.W.2d 576 (1943); *In re* Greagh, 1 Drury & Wal 323 (Ireland 1888). *Contra*, *In re* Johnson, 111 N.J. Eq. 268, 162 A. 96 (1932); *In re* Kernochan, 84 Misc. 565, 146 N.Y.S. 1026 (Sup. Ct. 1914); Lewis v. Moody, 149 Tenn. 687, 261 S.W. 673 (1923).

[11] *In re* Croft, 32 L.J. Ch. N.S. 481 (1862); *In re* Darling, 39 Ch. Div. 213 (1888); *In re* Flagler, 248 N.Y. 415, 162 N.E. 471 (1928). *Contra*, *In re* Evans, L.P. 21 Ch. Div. 297 (1882).

[12] *In re* Earl of Carysfort, Craig & Ph. 76, 41 Eng. Rep. 418 (1840).

the incompetent had formerly cohabited[13] and charities to whom the ward had shown a definite interest in providing financial support.[14] The gift and estate tax consequences of such applications were discussed in the leading cases of *City Bank Farmers Trust Co. v. McGowan*[15] and *City Bank Farmers Trust Co. v. Hoey*.[16]

With the advent of the modern tax structure, the courts have applied the doctrine for the purpose of saving taxes. The trail was blazed in theory in New York in *In re Carson*,[17] and further progress was made in Delaware in *In re duPont*[18] and in California in *In re Christiansen*.[19] However, Texas has held to the contrary in *In re Guardianship of Neal*.[20] Pennsylvania, which had held *contra* in *Bullock's Estate*,[21] reversed its position and permitted inter vivos gifts so as to reduce death taxes in *Groff Estate*.[22]

The incompetent's testamentary scheme is often a prime consideration, as are other relevant facts and circumstances. Judicial recognition of the doctrine does not mean that a request for its application would be routinely approved.[23]

III. State-by-State Review

This committee has examined the applicable law in 32 American jurisdictions and presents its findings herewith with the observation that the doctrine undoubtedly exists by statute or case law in some of the remaining states.

Alabama

The Substitution of Judgment Doctrine has not been adopted in this state. The closest thing to it is the making of charitable gifts on behalf of an incompetent from a trust of which the incompetent is the income beneficiary. Such gifts have been made by a corporate trustee with the written consent of the remaindermen and without court approval.

Alaska

There is no statutory provision dealing with the Substitution of Judgment Doctrine, but the potentially relevant provisions, section 20.05.18 et seq., do not prohibit the gifts which could result from the application of the doctrine. There appears to be no case in point.

California

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[13] *In re* Parry, 7 L.T. 77 (1846).

[14] Citizens State Bank v. Shanklin, 174 Mo. App. 639, 161 S.W. 341 (1913); *In re* Heeney, 2 Barb. Ch. 326 (N.Y. 1847); *In re* Brice, 235 Iowa 185, 8 N.W.2d 576 (1943); *In re* Strickland, L.R. 6 Ch. 226 (1871). *Contra, In re* Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

[15] 323 U.S. 594 (1945).

[16] 23 F.Supp. 831 (S.D. N.Y. 1938), *aff'd.* 101 F.2d 9 (2d Cir. 1939).

[17] 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962).

[18] 41 Del. Ch. 300, 194 A.2d 309 (1963).

[19] 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (1967).

[20] 406 S.W.2d 496 (Tex. Ct. Civ. App. 1966).

[21] 10 D. & C. 2d 682, 7 Fid. Rep. 266 (Orphans' Ct. 1957).

[22] 38 D. & C. 2d 556, 16 Fid. Rep. 1 (Orphans' Ct. 1965).

[23] Walkow, *Estate Planning for the Handicapped*, 111 Trusts & Estates 284 (1972).

The doctrine has been adopted by statute.[24] Probate Code §1558 provides:

> On the application of the guardian or next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward . . . to the next of kin whom the ward would, in the judgment of the court, have aided, if said ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court, but the court shall give consideration to the amount of surplus income available after due provision has been made for the proper support and maintenance of the ward, to the circumstances and conditions of life to which the ward and said next of kin have become accustomed and to the amount which the ward would, in the judgment of the court, have allowed said next of kin, had said ward been of sound mind . . . .

The leading case in California, and also of major importance elsewhere, is *Estate of Christiansen*,[25] which allowed the making of gifts from the estate of an incompetent under the general equitable powers of the court in the exercise of its jurisdiction over incompetents. There is no California Supreme Court decision on point.[26] Since *Christiansen*, the doctrine has been generally applied in California.[27]

Christiansen discusses the permissible donees, stating that "there must be...some showing of the relationship and intimacy of the prospective donees with the incompetent in order to show that they would be the objects of the incompetent's bounty by any objective test."[28] The ward must be shown to be incurable for the court to authorize a gift or transfer.[29] No history of past gifts was required "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."[30] *Christiansen*, which authorized a gift from principal, extended the prior California application of the doctrine, which had been limited to surplus income as provided by Probate Code §1558.

The size and frequency of gifts depend largely upon the size of the estate and the prospective needs of the ward. As to both potential donees and the manner of making gifts (*e.g.*, in trust) the provisions of the ward's will are considered.

Investigation has revealed at least two cases of the application of the doctrine in San Diego County, and it is reported that perhaps as many as 100 gifts have been allowed by the Probate Commissioners in San Francisco since *Christiansen*. A bill to expand by statute the authority of the courts in

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[24] *See also* §§1502, 1516, 1856.

[25] 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (1967).

[26] Earlier California cases dealing with the doctrine include Guardianship of Hudelson, 18 Cal. 2d 401, 115 P.2d 805 (1941); Guardianship of Hall, 31 Cal. 2d 157, 187 P.2d 396 (1947); Harris v. Harris, 57 Cal. 2d 367, 19 Cal. Rptr. 793, 369 P.2d 481 (1962).

[27] *See, e.g.*, Conservatorship of Wemyst, 20 Cal. App. 3d 877 (1971); WITKIN, SUMMARY OF CALIFORNIA LAW, Wills and Probate §335A, Guardian and Ward — Power to Make Gifts 1723-24 (1969); Note, *Guardianship: The Power of a Guardian to Make Gifts to His Ward's Property*, 18 HASTINGS L. J. 415 (1967).

[28] 248 Cal. App.2d 398 at 427.

[29] *Id.* 424.

[30] *Id.*

the application of the doctrine, with the backing of at least one county bar association, has been prepared for submission to the next session of the legislature.

Colorado

Since 1969 Colorado has had a restricted form of the Substitution of Judgment Doctrine by statute.[31] The conservator of the incompetent's estate is authorized to make gifts of specific property from the estate after such notice as the court may require and after the conservator has established and the court has found by a preponderance of the evidence that:

> (a) The mental incompetent may never be restored to reason, based on the testimony of at least two competent psychiatrists;
>
> (b) Any such gifts will not impair the estate's financial ability to provide for the foreseeable needs of the mental incompetent for care and maintenance;
>
> (c) The proposed donees of said gifts would be the natural objects of the mental incompetent's bounty;
>
> (d) The mental incompetent has no last will and testament; and
>
> (e) Those persons who would be heirs at law of said mental incompetent if said mental incompetent were deceased at the time of the filing of the petiton have consented to any such gifts.

The usefulness of the statute is limited by several features. It applies only to incompetents who are intestate, which requires proof of a negative, *i. e.*, the absence of a valid will. It limits the permissible class of donees to the "natural objects of the mental incompetent's bounty." Query: Is a natural object a natural person, thus eliminating charities which the incompetent may have supported in the past? The potential use is further limited by the requirement that putative heirs at law shall have consented to the proposed gifts, perhaps a reasonable requirement in many cases, but not in every one.

Prior to the adoption of the statute, lower courts had applied the doctrine on the basis of cases in other jurisdictions, thus making the doctrine available to all incompetents. It would appear that the adoption of the statute is a step backward.

Delaware

The Substitution of Judgment Doctrine has been recognized judicially in *In re duPont.*[32]

Florida

This state, which enjoys an above-average elderly population, has no statute dealing with the Substitution of Judgment Doctrine, nor has its highest court dealt with the doctrine. There have been some decisions of lower courts which have allowed gifts from the estate of an incompetent, both to individuals and to charities. As to the individuals, however, gifts have been permitted primarily when the individual was a relative who was dependent upon the ward prior to incompetency. Major criteria in deter-

[31] COLO. REV. STAT. 153-10-51 (1963).
[32] 41 Del. Ch. 300, 194 A.2d 309 (1963).

mining whether to authorize such gifts include the size of the incompetent's estate, the presence or absence of a pattern of past gifts, the physical and mental condition of the ward and the desire to do what the ward would have done had he been competent.

The doctrine is approached with caution, but where a ward had a substantial estate, it has been applied to effect tax savings in the case of a ward who followed a gift-giving pattern prior to his incompetency, it has been applied to continue such pattern so as to support a close relative.

Hawaii

There is no statutory authorization for the Substitution of Judgment Doctrine nor are there any cases in point.

Idaho

The statutory provision potentially dealing with gifts from the estate of an incompetent[33] has been repealed effective July 1, 1972, on which date the Uniform Probate Code[33a] adopted in Idaho takes effect. No cases have been found dealing with the Substitution of Judgment Doctrine.

Illinois

Although Illinois has no applicable statute, it has been the practice of the lower courts to permit gifts from incompetents' estates. This has been done to benefit relatives or descendants of the incompetent, with the prime motivating force often being the obtaining of tax advantages. Factors taken into account by the courts in determining whether to permit the conservator to make such gifts include the reasons for the gift, the size of the incompetent's estate, the financial requirements of the incompetent, the incompetent's age, physical and mental condition and recovery prognosis, and whether there was a pattern of past gifts.

Iowa

The Iowa statute provides that:

> For good cause shown and under order of court, a conservator may make gifts on behalf of the ward out of the assets under a conservatorship to persons or [charitable] organizations to whom or to which such gifts were regularly made prior to the commencement of the conservatorship. The making of gifts out of such assets must not foreseeably impair the ability to provide adequately for the best interests of the ward.[34]

Thus two standards are set forth in the enabling statute itself.

The leading Iowa case, *In re Brice*,[35] was decided prior to the adoption of the statute. The court in effect adopted the Substitution of Judgment Doctrine.

> Courts have wide powers in directing the management of an incompetent's estate and in a proper case may authorize an allowance to one to whom the ward owes no legal duty of support. In such matters the Court may direct

[33] IDAHO CODE §15-1821.
[34] IOWA CODE §633.668.
[35] 233 Iowa 183, 8 N.W.2d 576 (1943).
[33a] IDAHO CODE §15-5-408, 425. See discussion of Uniform Probate Code infra at 493.

that to be done which the incompetent, if sane have done. The power of the Court in such matters has its right to authorize donations by a guardian for charitabhich the incompetent had formerly been in the habit of mns.

There has been no reported case since the ie statute.[36]

Maine

In 1971, the legislature enacted Title 18, §39: the powers of trustees. This permits courts to authorize truifts of trust property if necessary in connection with the prition of the trust. Such a power is at best very limited and doior nontrust assets of an incompetent.

There appears to be no case law dealing witon of Judgment Doctrine.

Maryland

The leading case dealing with the Substitutnt Doctrine is *Kelly v. Scott*,[37] which held that equity courtsver to apply the doctrine absent statutory authority. The decitly followed by the enactment of Art. 16, §135A, which was he doctrine to some extent in *Scott v. First National Bank*.[38] In the statute was repealed, and was replaced by Art. 93A, §2nits the use of both principal and income but limits the uss to persons "who had been maintained and supported in w by the disabled person prior to the appointment of a guarless, section 215 provides that "the Court may confer on a g time of appointment or later, in addition to the powers cn by §§213 and 214, any other power." In view of the *Kelly*ver, and the lack of case law subsequent to the enactment oit is not yet clear in what manner the Substitution of Judgmill be recognized by the courts.

Massachusetts

Massachusetts adopted the Substitution of trine by statute in 1969. Ch. 201, §38 permits the probate plication of the conservator and on notice, to authorize him not required for his ward's maintenance and support towanment of an estate plan for the incompetent for the expr minimizing estate and income taxes. In addition, the courifts to such friends, relatives or charities as would be likely nations from the ward, including prospective legatees or heine statute includes a rebuttable presumption that the warrtax-reducing gifts, and thus avoids the need for showing a f making or inclination toward making gifts. Applications foy be made at least annually.

[36]Query whether §663.641, which sets forth duties of th estate, will be interpreted to limit §663.668 rather than to supplement it.

[37]215 Md. 530, 137 A.2d 704 (1958).

[38]224 Md. 462, 168 A.2d 349 (1961).

The statute was interpreted and declared constitutional in *Strange v. Powers*.[39] Chief Justice Wilkins, referring to the Massachusetts statute as well as to decisions in England, California, Delaware, North Carolina and Tennessee, permitted gifts of an aggregate of $51,000 from the estate of an 87-year-old widow with an estate of $1.2 million and an annual income of over $50,000, which placed her in the 55 per cent federal income tak bracket. The donees were the ward's only child and her grandchildren and great-grandchildren. The court found that such gifts were in the best interests of the incompetent and fulfilled an estate plan similar to what the ward's own counsel would presumably have suggested to her were she not incompetent.

Michigan

Michigan Cumulative Laws §703.17 provides that the assets of an incompetent are to be used to "pay all just debts due from the ward and all expenses incurred in the care, support or comfortable and suitable maintenance of such ward, and his family if there be any, as may be approved by the judge of probate...." Although the statute does not *per se* permit gifts from the ward's estate, the statute has been interpreted to allow such gifts.[40]

Mississippi

Mississippi has not dealt with the Substitution of Judgment Doctrine by statute or case law.

Montana

No statutes or decisions dealing with the doctrine have been found.

Nebraska

Section 38-413 provides that a guardian "shall not apply any portion of the income or the estate of his ward for the support and maintenance of any person other than the ward, the spouse and the minor children of the ward, except upon petition to and prior order of the court after a hearing." This statute could be interpreted to permit the courts, after a hearing, to permit gifts of the property of an incompetent to persons other than his immediate family, although it appears that the courts have not yet been faced with this question.

Nevada

Section 159.125 authorizes the guardian of the estate of an incompetent, with prior court approval, to use excess assets of his ward to make charitable gifts "consistent with the ward's standard of living" and to "contribute to the care, maintenance, education or support of persons who are or have been related to the ward by blood or marriage...." There are no reported cases on the subject.

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[39] 260 N.E.2d 704 (Mass. 1970).

[40] *In re* Buckley's Estate, 330 Mich. 102, 47 N.W.2d 33 (1951).

New Hampshire

Although it has no statute clearly in point, New Hampshire has adopted the Substitution of Judgment Doctrine. In a case involving a petition for authority to give $10,500 to each of the four children of an 80-year-old incompetent for the purpose of saving approximately $10,000 in potential estate taxes, the supreme court authorized the probate court to permit such gifts, the $120,000 which would be retained for the ward being alleged to be sufficient to cover her maximum needs.[41] The court relied upon the Massachustees case of *Strange v. Powers*,[42] and quoted with approval the statement therein:

> There is no reason why an individual, simply because he happens to be a ward, should be deprived of the privilege of making an intelligent common sense decision in the area of estate planning and in that way [be] forced into favoring the taxing authorities over the best interest of his estate.

New York

New York has no statutory provision expressly authorizing gifts from the estate of an incompetent or adopting the Substitution of Judgment Doctrine, but case law has long dealt with these matters.[43]

A leading case is *In re Carson*.[44] In that case the incompetent was *in extremis* and an application was made to order gifts to be made to her next of kin to achieve substantial tax savings. The incompetent's will, however, placed her property in trust until her children reached the age of 40, which age one child had not yet attained. The court complimented counsel for the committee "for his ingenuity in utilizing the broad equity powers of this Court to blend with the current and new situations created by our ever increasing tax structure to the further benefit of the incompetent's estate." A prior order had authorized the gifts, but in the reported case that order was reversed in the light of the limitation in the will.

In *In re Myles*,[45] the court applied the Substitution of Judgment Doctrine in allowing two $500,000 gifts from the $2 million estate of an 86-year-old ward whose will left her estate to the donees (her children), but only if they survived her. The court considered the testamentary wishes of the incompetent as well as her condition, and allowed the gift upon the theory that the ward's testamentary intent would not necessarily control and a reasonable, prudent man would make such gifts to save estate taxes.

More recently, in *Matter of Turner*,[46] the court, although finding that the application for gifts was for the purpose of reducing estate taxes and that such was an acceptable purpose, applied the prudent man test and re-

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[41] *In re* Morris, 281 A.2d 156 (N.H. 1971).

[42] 260 N.E.2d 704 (Mass. 1970).

[43] *See, e.g.*, Matter of Lord, 227 N.Y. 145, 124 N.E. 727 (1919); Matter of Flagler, 248 N.Y. 415, 165 N.E. 471 (1928); Matter of Hills, 264 N.Y. 349, 191 N.E. 12 (1934); *In re* Kernochan, 84 Misc. 565, 146 N.Y.S. 1026 (Sup. Ct. 1914); *In re* Fleming, 175 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940); *In re* Calasantra, 154 Misc. 493, 278 N.Y.S. 263 (Co. Ct. 1935); Matter of Heeney, 2 Barb. Ch. 326 (N.Y. 1847).

[44] 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962).

[45] 57 Misc. 2d 101, 291 N.Y.S.2d 71 (Sup. Ct. 1968).

[46] 61 Misc. 2d 153, 305 N.Y.S.2d 387 (Sup. Ct. 1969).

fused to allow annual gifts of $3,000 per donee from the 66-year-old ward's estate to his three teenage children because such gifts would deplete the estate too rapidly and, in addition, the incompetent's testamentary plan called for the distribution of his estate to his children only at age 25.

Factors considered by the New York courts in determining whether to permit gifts from the estate of an incompetent via the Substitution of Judgment Doctrine thus include the size of the estate, the physical condition and life expectancy of the ward, the chance of the ward's recovery, the ward's income and expenses, his testamentary scheme, a pattern of prior gifts, if any, and the potential tax saving which would result if such a gift were ordered.

North Carolina

Sections 35-20 through 35-29 permit gifts to relatives from the estate of an incompetent, and sections 35-29.1 through 35-29.16 have similar provisions dealing with charitable gifts.

As to gifts to relatives, these may be made only from surplus income and only if the ward is incurably incompetent. If the ward has issue, gifts may be made only if he is intestate. Differing circumstances covered by the statute determine which relatives are permissible donees. It should be noted that all such gifts are to be deemed advancements.

The only reported case[47] dealing with gifts to relatives under the doctrine permitted such advancements to the five adult children of an unmarried, intestate incompetent who was confined to a veteran's hospital, had an estate of $47,000, had an annual income of $310, but had free hospital and custodial care. Advancements equal to about 50 per cent of the ward's estate were allowed.

Charitable gifts from the income of an incompetent may be authorized only if the remaining income is at least twice the ward's average expenses. Gifts from principal are permitted only from excess principal which will not be needed by the incompetent, or those legally entitled to support from him, and only if such gifts will not jeopardize the rights of his creditors or the rights of specific legatees, devisees and beneficiaries under his will. A revocable trust may be declared irrevocable and the income interest given to charity if it is improbable that the ward will recover, that the remaining income will meet the income test, that the remaining principal will meet the principal tests, and that the legatees or heirs of the incompetent do not object. The statute[48] specifically provides that the lack of prior charitable gifts shall not be a controlling factor.

The only reported case[49] dealing with the charitable gift provisions upheld substantial charitable gifts from a $118 million estate, but apparently added the nonstatutory requirement that the court, in applying the Substitution of Judgment Doctrine, must determine that the incompetent would have made such gifts if sane.[50]

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[47] Ford v. Security National Bank, 249 N.C. 141, 105 S.E.2d 421 (1958).
[48] N. C. GEN. STAT. §35-29.3.
[49] *In re* Trusteeship of Kenan, 261 N.C. 627, 138 S.E.2d 547 (1964).
[50] Note, 43 N. C. L. REV. 616 (1965).

Ohio

A number of cases have rejected the Substitution of Judgment Doctrine. In *In re Beilstein*,[51] the doctrine was rejected as to the use of funds from a ward's estate for the support of a married adult child whom the parent was not legally liable to support. In *In re Tillman*,[52] the court refused to permit the giving of Christmas gift checks from the ward's estate even though the incompetent had been in the habit of making such gifts.[53] On the other hand, in *Smith v. Smith*[54] the court permitted the distribution of surplus income of an incompetent who had followed a plan of making such distributions. Thus the use of the doctrine is at present unsettled.

Oklahoma

Based upon Title 10, §4, Title 58, §821, and the leading cases of *Chambers v. Chambers' Estate*,[55] *Craig v. Collins*[56] and *Fixico v. Ming*,[57] Oklahoma courts routinely permit the making of gifts from the estate of an incompetent to members of his immediate family. The condition of the ward does not appear to be relevant, nor is there a requirement that a history of past gifts be shown. Gifts may be made from income or principal and do not appear to require the advance approval of the courts; the gifts are approved by being included in the guardian's accounting submitted to the probate court.

The Substitution of Judgment Doctrine does not appear to have been adopted as to charitable gifts.

Oregon

Although there is no case law dealing with the Substitution of Judgment Doctrine, Oregon enacted section 126-295, effective July 1, 1970, which permits a guardian of an incompetent, upon the prior order of a court, to make gifts from that part of his ward's estate which is not necessary for the proper care and support of the ward or those the ward must legally support. Such gifts, which must be "reasonable," may be made to the ward's relatives by blood or marriage or to charitable institutions, or may be used for the care and support of such relatives or for their funeral expenses.

In addition to the requirement that such gifts be from nonnecessary funds, it appears probable that the physical and mental condition of the ward, the likelihood of his recovery and the presence or absence of a pattern of past gifts will be relevant factors influencing a court's use of its substituted judgment powers.

Pennsylvania

Since 1965, Pennsylvania has provided by statute that:

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[51] 145 Ohio St. 397, 62 N.E.2d 205 (1945).
[52] 137 N.E.2d 172 (Prob. Ct. 1956).
[53] *See also* Marks v. Marks, 58 Ohio App. 266, 16 N.E.2d 509 (1937).
[54] 26 Ohio. Op. 541, 12 Ohio Supp. 101.
[55] 202 Okla. 412, 214 P.2d 901 (1950).
[56] 285 P.2d 859 (Okla. 1955).
[57] 176 Okla. 358, 55 P.2d 1027 (1936).

> The court, for cause shown, may authorize or direct the payment or application of any or all of the income or principal of the estate of an incompetent for the care, maintenance or education of the incompetent, his spouse, children or those for whom he was making such provision before his incompetency. . . .[58]

Prior to enactment of the statute, the payment of dowry from the estate of an incompetent to his daughter had been allowed and the Substitution of Judgment Doctrine in effect adopted.[59]

In *In re Bullock's Estate*,[60] the court refused to allow gifts from the estate of an incompetent so as to reduce potential estate taxes. In *Dougherty Estate*,[61] the same judge reversed himself, based upon the leading Pennsylvania case, *Groff Estate*.[62] In the latter case the court allowed gifts of surplus income to the ward's son, daughter-in-law and granddaughter, holding that it had statutory authority to do so under Title 20, §2080.304. The court found that the Substitution of Judgment Doctrine had been adopted by the supreme court in *Hambleton's Appeal*.[63] Query, however, whether the doctrine was in fact adopted by the *Hambleton* case insofar as its use as an estate planning tool is concerned.

Among the criteria employed by the courts in their application of the doctrine are the incompetent's assets, income and needs, his condition and the likelihood for improvement, his testamentary plan, his gift-making history, whether the proposed gift would be sound estate planning and the apparent desires of the ward. All of the cases have one feature in common: the ward's income exceeded his needs and was being accumulated.

The courts have permitted gifts of principal as well as income. In *Dougherty* the court awarded all of the principal to the trustees under the incompetent's will, as though he were already deceased, and the ward's excess future income was likewise dealt with.

South Carolina

No statute or case permitting the making of gifts from the estate of an incompetent has been found.

South Dakota

South Dakota lacks both statutory provisions and case law dealing with the Substitution of Judgment Doctrine. Nevertheless, the judicial custom is to approve gifts upon application, especially if a pattern of past gifts can be shown. Such gifts, however, are generally limited to small cash gifts to descendants for birthdays and similar occasions.

Texas

The Substitution of Judgment Doctrine has been adopted to a limited extent. Probate Code §421 permits the court to authorize the use of the

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[58] PA. STAT. ANN. tit. 50, §3101 et seq.
[59] *In re* Mechlowitz's Estate, 71 D. & C. 469 (Ct. Com. Pl. 1950).
[60] 10 D. & C. 2d 682, 7 Fid. Rep. 266 (Orphans' Ct. 1957).
[61] 42 D. & C. 2d 25, 7 Fid. Rep. 266 (Orphans' Ct. 1967).
[62] 38 D. & C. 2d 556, 16 Fid. Rep. 1 (Orphans' Ct. 1965).
[63] 102 Pa. 50 (1883).

ward's funds "for the support of his family and the education of his children, when necessary." Probate Code §230(b) states that, "It is the duty of the guardian of the estate [of a ward] to take care of and manage such estate as a prudent man would manage his own property." Probate Code §398 specifically authorizes the guardian of an incompetent to seek prior approval of charitable gifts from the income of the incompetent, but such contributions may not exceed 20 per cent of the net income of the ward's estate and such income must be expected to be in excess of $25,000 for the year in question. The gift must be "reasonable in amount" and "for a worthy cause," and it must yield a potential 100 per cent charitable deduction for federal income tax purposes.

The statutory provisions were limited judicially in *In re Guardianship of Neal*,[64] which disallowed a gift to the heirs of a 96-year-old incompetent in poor health, rejecting the Substitution of Judgment Doctrine. The fact that the ward had made $2.5 million in such gifts over the past 30 years was unimportant to the court.

In *Seley v. Howell*,[65] the predecessor to Probate Code §421 was construed to permit gifts from the estate of an incompetent for his invalid mother.

Although the doctrine has thus far been substantially rejected by the courts, Probate Code §230(b) would appear to warrant the courts to reverse their position.

Virginia

Section 37.1-146, permits the fiduciary of an incompetent confined in a state hospital to make gifts "conducive to the happiness and comfort" of the incompetent. There have been no cases construing this statute, but *Lake v. Hope*[66] dealt with a related topic, holding against gifts from the incompetent's estate. Almost all of the 20 judges polled either had no experience with the Substitution of Judgment Doctrine or believed it was not followed in Virginia. In at least one unreported case, however, approval was given to an application to make the usual charitable gifts which the incompetent had previously made.

Washington

The property of an incompetent is liable for the support and education of his children and for the family expenses under section 26.16.205. Pursuant to section 11.92.040 the courts have potential authority to adopt the Substitution of Judgment Doctrine. The probate courts have sanctioned gifts or expenditures deemed to be in the best interests of the incompetent or his estate.[67] However there appears to be no statute or case exactly on point.

West Virginia

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[64] 406 S.W.2d 496 (Tex. Ct. Civ. App. 1966), *writ refused*, 407 S.W.2d 770 (Tex. 1966).
[65] 115 Tex. 585, 285 S.W. 815 (Ct. Com. App. 1926).
[66] 116 Va. 687, 82 S.E. 738 (1914).
[67] *See In re* De Nisson, 197 Wash. 265, 84 P.2d 1024 (1938) and cases cited therein.

There is no reported case nor statutory provision dealing with the Substitution of Judgment Doctrine.

Wisconsin

Section 319.175 permits the court, upon petition by a guardian or close relative, to authorize the transfer of assets of an incompetent to certain categories of trust created by the incompetent. Under section 319.21, the guardian of an incompetent is directed to apply the corpus and income of the incompetent's estate to the maintenance and support of the ward and his dependent family members; thus, limited gifts may be made, presumably without prior court approval, to a limited class of donees. It appears, however, that such gifts are rarely permitted. In *Estate of Evans*,[68] the supreme court, in *dictum*, stated that there was no express statutory provision which permitted a guardian to make a gift on behalf of his ward. Therefore, despite the limited statute, the Substitution of Judgment Doctrine has not yet gained acceptance.

IV. Uniform Probate Code

The Uniform Probate Code has recognized and adopted in section 5-408 the Substitution of Judgment Doctrine by conferring on the court of jurisdiction all powers which the "protected person" could exercise in his own behalf if he were of full capacity, except the power to make a will. The powers expressly included are the power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release powers of appointment, to create revocable or irrevocable trusts of property of the estate which may extend beyond such person's disability or life and to renounce any interest by testate or intestate succession or by inter vivos transfer.

In addition, the court may exercise, or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20 per cent of any year's income of the estate and to change beneficiaries under insurance and annuity policies if it is determined that such action is in the best interests of the protected person and that he either is incapable of consenting or has consented to the proposed exercise of power. In each instance the court acts through the conservator or other fiduciary by its order and for the benefit of the protected person and members of his household.

The conservator, without court authorization or confirmation, may expend or distribute income or principal of the estate for the reasonably necessary support, education, care or benefit of the protected person with due regard to the size of the estate, the probable duration of the conservatorship, the likelihood that the protected person at some future time may be fully able to manage his affairs, the accustomed standard of living of the protected person and members of his household, and other funds or sources used for the support of the protected person. If the estate is ample to pro-

[68] 28 Wis. 2d 97, 135 N.W.2d 852 (1965).

vide for the protected person and his dependents, the conservator has the power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 per cent of the income from the estate.[69]

Section 5-408 does not provide any guidance to the court with respect to the exercise of its power to make gifts, yet it seems likely that the standards of section 5-425 will be applied. Thus, any state which adopts Article 5 in its present form will accept the Substitution of Judgment Doctrine.

V. Conclusion

Many, and perhaps most, jurisdictions do not yet have statutory provisions permitting gifts from the estate of an incompetent, and some courts are reluctant to act in the absence of such statutory authority, thus denying an opportunity for tax savings for the benefit of the heirs and next of kin.

It is apparent, however, that the trend is toward judicial adoption of the Substitution of Judgment Doctrine. In addition, the courts are expanding the scope of the gifts they permit and are increasingly considering tax saving as a major reason for permitting gifts to be made. The recent statutes tend to prescribe the same results.

In future years one may expect to see the application of the doctrine in more and more jurisdictions, either as the result of its adoption by statute, or by virtue of the courts deciding that the application of this doctrine is a power that has been inherent in courts of equity.[70]

Respectfully submitted,

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John H. Herold, *Vice Chairman*, Baltimore, Md.
Louis N. Adcock, St. Petersburg, Fla.
Richard Berman, Marblehead, Mass.
Manya Bertram, Los Angeles, Cal.
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Marvin A. Cohen, Jackson, Miss.
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Francis F. Faulkner, Keene, N. H.
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James Lee Miller, Jr., Norfolk, Va.
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Edwin J. Stuart, Melbourne, Fla.
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William C. VonderHeide, Chicago, Ill.

*Draftsman of report.

[69] Unif. Prob. Code §5-425.

[70] For a general discussion of the Substitution of Judgment Doctrine, *see* Annot., 24 A.L.R.3d 865 (1969). *See also* Carrington, *The Application of Lunatics' Estates for the Benefit of Dependent Relatives*, 2 Va. L. Rev. 204 (1914); Thompson and Hale, *The Surplus Income of a Lunatic*, 8 Harv. L. Rev. 472 (1895); 39 Am. Jur. 2d, *Guardian and Ward* §81 (1968); Kane, *Application of the Substitution of Judgment Doctrine in Planning an Incompetent's Estate*, 16 Vill. L. Rev. 132 (1970). For an up-to-date documented discussion, *see* Walkow, *Estate Planning for the Handicapped*, 111 Trusts & Estates 284 (1972).

EXHIBIT 3

[Mass. Ann. Laws, ch. 201, § 38.]

§ 38. Support of Ward and Family.

[Effective July 1, 1978, the first paragraph will read as follows:]

He shall have custody of all wills, codicils, and other instruments purporting to be testamentary dispositions executed by his ward. (Amended by 1976, 515, § 25, approved October 27, 1976; by § 35, effective July 1, 1978.)

[Until July 1, 1978, the following paragraphs will read as follows:]

The probate court, upon the application of a conservator or guardian, and after such notice to all other persons interested as it directs, may authorize such conservator or guardian to apply such funds as are not required for the ward's own maintenance and support 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 ward's estate or for gifts to such charities, relatives and friends as would be likely recipients of donations from the ward. (Added by 1969, 422, approved June 16, 1969, effective 90 days thereafter.)

The conservator or guardian in his application shall briefly outline the proposed estate plan, what it may accomplish and the likely tax savings to accrue. The plan may include gifts of the ward's personal property or real estate, but transfers of real estate shall be subject to the requirements of chapter two hundred and two. Gifts may be for the benefit of prospective legatees, devisees or heirs apparent of the ward or may be made to individuals or charities in which the ward is believed to have an interest. The conservator or guardian shall also indicate in the application that any planned disposition is consistent with the intentions of the ward insofar as they can be ascertained, and if the ward's intentions cannot be ascertained, the ward will be presumed to favor reduction in the incidence of the various forms of taxation and the partial distribution of his estate as herein provided. The conservator or guardian shall not, however, be required to include as a beneficiary any person whom he has reason to believe would be excluded by the ward. (Added by 1969, 422, approved June 16, 1969, effective 90 days thereafter.)

The order of the court upon each such application shall be for a period of not longer than the ensuing twelve months, but similar applications in subsequent years may be permitted for a further twelve month period without further notice, in the court's discretion. (Added by 1969, 422, approved June 16, 1969, effective 90 days thereafter.)

[Effective July 1, 1978, the second, third, and fourth paragraphs will read as follows:]

The probate court, upon the petition of a conservator or guardian, other than the guardian of a minor, and after such notice to all other persons interested as it directs, may authorize such conservator or guardian to take such action, or to apply such funds as are not required for the ward's own maintenance and support, in such fashion as the court shall approve as being in keeping with the ward's wishes so far as they can be ascertained and as designed to minimize insofar as possible current or prospective state or federal income, estate and inheritance taxes, and to provide for gifts to such charities, relatives and friends as would be likely recipients of donations from the ward. (Amended by 1976, 515, § 26, approved October 27, 1976; by § 35, effective July 1, 1978.)

Such action or application of funds may include but shall not be limited to the making of gifts, to the conveyance or release of the ward's

contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to the exercise or release of his powers as donee of a power of appointment, the making of contracts, the creation of revocable or irrevocable trusts of property of the ward's estate which may extend beyond his disability or life, the exercise of options of the ward to purchase securities or other property, the exercise of his rights to elect options and to change beneficiaries under insurance and annuity policies, and the surrendering of policies for their cash value, the exercise of his right to an elective share in the estate of his deceased spouse, and the renunciation or disclaimer of any interest acquired by testate or intestate succession or by inter-vivos transfer, (Amended by 1976, 515, § 26, approved October 27, 1976; by § 35, effective July 1, 1978.)

The guardian or conservator in his petition shall briefly outline the action or application of funds for which he seeks approval, the results expected to be accomplished thereby and the tax savings expected to accrue. The proposed action or application of funds may include gifts of the ward's personal property or real estate, but transfers of real estate shall be subject to the requirements of chapter two hundred and two. Gifts may be for the benefit of prospective legatees, devisees or heirs apparent of the ward or may be made to individuals or charities in which the ward is believed to have an interest. The conservator or guardian shall also indicate in the petition that any planned disposition is consistent with the intentions of the ward insofar as they can be ascertained, and if the ward's intentions cannot be ascertained, the ward will be presumed to favor reduction in the incidence of the various forms of taxation and the partial distribution of his estate as herein provided. The conservator or guardian shall not, however, be required to include as a beneficiary any person whom he has reason to believe would be excluded by the ward. (Amended by 1976, 515, § 26, approved October 27, 1976; by § 35, effective July 1, 1978.)

PROPOSED NEW PROBATE SECTION 1856.1

EXHIBIT 4

[State Bar Conference Committe proposal]

"Section 1856.1. On the application of the conservator of the estate of a conservatee, or the application of another interested person, the court may approve the establishment of a plan or plans for the transfer or disposition of assets for the conservatee and may direct the conservator to transfer and dispose of assets for the conservatee in accordance with such plan or plans. Such plan or plans may include, but shall not be limited to, elections, disclaimers, exercises of powers of appointment, and gifts, outright or in trust. Such plan or plans may be for the benefit of prospective legatees, devisees or heirs apparent of the conservatee, family members of the conservatee, other persons, charities, or other entities, public or private.

"The court, in considering any proposed plan, shall first take into consideration the assets and income required for the conservatee's maximum foreseeable needs. The court shall then take into consideration with respect to assets in excess of such needs of the conservatee the probability of the conservatee's recovery, the showing of former practice or conduct of the conservatee prior to establishment of the conservatorship, the relationship and intimacy of prospective donees with the conservatee and the extent to which they would be objects of the conservatee's bounty by objective test, the prospective minimization of income, estate or inheritance taxes, or other expenses, and the likelihood from all of the circumstances that the conservatee, if competent, as a reasonably prudent person,

would establish such a plan or plans. The court, taking into account the mental and physical condition of the conservatee, may also consider the wishes of the conservatee and the dispositions to be made under the conservatee's Will and other dispositive documents, if any. Notice of the hearing of said application shall be given for the period and in the manner required by section 1200 of this Code. In addition, at least ten days before the time set for the hearing of such application, the applicant must cause notice of the time and place of hearing thereof to be mailed to the conservator when he is not the applicant and to such other person or persons as may be directed by the court. When the conservatee is or has been, during the conservatorship, confined in a state hospital in this state, notice of hearing and copy of the application must be given to the Director of the State Department of Health at his office in Sacramento at least fifteen days before the hearing.

"The court, upon its own motion or on request of any interested person, may appoint a guardian ad litem to represent the interests of the conservatee.

"The court may approve, modify or disapprove any such proposed plan or plans.

"This section shall not be construed as creating any duty or obligation on a conservator to establish any plan or plans for the transfer or dispostion of assets for the conservatee."

Memorandum 77-75

EXHIBIT 5

[Civ. No. 12626. Third Dist. Oct. 28, 1971.]

Conservatorship of the Estate of WILMA H. WEMYSS, Conservatee. BANK OF STOCKTON, Petitioner and Respondent, v. WILLIAM E. WEMYSS, Contestant and Appellant.

SUMMARY

On the filing of a conservator's second account for an estate valued in excess of $1,000,000, the son of the conservatee made objections to the allocation between principal and income of gifts to himself and his sister, a family allowance received by the conservatorship from the estate of the conservatee's deceased spouse, certain fees, costs, and gift taxes, and to the allowance of a $6,000 fee to the conservatorship attorney. The probate court overruled the objections and confirmed the account. (Superior Court of San Joaquin County, No. 33878, Thomas B. Quinn, Judge.)

The Court of Appeal reversed that portion of the order settling the account that allocated to income the family allowance and the gifts to the conservatee's children. The court observed that conservators have authority similar to guardians to make judicially supervised gifts of principal under appropriate circumstances and held that a conservator may, with court approval, make gifts of principal to the conservatee's next-of-kin. The court also held, inter alia, that the probate court committed reversible error in failing to exercise its discretionary power to consider whether, under the circumstances, the gifts should have been charged to principal, and that the probate court's exercise of discretion as to the allocation of the family allowance was based on the unacceptable theory that, without the family allowance, an equivalent amount of corpus would have been spent for the conservatee's support. The court further held that the probate court did not err in allocating to income the appraisal fees, court costs, attorney and conservator's fees and gift taxes, and that the amount of the attorney's fee was reasonable in light of the services rendered and the size of the estate. (Opinion by Friedman, Acting P. J., with Janes, J., and Pierce, J.,* concurring.)

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

Classified to McKinney's Digest

(1) **Guardian and Ward § 128—Conservatorship—Gifts of Principal to Next-of-Kin.**—Conservators have authority similar to guardians to make judicially supervised gifts of principal under appropriate circumstances; a conservator may, with court approval, make gifts of principal to conservatee's next-of-kin.

[See **Cal.Jur.2d**, Guardian and Ward, § 220.]

(2) **Guardian and Ward § 128—Conservatorship—Error in Settling of Account.**—In its order settling a conservator's second accounting, the probate court erred in determining that its prior approval and authorization of gifts to the conservatee's children was an authorization of gifts from surplus income, where the prior order had not specified whether the gifts were to be made from income or principal and the court had approved the conservator's first accounting, that had charged the gifts to principal.

(3) **Guardian and Ward § 128—Conservatorship—Error in Settling of Account.**—In overruling objections to a conservator's accounting, charging to income certain judicially approved gifts to the conservatee's children, the probate court erred in failing to exercise its discretionary power to consider whether under the circumstances the gifts should have been charged to principal; the court's failure to exercise discretion called for reversal and for a hearing and determination on the merits.

(4a, 4b) **Guardian and Ward § 128—Conservatorship—Error in Allocation of Family Allowance.**—The probate court erred in allocating, half to principal and half to income, money received as a family allowance by a conservatorship from a decedent's estate, where the court's exercise of discretion was not based on the condition and needs of the conservatee, her estate and of her next-of-kin, but was based on the unacceptable theory that, without the family allowance, an equivalent amount of corpus would have been spent for the conservatee's support.

(5) **Decedent's Estates § 304—Family Allowance Not a Distribution of Community Property.**—A family allowance is not a distribution of community property to a widow; it is a payment for her support, not a distribution of capital.

(6) **Guardian and Ward § 128—Conservatorship—Discretion of Conservator and Court.**—The Revised Uniform Principal and Income Act (Civ. Code, § 730 et seq.) and the Legal Estates Principal and Income Law (Civ. Code, § 731 et seq.), requiring a split between principal and income of the expenses of appraisal fees, court costs, and attorney and conservator's fees, and a charge to principal of gift taxes, do not apply to conservatorships; hence, it was not error for a conservator and probate court, in the administration of a conservatorship, to charge these fees, costs, and taxes to income.

(7) **Guardian and Ward § 128—Conservatorship—Attorney's Fees.**—The allowance of a $6,000 fee to a conservatorship attorney was within the probate court's discretion, where the attorney had spent 250 to 300 hours on the estate's affairs and the estate was valued at over $1,000,000.

COUNSEL

Lee & Hertzer and Theodore B. Lee for Contestant and Appellant.

Gordon J. Aulik for Petitioner and Respondent.

OPINION

FRIEDMAN, Acting P. J.—This is an appeal from a probate order made in the course of administration of a conservatorship. (1) The primary question is whether the conservator may, with court approval, make gifts of principal to the conservatee's next of kin.

Appellant, a son of the conservatee, invokes *Estate of Christiansen*, 248 Cal.App.2d 398 [56 Cal.Rptr. 505], a decision sustaining permissibility of judicially supervised gifts of principal by the guardian of an incompetent's estate. Respondent, the conservator, argues that *Christiansen* applies solely to guardianships, not to conservatorships; that Probate Code section 1856, governing conservatorships, permits gifts only from surplus income.[1]

[1]Probate Code section 1856 provides in part: "On the application of the conservator or next of kin of a conservatee, the court may direct the conservator of the estate to pay and distribute surplus income, not used for the support and maintenance of the conservatee, or any part of such surplus income, to the next of kin whom the conservatee would, in the judgment of the court, have aided, but for the existence of

The conservator is wrong. *Christiansen* authoritatively construed the Probate Code provisions governing the guardianship of incompetents' estates; held that these statutes recognize the probate court's power to apply general equitable principles, including the traditional "substituted judgment doctrine," which permits the court to authorize transfers of property (i.e., income or principal) which the ward himself would have made had he been competent to act.

Turning to the conservatorship statutes, we find Probate Code section 1852, which in a general way invests conservators with the powers granted to the guardians of incompetents.[2] Since, as construed by the court in *Christiansen*, the latter statutes authorize guardians to make judicially supervised gifts of principal under appropriate circumstances, it follows that conservators have similar authority.

We describe the authority as "similar" rather than identical. The *Christiansen* opinion discusses the criteria for authorizing gifts of corpus, including such factors as the extent and permanence of the ward's incapacity, the primacy of the ward's needs, the uncertainties and expectancies in devolution of the estate, and finally, evidence of factors pointing to donative intent or attitude. (248 Cal.App.2d at pp. 424-428.) The determinant factors characterizing the conservatorship of an elderly but aware conservatee would differ from those obtaining in the guardianship of an incompetent. Variations in the age, needs and mental capacity of the ward; in the value, liquidity and productiveness of the estate; in the familial relationships and standards of living will play a role in the court's discretion.

In the light of these observations we turn to the case at hand: The Bank of Stockton is executor of the will of the late Edwin Wemyss, testamentary trustee of several trusts for his grandchildren and conservator of the estate of Wilma Wemyss, his widow. Edwin Wemyss' entire estate consisted of community property. There are two adult children, William, the appellant, and Mrs. Eleanor Sudduth, his sister. In 1966 when the conservatorship was established Mrs. Wemyss was 79 years of age. She requested the conservatorship on the ground that "due to age and infirmity [she] is unable to manage her estate." In 1967, according to an account filed by the conservator, the corpus of the conservatorship estate had a value in excess of one million dollars.

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the conservatorship. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court, . . ."

[2]Section 1852 of the Probate Code provides: "Every conservator of the estate or of the person and the estate of a conservatee shall have the powers granted to a guardian of the estate or of the person and estate of an incompetent in Chapters 7, 8, and 9 of Division 4 of this code, . . ."

In September 1966, after the bank had been appointed conservator but before it discovered a savings account in Mrs. Wemyss' name, she withdrew $12,259.51 from the account and gave it to her adult son, William. She later asked the conservator that William be permitted to keep the gift and that a like sum be given to her daughter, Mrs. Sudduth. The conservator asked the court for instructions. The court approved the gift to William and authorized the conservator to deliver an equivalent amount to Mrs. Sudduth. The order did not specify whether these gifts were to be charged to corpus or income. In its first account, the bank later charged the Sudduth gift to principal. This account was approved by the court.

In August 1968 William Wemyss filed a petition, alleging that the conservatorship estate had a surplus income of $16,000; alleging that family trusts had not produced adequate income to sustain the customary living standard of his sister and himself, and requesting that the court approve distribution of the $16,000 to his sister and himself. At that point the conservator requested a certified public accountant to determine the net income of the conservatorship estate from its inception in May 1966 to the end of August 1968. The accountant's report showed a gross income of $165,523.31, total disbursements of $158,956.82 and surplus income of $6,566.49. Although Mrs. Wemyss had made her gift to William from a savings account; although the probate court had earlier designated no source for the gift to Mrs. Sudduth; despite the conservator's first account charging the latter gift to principal, the accountant chose to charge both gifts to income. An alternative choice by the accountant would have been reflected by an increase of more than $24,000 in the surplus income figure.

The court did not act on William's request for an allowance from income, but asked the parties to attempt an agreement. In that state of the matter the bank, in October 1969, filed its second account. The second account reflected a shift from the first account in that the conservator now chose to list the two gifts as reimbursements to principal and charges against income.

William filed an objection, charging that both gifts had been made from principal and should not be charged against estate income. The court overruled the objection. Referring to its prior order and without regard to its confirmation of the conservator's first account, the court declared "it appears clearly that the court, pursuant to Probate Code Section 1856, authorized distribution of surplus income. . . ."

(2, 3) The court erred in two respects: First, it misinterpreted its own order, which had made no allocation whatever of these charges. Second,

the court failed to exercise its discretionary power to consider whether, under the circumstances, the gifts should have been charged to principal. The court's failure to exercise discretion calls for reversal and for a hearing and determination on the merits. (*Estate of Christiansen, supra,* 248 Cal.App.2d at pp. 406, 428.)

(4a) Appellant charges error in another ruling assigning money to principal rather than income. During a period preceding the second account, the conservatorship estate received $64,000 as a family allowance from the estate of Edwin Wemyss. The conservator chose to treat one-half this amount as income and the other half as an augmentation of principal. Over appellant's objection, the court sustained this phase of the account.

The probate court based its ruling on the inacceptable theory that, without the family allowance, an equivalent amount of corpus would have been spent for Mrs. Wemyss' support. The theory is circular and would justify crediting the allowance in either direction. If absence of the family allowance would have necessitated drawing support money from principal, receipt of the family allowance avoided that necessity. There is no finding that the estate's remaining income was inadequate for the conservatee's support. Nor does the theory logically justify the 50-50 split which occurred.

The parties have referred us to no fixed rule allocating this kind of receipt either to income or to principal. **(5)** Contrary to the conservator's contention, the family allowance is not a distribution of community property to the widow; it is a payment for her support, not a distribution of capital. (Prob. Code, § 680; *Estate of Resler,* 43 Cal.2d 726, 738 [278 P.2d 1].) **(4b)** The Probate Code provisions governing both guardianships and conservatorships contemplate the ward's support out of income before the invasion of principal. (See, §§ 1502-1505.) Thus, generally speaking, receipts for support, such as the family allowance, should be treated as income. There is, nevertheless, no ineluctable demand for that kind of treatment. Exceptional facts may call for its allocation to corpus, and the probate court should have discretion so to treat it. Here, the court's exercise of discretion was guided by an inacceptable criterion. The court should now exercise its discretion according to the conditions and needs of the conservatee, her estate and of her next of kin.

(6) Still seeking to achieve maximum credits to income and to minimize principal, appellant objects to that phase of the account which charged to income expenses such as the following: appraisal fees, court costs, attorney and conservator's fees and gift taxes. Appellant invokes the Revised Uniform Principal and Income Act (Civ. Code, § 730 et seq.) and the Legal Estates Principal and Income Law (Civ. Code, § 731 et seq.).

While these statutes provide guidance, they do not govern the administration of conservatorships established under the Probate Code. (Civ. Code, §§ 730.15, 731.02.) Had the Revised Uniform Principal and Income Act been followed here, the fees and court costs would have been split between income and principal and the gift tax charged to principal. (Civ. Code, § 730.13.) For some undisclosed reason the conservator and the probate court chose to disregard this standard. Since the standard did not bind them as a matter of law, we cannot say they erred as a matter of law.

(7) Appellant challenges allowance of a $6,000 fee to the conservatorship attorney. The attorney testified that over a period of 26 months he had spent 250 to 300 hours in the estate's affairs. Considered in relation to the services rendered and the size of the estate, the fee was well within the range of the probate court's discretion.

The order settling the conservator's second account is reversed as to those portions which treat the gifts to appellant and Mrs. Sudduth as charges against income and which treat half the conservatee's family allowance as a credit to principal. As to those phases of the account, the probate court is directed to reconsider the objections of William Wemyss in the light of this opinion. The order is otherwise affirmed. The conservatorship shall bear appeal costs.

Janes, J., and Pierce, J.,* concurred.

A petition for a rehearing was denied November 16, 1971.

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.