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The Aged Person's Right to Property

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The evolution of treatment of the aged by the state insofar as the management of their property is concerned is extremely instructive. One thing that quickly becomes evident in the review of historical development is that the state has not bascially altered its intervention in the right of self-management of the aged but it has very basically changed its description of the process. Briefly to review what was stated at greater length in the earlier presentation, the aged who were subjected to such practice were historically deprived of management rights in their property under the provision of law applicable to lunatics. In some states that is still the law. In many, the lunacy provisions remain the appropriate legislation, but persons may be declared incompetent on the basis of lunacy (perhaps now mental illness) *or age*. Finally, many states have moved toward a separate incompetency proceeding exclusively for the aged. In such proceedings, the determinative issue is still whether the subject of the proceeding is competent to function adequately in the disposition of his property but the statutes carefully avoid any link with this kind of competence and insanity. Even the surrogate managers of property lose their titles as guardians and become instead conservators.

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Inherent in this semantic juggling is the recognition of the often devastating impact of labelling persons insane. Quite aside from the stigmatizing effect of such a label and its consequent dehumanizing of the person labelled, the characterization tends to carry with it certain inevitable consequences wholly unrelated to the goals of surrogate management of the property of the aged, the most horrendous of which is institutionalization. These are matters on which I have previously commented[176] and on which the literature is extensive.[177] It should suffice to note with relief the movement away from the use of the concept of mental illness in providing surrogate managers for the aged.

One should also note that the insanity test when it was in vogue appeared to impose no significant legal barriers to the process. Although the test was mental incompetence in the insanity sense, the testimony in the cases appears to have been largely the same testimony that is now admitted on the issue of functional competence. Primarily, the question still is how bizarre was the behavior of the person in question? Whether described in medical jargon or in lay language, judgment about behavior was and is the central test. One should not be surprised. Precisely the same thing happens in criminal law. The insanity of a defendant is relevant to his responsibility. His functional competence to assist in his defense is relevant to his triability. If one compares the testimony introduced on responsibility with the testimony introduced on competence to stand trial, he will find the same similarity that is to be found in testimony concerning the need for conservator and that relating to a guardian. The reason, of course, is that whatever utility medical concepts may have in the treatment of patients, as used in the legal context, mental illness is merely a conclusion designed to support a result. If one wishes to exculpate a criminal defendant he is mentally ill. If one wishes to convict him, he is sane. Similarly, if one wishes to deprive an aged person of the right to manage his property, he is mentally ill (if that is the test), otherwise, he is sane.

Unfortunately, mental illness because it is described in medical terms is

176. Alexander and Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME L. REV. 24 (1967).

177. T. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963); T. SZASZ, PSYCHIATRIC JUSTICE (1965); Morris, *Habeas Corpus and the Confinement of the Mentally Disordered in New York: the Right to the Writ*, 6 HARV. J. LEGIS. 27 (1968). Harris, *Mental Illness, Due Process and Lawyers*, 55 A.B.A.J. 65 (1969). Allen, *Retarded Offender: Unrecognized in Court and Untreated in Prison*, 32 FED. PROB. 22 (1968). Tao, *Civil Commitment of the Mentally Ill in the District of Columbia*, 13 HOW. L.J. 303 (1967). *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967). Swartz, *Compulsory Legal Measures and the Concept of Illness*, 19 S.C.L. REV. 372 (1967). *Involuntary Commitment of the Mentally Ill in Pennsylvania*, 5 DUQUESNE U.L. REV. 487 (1967). *Massachusetts Commitment and Hospitalization Laws for the Mentally Ill: Analysis and Proposals for Change*, 2 PORTIA L.J. 19 (1966). Plaut & Holland, *Recognition and Handling of Emotional Problems and Mental Illness by the Attorney*, 13 PRAC. LAW. 69 (1967). *Release Procedure under the Pennsylvania Mental Health and Mental Retardation Act of 1966*, 5 DUQUESNE U.L. REV. 496 (1967).

often not recognized as a means to an end and is erroneously perceived in its legal context to be subject to scientific verification. Consequently, triers of fact tend to be somewhat mesmerized by the testimony of experts with medical training.[178] In the worst cases, they may decide incorrectly as to whether a surrogate manager is appropriate because they weigh the medical reliability of those before them. In the best cases they are subjected to a significant amount of irrelevant information in an effort to decide a fairly straight forward question. One should, consequently, applaud the movement of the law toward a more precise inquiry into the ability of a person to function and away from broader notions relating to the state of his supposed mental health.

The next important inquiry should follow fairly naturally from the resolution above described. Implicit in the notion that the standard for state intervention for purposes of surrogate management should have a precision not reached by the broad mental illness standard is a recognition that this kind of intervention is a basic deprivation of a right cherished in a free society: the right of an individual to self determination. It is important to recognize that however benevolent the intention of those who would seek to substitute other decision makers for the aged, persons deprived of the right to decide for themselves will have lost the fairly basic attribute of citizenship.[179] Consequently, it seems more appropriate to view the question of how the law should intervene not as a question of maximizing benefit to the potential ward but of reducing to a minimum the deprivation of that person's rights. From this perspective, one might better ask in whose interest is a surrogate manager of property appointed?

There is one sense in which the notion that the surrogate is imposed on an individual solely in his own interests is probably sound. It is doubtless true that courts could find property managers for most people who, because of superior experience and skill, would better manage the property than their wards. This is merely a specific application of the fact that there are usually people of greater skill and capacity than any given person. Without even considering whether the legal process is perfect enough to substitute a better decision maker in most cases, about which we could have some doubt, it is easy to reject the notion of benefit to a person occasioned by providing such paternalistic oversight. A person may, of course, always voluntarily obtain a skilled manager for his property; if one is involuntarily imposed on him one should be skeptical of the benefit of such appointment to the potential ward.

Especially in the case of the aged, one can reject the facile answer often given in other cases that a surrogate can preserve property which his ward will later be able to use. To the extent that conditions of the aged are likely to be the result of general deterioration of mental processes, it seems unlikely that

178. Dershowitz, *Psychiatry in the Legal Process: a Knife that Cuts Both Ways*, 4 TRIAL 29 (Feb.-Mar. 1968).

179. Alexander and Szasz, *supra* note 176, at 28.

the property management function will often revert to the ward. Although his wealth may increase, unless he retains the power to spend his money to maximize his own enjoyment, the ward's affluence would hardly seem likely to be perceived by him as a benefit. It is, of course, possible that a condition requiring substitute management is temporary and that the ward will be able to benefit from an intervention which prevents the dissipation of property which later he could enjoy. At this point, the information available to the study group does not indicate what proportion of those enmeshed in surrogate management have a reasonable expectation of again becoming autonomous. The question should, obviously, be explored.

Without empirical data, we can only note that the process described deals with people who by definition are mentally debilitated; no reason exists to assume that such people as a class are any more indifferent to proper maintenance of their wealth than the general population. Presumably, those who need surrogate managers will in many cases voluntarily obtain them.

Also, the coupling of management operations and decision-making in the hands of the surrogate manager may be an unnecessarily broad interference with the rights of the ward. As many of the aged suffer merely from memory loss and unfamiliarity with legal processes without having lost their judgment concerning their personal goals, whatever "judgment" might mean in this context, a provision allowing a surrogate to seize decision-making authority appears to be an overreaction to the problem. As an alternative, to guardians or conservators, the law should permit courts to appoint a new category of agents called, perhaps, legal assistants.

A legal assistant would be responsible for reviewing with his charge all major financial transactions which the charge seeks to undertake. He would remind him of prior obligations, legal restrictions and other complications to be anticipated but would be expressly denied the right to substitute his own decision for that of his charge. In effect, he would provide a service that is directly responsive to a weak memory and a lack of orientation to the legal framework of commerce without removing the essential right to property disposition from the aged person.

While the mechanics for this proposed relationship are beyond the purpose of this brief comment the following notions may flesh out the essential idea sufficiently for further study. The law might provide for the voidability of all major contractual and property transactions made after the designation of a legal assistant unless the agreements were made with both the legal assistant and his charge or countersigned by the legal assistant. Minor transactions, such as purchases of necessities, should probably be exempted so as not to complicate unnecessarily the every day functioning of the charge. The legal assistant should be obliged fully to explain the implications of a proposed transaction to his charge but, equally explicitly, be required to authorize any transaction proposed when his charge has arrived at an informed judgment as to its merits. By such an agency the state could satisfy itself that debilitated persons would not fall victim to sharp practices by

others without depriving the person of the reason for the protection: the preservation of his legitimate use of his own wealth.

The availability of these two alternatives to surrogate management, neither of which requires depriving a person of the ability to make use of his own property, would seem in most cases adequate to deal with the problem from the standpoint of the interests solely of the ward. Obviously, however, the ward is not the only person concerned in the maintenance of his wealth. Those who are potential beneficiaries of the ward's affluence take a natural interest in its waste; the state has an interest in preventing its citizens from so reducing their financial integrity as to become public charges. What is important about these interests is that they are interests adverse to the interests of the ward. The present process, with its focus on benefit to the ward, inadequately and inarticulately deal with such interests. In consequence, beneficiaries find themselves in the cynical position of being forced to plead in court for surrogate management premised on benefit to the object of the proceeding rather than, candidly, benefit to themselves. I shall review shortly a number of illustrations of such suits. Unfortunately, when the underlying self interest of the petitioner is probed he appears in a very bad light in such court proceedings. Equally unfortunately, when this issue is not explored, potential beneficiaries may be awarded an interest in the ward's property which the court would find untenable were it determined from the perspective of protecting the beneficiaries' interest rather than the ward's.

A better procedure, it would appear to me, would be to attempt legislatively to identify legitimate interests of others and to protect them expressly in law rather than to protect them circuitously through incompetency proceedings. The same apparently bizarre spending habits of a potential ward would seem much more objectionable where they divert funds from a destitute wife than when they represent merely the extravagence of a person who has decided in old age to become self-indulgent at the expense only of distant relatives who might otherwise stand to inherit on his demise.

The law has already established fairly viable procedures for the protection of its own interest in preventing citizens from becoming wards of the state.[180] It has also addressed itself quite concretely to the requirement of support of a wife or an ex-wife[181] and, at least in minority, of a child, legitimate or not.[182] Parents, also, may be entitled to a modicum of financial support at least when without such support their indigence threatens public coffers.[183] Creditors have

180. *See, e.g.*, N.Y. DOM. REL. LAW § 32(4, 5) (McKinney 1964); N.Y. FAM. CT. ACT § 415 (McKinney Supp. 1968).

181. *See, e.g.*, N.Y. DOM. REL. LAW § 32(1) (McKinney 1964); N.Y. FAM. CT. ACT § 412 (McKinney 1963).

182. *See, e.g.*, N.Y. DOM. REL. LAW §§ 30-43 (Uniform Support of Dependents Law) (McKinney 1964); N.Y. FAM. CT. ACT § 413 (McKinney Supp. 1969).

183. *See, e.g.*, N.Y. FAM. CT. ACT § 415 (McKinney Supp. 1969).

a right to collect their debts.[184] It would seem useful now to attempt to identify others whose financial expectations should also be expressly recognized by law. Admittedly, I have not attempted to delimit the group. Perhaps it is already large enough. The question appears to be worthy of further consideration.

Once society has appropriately identified those who may legitimately expect financial support from a given person, it would seem a salutary change in the focus of present law to allow a direct action by such persons in pursuance of their interests in preference to an incompetency proceeding addressed against the ward. Of what moment is the mental acuity of a wealthy defendant if he in fact squanders funds which society has decided should first meet his obligations to those near to him? Indeed, a squandering of money legitimately owed to creditors or spouses or others would seem morally far more reprehensible when the squanderer is a person fully capable of more circumspect management. On the other hand, the self-indulgence of a person on whom no one legitimately depends, however abhorrent to our Calvinist tradition, ought not to occasion state intervention.

Recasting the problem of surrogate management in adversary terms leads to one other important result. The self-interest of the surrogate manager becomes a problem of moment. At present, the law prefers near relatives to strangers as surrogate managers. Yet near relatives are most likely to have their own financial expectations in their ward's estate and thus to be driven by duty to their ward and self-interest in opposite directions. Any authorized expenditure reduces their own potential inheritance.

While courts can supervise surrogate relationships with a view to preventing decisions adverse to the ward's interests, the time expenditure required makes it unlikely that they will adequately accomplish such a demanding task. It would seem better to eliminate the conflict of interests. Yet near relatives are often the only available surrogates and sometimes (but not always) the most sympathetic ones.

One solution to the problem would be to require courts to attempt to obtain professional managers as surrogates in all cases. In the event the estate is sizable, the task should not be difficult. (In the event that the estate is too small to attract professional management, the temptation to near relatives is likely also less pronounced.) If it is determined that professional management is available, a court should give near relatives the option of professional management or their own appointment, conditioning the appointment of the surrogate on an express renunciation of any financial benefit from the ward, in his life or on his death, other than the fee for guardianship/conservatorship. If professional management is unavailable, no such renunciation should be required. Of course, the ward's previously expressed wishes, if legally compe-

184. *See, e.g.*, N.Y. UNIFORM COMMERCIAL CODE § 1-106 (McKinney 1964).

tent, ought to prevail over the plan described. The plan is designed to meet what will likely remain the great majority of cases in which the ward has not previously expressed himself on the subject.

While the discussion so far has related specifically to problems of the aged it seems appropriate to note that the notions above expressed are applicable not only to aged citizens but equally to all citizens threatened by state intervention in their property management. Others accused of the "mental illness" which was once the hallmark of proceedings against the aged would seem equally entitled to remain in possession of their rights of property disposition so long as they do not deprive others legitimately entitled in the process. It again seems to make little difference whether the alleged squandering of funds results from indulgence in old age or the desire more fully to live in one's fantasy life. It will, of course, be asserted that it is more likely in cases of mental illness than of mere aging that the period of incompetence is a temporary one and that the property could be preserved for later use by the incompetent. I am not prepared adequately to refute the accuracy of such an observation; an empirical study would seem warranted. The length of present terms of incarceration of persons committed for mental illness suggests, however, that the notion of "speedy cure" of "mental illness," whatever that might mean, is a distant one. Also, the implicit assumption that there is a legally relevant content to the notion of mental illness is again called into question though I will not belabor that point here. Instead, I should like to illustrate prior use of "mental illness" as a determinant of incompetence to manage property to demonstrate the significance of recasting the problem in adversary terms and abandoning the euphemistic notion of benefit to the ward.

Some of the curious conflict of interest of the type discussed can be found in *Denner v. Beyer*.[185] The alleged incompetent's sister brought the proceedings to have herself appointed guardian and succeeded in obtaining that appointment in a trial court. In the ward's appeal to the Supreme Court of Pennsylvania, it turned out that her interests were substantially adverse to those of her guardian. The ward was a diabetic and partially blind widow of sixty years. She had inherited approximately twenty-two thousand dollars from her husband and had given plaintiff a power of attorney over her money in return for a promise to provide a home for her for life. According to the ward, shortly thereafter, her guardian renigged on the obligations of care and attempted to place her in homes in various parts of Pennsylvania. The ward's response was to revoke her will, removing her guardian as chief beneficiary and revoking the power of attorney. At this point, the guardian countered by bringing an incompetency proceeding. By the success in the trial court, the guardian obtained not only a continuation of her power of attorney, now

185. 352 Pa. 386, 42 A.2d 747 (1945).

judicially sanctioned, but also well advanced her litigation posture on probate of the will, being able to claim that the revocation was a product of a diseased mind. If anything, the appellate court appears to be guilty of understatement when it notes:[186] "The record gives the impression that the motive for the petition was not so much to conserve the respondent's property as to channel its inheritance to the next of kin."[187]

Similarly, in *Lomax v. Washam*,[188] a daughter obtained guardianship when her father, after an unsuccessful period of living with her, used his resources to finance a home for himself with strangers. Especially as those strangers began to become beneficiaries of his limited estate, his daughter sought judicial intervention and, as in the prior case, found the trial court quite willing. The appellate court reversed, blocking her plans. Also, in *Malnick's Estate*,[189] the Supreme Court of Nebraska was forced to reverse an appointment of a guardian which appeared to have been premised primarily on the ward's inability to account for the disposition of a sum of $5,400 which she had received in a one year period. The court noted that the daughter who would obtain guardianship was a joint tenant in the ward's property, bonds, checking accounts, and safe deposit box and thought her an inappropriate guardian.

The fact that, in each case, the guardianship was dissolved on final appeal should not be understood as an indication that such cases are resolved satisfactorily in the present system. Research of the cases of necessity focused on data available in reported decisions. Only in those in which an appellate court was perceptive enough to look through the discussion on mental illness or functional incompetence (and thus often reversed the decision below), could one obtain a sense of the facts. Doubtless, the appellate cases mentioned are illustrative of many others in which the trial court prevailed. Even were one more sanguine about court decision on appellate review, the substantial costs of appeal in addition to trial would make this an inappropriate method of safeguarding wards.

The problem can, of course, be more complicated than a simple effort by beneficiaries to insure their inheritance. The proceeding may turn out to by an effort by some of the beneficiaries to improve their position vis-a-vis other beneficiaries. Thus, in *Lamont's Estate*,[190] the trial and appellate courts both agreed that lapses in memory on the part of the ward would justify the appointment of a guardianship. Mrs. Lamont had obvious difficulty with her memory. She had deeded all of her land to one son but later asserted that she

186. *Id.* at ____, 42 A.2d at 748.

187. *See also* Bryden's Estate, 211 Pa. 633, 61 A. 250 (1905); Hoffman's Estate, 209 Pa. 357, 58 A. 665 (1904).

188. 364 P.2d 896 (Okla. 1961).

189. 180 Neb. 748, 145 N.W.2d 339 (1966).

190. 95 Utah 219, 79 P.2d 649 (1938).

would prefer him not to have it. She also had a number of other obvious memory losses. Among other things, she had apparently signed a document authorizing the appointment of a guardian which she later repudiated. She could not recall the number of acres in her farm or how many cows she owned. More central than a concern for the effect of her memory on the disposition of her property, however, appeared to be the concern of the other children that the son who had benefited from her previous generosity was obtaining an undue advantage over them. The guardianship approved in both the trial and appellate courts presumably took care of their interests.

In *Olson v. Olson,*[191] the main dispute appears to have been between the aard's second wife and his children. The ward was a man of limited education (less than one year of formal education). Although penniless when he married his first wife, he apparently amassed a substantial sum during his lifetime. He lost most, but not all of it, during the depression by loaning large sums to his friends. About twenty-three thousand dollars was lost in this fashion. After the death of his first wife he remarried in 1939. His life with his second wife was marked by trouble and in the process the ward's funds were further depleted. When the second wife died the ward's children arranged for his care with a nephew, apparently not wanting to care for him themselves. The ward agreed to pay the nephew five thousand dollars for the care of him for the rest of his life. This left seven thousand dollars of his funds in the bank. On the urging of his nephew's wife, that the money be put in a bank, he consented only to find that she deposited it in her own name. At this point, plaintiff's children reappeared. They offered help and took their father to an attorney. Instead of legal proceedings to recover his seven thousand dollars, however, the proceedings initiated were those appropriate to having him declared incompetent. On later review the Supreme Court of Iowa returned him to competence.

The most common functional defect attributed to alleged incompetence in the cases is memory loss. Memory loss was central to the decision to allow guardianship in *Lamont's Estate.*[192] The ward's forgetfulness in *Schulmeyer's Guardianship v. McAllister,*[193] and most particularly his inability to recall his recent financial transactions, led to the court's approval of his guardianship. Similarly in *Blochowitz Guardianship*[194] the ward's confusion as to the current status of various pieces of property featured prominently in her being declared incompetent. On the other hand, in the *Denner* case discussed previously and *Michelson's Guardianship*[195] and *Nelson's Guardianship*[196] the courts refused

191. 242 Iowa 192, 46 N.W.2d 1 (1951).
192. *Supra* note 190.
193. 171 Cal. 340, 153 P. 233 (1915).
194. 135 Neb. 163, 280 N.W. 438 (1938).
195. 8 Wash. 2d 327, 111 P.2d 1011 (1941).
196. 12 Wash. 2d 382, 121 P.2d 968 (1942).

to consider mere memory impairment a sufficient reason for legitimating guardianship. The dilemma, in these cases, results from the court's lack of alternatives. They could either declare incompetency or refuse to declare it. Neither alternative well matched the needs of the case. The proposal, in this paper, for the appointment of a legal assistant would appear to provide a more appropriate remedy in such cases and to relieve the courts of the dilemma.

Finally, a comparison of two cases of alleged incompetents who exhibited bizarre behavior suggests the importance of viewing cases from a new perspective. In *Waite's Guardianship*[197] the ward was 78. Her second husband died when she was 75 leaving her thirty-one thousand dollars. At 76 she married her third husband, aged 45, living with him only two months. Her divorce cost her four thousand dollars. She spent another eight thousand dollars on purchasing a ranch which she had always wanted to own and paid $850 to stock it with cattle. Having acquired it, she gave half interest in the ranch and its income to a man in return for his management of it and his serving her as chauffeur. By the time of the incompetency hearing she had tired of the ranch and wanted to be rid of it.

In *Smith v. Smith*[198] the alleged incompetent was 77 years old and worth about one hundred thousand dollars. Much of his accumulated wealth was apparently due to the hard effort of his wife who died of malnutrition three years before the proceedings in question. During her life his wife had been required to live in a small portion of her husband's hotel on a narrow cot although there were many unoccupied bedrooms in the hotel. Her diet consisted of sandwiches, crackers and canned goods despite their wealth and this undoubtedly led to the malnutrition of which the wife died. The husband, after his wife's demise, often frequented local taverns, made a present of eighteen thousand dollars in bonds to a married woman (although he later forgot what had happened to the money). He followed that gift with a gift of a three thousand dollar car. She in turn cared for the widower. Finally, when the widower published a public notice of his intention to sell all of his real property, his only child brought suit to have him declared incompetent.

The courts decided the cases differently. Although guardianship had resulted in the trial court, the Supreme Court of California in *Waite's Guardianship*[199] invalidated it, characterizing the ward's conduct as merely poor business judgment. On the other hand, in *Smith v. Smith*[200] the Supreme Court of Alabama affirmed the appointment of a guardian. In both courts, the self-indulgent conduct of the alleged incompetent was the sole focal issue. In neither did the court address itself to the question of the deprivation of others by the squandering of funds. Yet, clearly, that is what both cases were

197. 14 Cal. 2d 727, 97 P.2d 238 (1939).
198. 254 Ala. 404, 48 So. 2d 546 (1950).
199. *Supra* note 197.
200. *Supra* note 198.

primarily about. In both the aged had used their funds to gratify their immediate desires. At the time of hearing, children of both stood to lose substantial value in their inheritance expectancy. Yet, neither court inquired into their needs or the legitimacy of their claims on their parents' estate. It may well be, in the circumstances, that both parents were, quite rationally, squandering their funds in recognition of the fact that they would not likely be able to enjoy them much longer. If one examines both cases from the standpoint of interests adverse to the ward's, there is little reason, on the facts developed, for distinguishing between the children of the two alleged incompetents in question. The interest of the wife in *Smith v. Smith*,[201] however, had she been alive at the time when proceedings were begun, would be another matter. Her husband's self-indulgence with his substantial wealth would be most objectionable when contrasted to her Cinderella-like existence. One could easily justify an intervention in her husband's financial schemes on her behalf while, on the basis of the same conduct, one might have greater doubt about his child and should probably reject a claim based on familial ties by anyone more distantly related.

It is rather curious that in a legal system which ordinarily is very cognizant of checks and balances, persons are allowed the weapon of incompetency in promoting self-interest. Elemental notions of conflicts of interests suggest that a revision of the underlying theory is long overdue. Where intervention is required for any reason it seems extremely important to assure that if a surrogate be appointed he be as free of the pressures of avarice as the system will allow. It should be clear that his obligation is to maximize the benefit to the ward and not of the ward's heirs.[202] At the same time, the system should be recast so as to reduce the occasions for the appointment of a surrogate at all.

201. *Id.*

202. *See* Jones v. Lamoourn, 159 Colo. 246, 411 P.2d 11 (1966).