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The Incompetent Spouse's Election: A Pecuniary Approach

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THE INCOMPETENT SPOUSE'S ELECTION: A PECUNIARY APPROACH

In order to prevent a husband from disinheriting his spouse,[1] the common law gave the surviving wife a dower right in her husband's property, of which she could not be denied without her consent.[2] The dower right consisted of a life estate in one-third of the real property of which the husband was seised during the marriage.[3] This protection of the surviving spouse rose to a revered position in the law.[4] Several considerations motivated this protective policy. Courts and legislatures concluded that allowing a husband to disinherit his wife was inequitable,[5] and in-

1. This Note adopts the convention of referring to the "surviving wife" and the "deceased husband." This assumption is based on the factual pattern in the majority of cases regarding the incompetent surviving spouse's right to elect; additionally, the rights at issue were originally developed to protect the widow. One may reasonably assume, however, that the issues involved also apply to situations in which the husband is the incompetent survivor. *See* Friedman, *The Renounceable Will: The Problem of the Incompetent Spouse*, 1958 WIS. L. REV. 400, 400 n.1. The concerns of protecting the surviving spouse may not be as strong when applied to an incompetent widower, however, given the different policies underlying the development of the widower's protection. For a discussion of the development of a husband's common law rights in the property of his wife, see Boyer & Miller, *Furthering Title Marketability By Substantive Reforms With Regard To Marital Rights*, 18 U. MIAMI L. REV. 561, 563-65 (1964).

2. 5 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 47.4 (rev. ed. 1962) [hereinafter cited as PAGE]; R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 2.13 (1984); W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 60-61 (1960). For a more detailed discussion of the development of dower, see Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948).

3. W. MACDONALD, *supra* note 2, at 60; Haskins, *supra* note 2, at 43.

4. *See, e.g.*, Chrisman v. Linderman, 202 Mo. 605, 614, 100 S.W. 1090, 1092 (1907) (stating that dower is a "cherished . . . jewel of the common law" which is comparable to life and liberty); Mathews v. Marsden, 71 Mont. 502, 507, 230 P. 775, 777 (1924) (recognizing that "the law is very jealous in the protection of dower and kindred statutory rights of widows"); Hovey v. Hovey, 61 N.H. 599, 601 (1882) (noting that "dower was so highly rated in the catalogue of social rights as to be placed in the scale of importance with liberty and life"); Tuten v. Almeda Farms, 184 S.C. 195, 206-07, 192 S.E. 153, 157-58 (1937) ("Dower has always been regarded as a sacred right in this State, and has always been strongly fortified against invasion. It is favored in a high degree by the law, and Courts are vigilant and astute in preserving it, and will always award it in cases of doubt.").

5. W. MACDONALD, *supra* note 2, at 24 (noting that if disinherited, the widow must take on the role of provider, even though she may be ill-equipped to do so because her

consistent with the husband's duty to support his wife and children during his lifetime.[6] In addition, the state always has an interest in ensuring the widow's welfare, because of the state's interest in the family as a component of the community[7] and its interest in avoiding an obligation to support the surviving spouse.[8] These policies suggest that the goal of protecting the surviving spouse developed to ensure the financial security of the surviving spouse during her lifetime.[9]

The administration of the dower right became impracticable due to the resulting encumbrances of title,[10] and the protection provided became inadequate as wealth was increasingly held as

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marriage delayed her entrance into the job market and prevented her from acquiring the necessary skills); Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 1061 (1977) (noting that one basis of the policy of protecting the surviving spouse is the recognition of "the spouse's contribution towards the accumulation of a deceased spouse's wealth.").

6. W. MACDONALD, *supra* note 2, at 24; *see, e.g.*, Hovey v. Hovey, 61 N.H. 599, 601 (1882) (noting that dower was intended for "the sustenance of the widow and the nurture and education of her children"); *see also* Schoellkopf v. DeVry, 366 Ill. 39, 44, 7 N.E.2d 757, 760 (1937); Seager v. McCabe, 92 Mich. 186, 196, 52 N.W. 299, 302 (1892); Henze v. Mitchell, 93 Neb. 278, 287, 140 N.W. 149, 152 (1913).

Consistent with this emphasis on protection of both the wife and children, the size of the statutory share available to the widow typically varies with the number of children involved. *See infra* note 14. However, the right of the surviving widow to elect some portion of her husband's estate is not usually dependent upon the existence of children, because even childless widows generally have a statutory right to elect. W. MACDONALD, *supra* note 2, at 22; *see infra* note 14.

7. W. MACDONALD, *supra* note 2, at 25 ("The welfare of the family is the welfare of the state."); Boyer & Miller, *supra* note 1, at 592 (recognizing society's paramount interest in family stability); Mahoney, *Elective Share Statutes: The Right to Elect Against Property Subject to a General Power of Appointment in the Decedent*, 55 NOTRE DAME LAW. 99, 100 (1979) (noting that forced share legislation is justified by various policy considerations, "centering around the state interest in marriage and families"). This aspect of state interest also reflects society's interest in the wife as a citizen and in the children as future citizens. *See, e.g.*, W. MACDONALD, *supra* note 2, at 24.

8. Kurtz, *supra* note 5, at 1061 (noting that the protective policy stems in part from concern that "if the surviving spouse is left financially destitute, the spouse may become a financial burden upon society"); Mahoney, *supra* note 7, at 100 (stating that the obligation imposed upon the decedent's estate by the statute monitors the economic independence of the family and relieves the state of a potential duty to support).

9. *See supra* note 6; *see also* Boyer & Miller, *supra* note 1, at 566 (noting that dower arose to meet the need to provide for the future support of the widow). *See also infra* note 21.

10. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 2, at § 2.14. The encumbrance of title arose because of the need for the wife to join in the conveyance of any land to which her dower right attached. Without her consent, the land remained subject to her dower right. Therefore, a title examiner had to ascertain the existence of any outstanding dower rights, which required consideration of the marital status of all persons in the chain of title. *See* Boyer & Miller, *supra* note 1, at 562-63; Kurtz, *supra* note 5, at 988-89 (noting that "common law dower diminishes the alienability of land and causes nightmares for title examiners").

personal property.[11] Most states responded by supplementing or replacing the dower right with a statutory right to a share of the husband's estate.[12] This "forced share" legislation[13] gives the surviving spouse the right to elect a relatively fixed share of her husband's estate instead of accepting the share left to her under her husband's will.[14] Thus, the policy of protecting the surviving spouse retains its prominence through state legislation that gives the surviving spouse more effective protection against disinheritance than the right of dower could provide in today's society.

Many states extend the right of election to incompetent[15]

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11. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 2, at § 2.14. Because the dower right applied only to real property, the protection afforded by dower decreased as wealth shifted from real to personal property. *See, e.g.*, Kurtz, *supra* note 5, at 989 (noting that the United States developed beyond a predominantly "agrarian economy with lands necessarily the principal source of wealth").

12. *See, e.g.*, ALA. CODE § 43-8-70 (1975); DEL. CODE ANN. tit. 12, § 904 (1974); D.C. CODE ANN. § 19-113 (1981); FLA. STAT. § 732.201 (1983); IND. CODE § 29-1-3-1 (1976); IOWA CODE § 633.236 (1983); MD. EST. & TRUST CODE ANN. § 3-203 (1974 & Supp. 1984); MASS. ANN. LAWS ch. 191, § 15 (Michie/Law. Co-op. 1981); MISS. CODE ANN. § 91-5-25 (1972 & Supp. 1984); MO. REV. STAT. § 474.160 (1978); NEB. REV. STAT. § 30-2313 (1979); N.H. REV. STAT. ANN. § 560:10 (1974); N.J. STAT. ANN. § 3B:8-1 (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981); OHIO REV. CODE ANN. § 2107.39 (Page 1976 & Supp. 1983); 20 PA. CONS. STAT. ANN. § 2203 (Supp. 1985).

13. The term "forced share" refers to the fact that the share may be elected, or "forced," regardless of the provisions of the will. W. MACDONALD, *supra* note 2, at 21.

14. State statutes differ with respect to the precise share that the surviving spouse may elect. Some provide that the surviving spouse may elect the intestate share. *See, e.g.*, ILL. ANN. STAT. ch. 110½, § 2-8 (Smith-Hurd 1978); OHIO REV. CODE ANN. § 2107.39 (Page 1976 & Supp. 1983). Others limit the surviving spouse to a fraction or defined amount of the decedent's estate. *See, e.g.*, IND. CODE § 29-1-3-1 (1976). Sometimes the survivor is also given the choice of electing her dower right. *See, e.g.*, MASS. ANN. LAWS ch. 189, § 1 (Michie/Law. Co-op. 1981).

In addition, the size of the share typically varies with the number of children involved. *See, e.g.*, ILL. ANN. STAT. ch. 110½, § 2-8 (Smith-Hurd 1978); MD. EST. & TRUSTS CODE ANN. § 3-102 (1974 & Supp. 1984); N.H. REV. STAT. ANN. § 560:10 (1974); R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 2, § 2.14; *see also* W. MACDONALD, *supra* note 2, at 21-22.

Such statutes are uncommon in states which have chosen to provide for the widow's security by preserving the dower right or by means of community property. *See* Friedman, *supra* note 1, at 400 n.1. This Note necessarily restricts its analysis to states that have provided a statutory right to elect.

15. "Incompetency" in this context generally refers to mental incapacity to manage one's own affairs. The precise definition of the term, however, differs among the states, which rely on over 50 words and phrases to define "incompetency." *See* R. ALLEN, E. FERSTER & H. WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCE 32-45 (1968); A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION 164 (1975).

Similarly, the procedure for determining incompetency varies among jurisdictions. Generally, the proceeding is initiated by a petition made by a close relative, followed by a hearing. Hearings are often quite brief because most cases are uncontested. *See* R. ALLEN, E. FERSTER & H. WEIHOFEN, *supra*, at ix, 70-91 (detailing variations on this procedure in an exhaustive study); THE MENTALLY DISABLED AND THE LAW 257-60 (S. Brackel & R. Rock rev. ed. 1971) [hereinafter cited as S. BRACKEL & R. ROCK]. *But see* Commit-

spouses as well.[16] Like the competent surviving spouse, the incompetent is entitled to a share of the decedent's estate.[17] This result is entirely consistent with the policy of protecting surviving spouses. The need for such a policy becomes even stronger in the case of an incompetent spouse, because incompetency implicates additional concerns. The state has traditionally recognized an interest in ensuring the security of those members of society who are unable to manage their own affairs,[18] both as a matter of equity[19] and in order to monitor its support obligation should the incompetent become a financial burden to the state.[20] Therefore, the security of the incompetent widow remains a paramount consideration.[21]

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tee on Legal Services for the Elderly and Their Estates, *Substitution of Judgment Doctrine and Making of Gifts From an Incompetent's Estate*, 7 REAL PROP. PROB. & TR. J. 479, 479 (1972) (stating that declaration of incompetency involves a complex and expensive procedure).

16. *See, e.g.*, ALA. CODE § 43-8-71 (1975); FLA. STAT. § 732.210 (1983); IND. CODE § 29-1-3-4 (1976); IOWA CODE § 633.244 (1983); MO. REV. STAT. § 474.200 (1978); NEB. REV. STAT. § 30-2315 (1979); N.H. REV. STAT. ANN. § 464-A:34 (1979); N.J. STAT. ANN. § 3B:8-11 (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(d)(4)(B) (McKinney 1981); OHIO REV. CODE ANN. § 2107.45 (Page 1976 & Supp. 1983).

17. *See* statutes cited *supra* note 16.

18. For a detailed discussion of the development of state involvement in the care of incompetents, see generally A. DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 229-71 (1946).

19. *See, e.g.*, Miller v. Keown, 176 Ky. 117, 122, 195 S.W. 430, 433 (1917) (noting that legally incapacitated individuals are wards of the courts, "especially when they and their property are duly brought before the court for the purpose of administration"), *overruled on other grounds*, Lockhard v. Brown, 536 S.W.2d 318 (Ky. 1976); *see also* S. BRACKEL & R. ROCK, *supra* note 15, at 251 (stating that the "main purpose of an incompetency determination is to safeguard the assets of an individual incapable of managing his affairs"); A. DEUTSCH, *supra* note 18, at 137 (noting that incompetents were viewed as "wards of the state"); A. STONE, *supra* note 15, at 13 (noting that the state steps in when an incompetent cannot be cared for by "society's principal care-taking unit, the family").

20. S. BRACKEL & R. ROCK, *supra* note 15, at 251-52 (appointing a guardian is designed to prevent the incompetent from becoming a financial burden to the public). *But see* A. STONE, *supra* note 15, at 13-14 (stating that availability of state aid for care of incompetents enhances the tendency for families to abandon their aged relatives, which has corresponding social consequences for the aged in our society, and also results in continually increasing costs of state geriatric facilities).

21. *See supra* note 9 and accompanying text; *see also* Mead v. Phillips, 135 F.2d 819, 826 (D.C. Cir. 1943) ("There is just as much reason today, as there was two hundred years ago, for safeguarding the interests of widows . . . .").

This Note assumes that the financial security of the widow is the goal sought by the "best interest" standard. The history of protecting the surviving spouse has been aimed at securing a given amount of funds for the widow's use in order to prevent her from being left destitute upon her husband's death. Ensuring the widow's security in her remaining years is concededly in her best interest. First Nat'l Exch. Bank v. Hughson, 194 Va. 736, 755, 74 S.E.2d 797, 808 (1953) (Smith, J., concurring) ("The best interests of an incompetent are achieved when full security is afforded . . . ."); *see also* W. MACDONALD, *supra* note 2, at 29 (noting that "the chief goal of the statutory share is uninterrupted family support"). Rather than speculate as to what might be "best" for the in-

Although many state legislatures have preserved the incompetent widow's right of election,[22] these states have developed only general guidelines to govern such an election. These guidelines merely direct the court to act in the "best interests" of the incompetent widow.[23] Courts of the various jurisdictions differ in their approach to determining the "best interests" of the incompetent.[24] Most courts examine all surrounding circumstances regarding the incompetent widow's situation, such as the intent of both the wife prior to her incompetency and of the testator, and the adequacy of the will's provision for the incompetent widow.[25] A minority of jurisdictions, however, rely almost exclusively on a monetary determination of whether the will or the statutory provision gives the incompetent widow the larger share of the estate.[26]

Because incompetency in a probate setting often arises due to advanced age or accompanying senility,[27] the difficulties posed

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competent widow, courts should rely on the essential underpinning of the policy of protecting the surviving spouse, i.e., her security, in determining her best interests.

22. The incompetent widow cannot personally exercise her right to elect because of her incompetency. Thus, the relevant statute generally specifies the party authorized to make the election on the incompetent widow's behalf, typically either the incompetent's guardian or the court itself. Even where the guardian is the authorized party, however, the court is often required to review or supervise the guardian's election. This Note will therefore assume that the court is the relevant decision-making body. For a more detailed discussion of the entity authorized to make the election on the incompetent widow's behalf, see Friedman, *supra* note 1, at 401-07; *see also* PAGE, *supra* note 2, § 47.18.

23. Some states issue an express mandate to act in the best interests of the incompetent widow. *See, e.g.*, FLA. STAT. § 732.210 (1983); IOWA CODE § 633.244 (1983); KAN. STAT. ANN. § 59-2234 (1983) (stating that the court shall make the election that is the "more valuable or advantageous" to the incapacitated surviving spouse); NEB. REV. STAT. § 30-2315 (1979); OHIO REV. CODE ANN. § 2107.45 (Page 1976 & Supp. 1983) (directing the election of the share that would be "better" for the incompetent spouse). Other state statutes lack such a mandate; instead, the statute authorizes the court to allow the guardian to elect. *See, e.g.*, IND. CODE § 29-1-3-4 (1976); MO. REV. STAT. § 474.200 (1978); N.H. REV. STAT. ANN. § 464-A:34 (1974). However, this often translates into a mandate to act in the incompetent widow's best interests due to the standards to which a guardian is held in discharging his duties. *See, e.g.*, Briggs v. Clinton County Bank & Trust Co., 452 N.E.2d 989, 1010 (1983) ("A guardian is under a duty to his ward to administer the estate solely in the interests of the ward."); MO. REV. STAT. § 475.130 (1978) (stating that the guardian must "protect and preserve the estate, invest it prudently"). Still other jurisdictions advance a judicial standard of "best interests of the incompetent surviving spouse." *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 602, 185 N.E.2d 888, 889 (1962) ("Courts are in agreement that the primary consideration is the best interest of the incompetent."). *But see infra* note 64, which discusses states that have a statutory mandate to inquire as to the incompetent surviving spouse's needs.

24. *See generally* Friedman, *supra* note 1; *see also infra* notes 29-45.

25. *See infra* notes 28-43 and accompanying text.

26. *See infra* notes 44-45 and accompanying text.

27. *See generally* A. STONE, *supra* note 15, at 161-63.

by the incompetent widow's election are likely to arise with increasing frequency as medical advances continue to extend the human lifespan. This development increases the need for an effective and fair means of disposing of such cases in a manner consistent with the policies underlying the incompetent's statutory right of election. This Note argues that the minority, or pecuniary, approach provides such a solution. Part I provides a general description of the majority and pecuniary approaches. Part II discusses the reasons supporting a preference for the pecuniary approach, and Part III suggests some refinements of the pecuniary approach that will lead to fairer results and to greater internal consistency.

I. TWO APPROACHES

A. *Majority Approach*

All jurisdictions recognize the clear correlation between money received by the incompetent widow and benefit to the incompetent widow.[28] The majority view, however, does not give controlling weight to the monetary value of the prospective estate shares available to the incompetent widow.[29] Instead, majority courts consider all surrounding facts and circumstances in determining which share would best serve the interests of the incom-

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28. *See* Friedman, *supra* note 1, at 409; *see also infra* note 46 and accompanying text.

29. *See, e.g.*, Edwards v. Edwards, 106 So. 2d 558, 564 (Fla. 1958) (stating that the best interests of the incompetent widow do not require election of the larger share); Kinnett v. Hood, 25 Ill. 2d 600, 602-03, 185 N.E.2d 888, 889 (1962) (stating that the welfare of the incompetent does not mean the greatest amount of property available; rather, it means that consideration of "all surrounding circumstances" is appropriate); *In re* Estate of Kees, 239 Iowa 287, 292, 31 N.W.2d 380, 382-83 (1948) ("The question of value is a proper consideration but it is not controlling."); State *ex rel.* Percy v. Hunt, 88 Minn. 404, 411, 93 N.W. 314, 316 (1903) ("[T]he matter of mere property values may not necessarily be the guiding motive."); Manufacturers Bank & Trust Co. v. Kunda, 353 Mo. 870, 874, 185 S.W.2d 13, 14 (1945) (stating that the best interests of the incompetent widow were not exclusively related to monetary considerations); *In re* Estate of Connor, 254 Mo. 65, 93, 162 S.W. 252, 260 (1914) (" 'Best interest of the insane' does not necessarily mean from a pure monetary viewpoint . . . ."); Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 901 (Okla. 1953) (stating that the fact that the incompetent would get more by electing the statutory share "does not make it mandatory for the court to direct that she so take"); *In re* Hansen's Guardianship, 67 Utah 256, 266, 247 P. 481, 485 (1926) (approving of the approach taken in *In re Estate of Connor*); Van Steenwyck v. Washburn, 59 Wis. 483, 507, 17 N.W. 289, 294 (1884) (rejecting application of a rule that would give the incompetent the most valuable share).

petent widow.[30] These courts value the flexibility afforded by such an approach,[31] and emphasize that the wide variety of factual situations that they encounter precludes any delineation of a weighted list of factors for determining the incompetent widow's best interests.[32] Still, majority courts consistently recognize several factors relevant to such an inquiry.

Many majority courts stress the importance of preserving the testator's intent.[33] An economic and political system based on private property ownership places great importance on freedom of testation,[34] a liberty that some courts have described as a "sa-

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30. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 602, 185 N.E.2d 888, 889 (1962) (noting that majority of jurisdictions "consider all the surrounding circumstances, where ample provision is made in the will for the welfare and comfort of the incompetent spouse, including the testamentary design and purpose of the testator and the election which the spouse might have made if he or she were competent"). *See infra* notes 33-43 and accompanying text.

31. *See, e.g.*, Copeland v. Turner, 273 Ala. 609, 612, 143 So. 2d 625, 628 (1962) (stating that determination of the incompetent widow's best interests should not be made by reliance upon a "hard and fast rule"); *In re* Estate of Connor, 254 Mo. 65, 83, 162 S.W. 252, 257 (1914) (stating that formulation of a fixed rule to determine the best interest of the incompetent widow is difficult due to the fact-specific nature of the incompetent widow's needs).

32. *See* Copeland v. Turner, 273 Ala. 609, 612, 143 So. 2d 625, 628 (1962) ("[I]n determining whether or not it is to the interest or 'best interest' of an insane widow to dissent from a will, no hard and fast rule should be laid down."); Kinnett v. Hood, 25 Ill. 2d 600, 603, 185 N.E.2d 888, 889 (1962) ("It is impractical to delineate the factors which would apply in every case or, in fact, the relative weight to be given each in order to determine that which is to the best interest of the incompetent."); *In re* Estate of Conner, 254 Mo. 65, 84, 162 S.W. 252, 257 (1914).

33. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 602, 185 N.E.2d 888, 889 (1962) (stating that the court must consider the testamentary design and purpose of the testator in determining what constitutes the incompetent's best interests); Grammer v. Bourke, 117 Ind. App. 151, 155, 70 N.E.2d 198, 200 (1946) ("Courts strive always to discover and effectuate the intention of the testator . . . ."); Van Steenwyck v. Washburn, 59 Wis. 483, 508, 17 N.W. 289, 295 (1884) (expressing concern regarding defeating the intentions of the testator).

34. *See, e.g.*, W. MACDONALD, *supra* note 2, at 38 (noting that freedom to transfer wealth "expresses a basic democratic notion of freedom of individual action . . . and provides an accumulation of capital which is necessary for productive enterprise").

Free-market advocates find governmental interference with the accumulation and disposition of private property undesirable for two reasons. First, freedom in economic arrangements (involving the accumulation of property) is said to be essential to political freedom; thus, a democratic society must not unduly interfere with economic freedom. *See* M. FRIEDMAN, CAPITALISM AND FREEDOM 7-8 (1962). Second, the absence of secure expectations about future enjoyment of the fruits of one's labor may decrease the individual's incentive to work; thus, a system that protects the rights of individuals to control the resources that they labor to accumulate maximizes productivity. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 10 (1973); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1968). *But see infra* notes 36, 52-53 and accompanying text, for the argument that social policy requires limits on freedom of testation.

cred right."[35] Relying on this notion, majority courts give great deference to the husband's will. However, undue reliance on the testator's intent might contravene the underlying policy of providing for the incompetent widow's security.[36] Thus, majority courts often interpret this policy as permitting deference to the testator's intent only when he has adequately provided for his wife in his will.[37] Such an approach requires courts to examine the adequacy of the will's provision for the incompetent widow.[38]

Majority courts also examine the choice that the widow would probably have made had she been competent.[39] These courts emphasize that in many cases, had the widow been competent, she would not have disregarded her husband's last wishes by electing a larger statutory share of his estate, and that the will should thus be upheld.[40] In determining the incompetent

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35. Sawyer v. Sawyer, 261 Iowa 112, 121, 152 N.W.2d 605, 610 (1967); Van Steenwyck v. Washburn, 59 Wis. 483, 508-09, 17 N.W. 289, 295 (1884).

36. *See, e.g.*, Matter of Hills, 264 N.Y. 349, 355, 191 N.E. 12, 14 (1934) (stating that within the limits set by law, a testator may dispose of his property as he sees fit); Peden Estate, 409 Pa. 194, 202, 185 A.2d 794, 798 (1962) (noting that "a testator's intent must prevail, but only if it is valid and not against the law or against public policy"). For a discussion of the policy of protecting the incompetent widow, see *supra* notes 2-21 and accompanying text.

37. *See, e.g.*, Edwards v. Edwards, 106 So. 2d 558, 564 (Fla. 1958) (stating that once the husband made ample provision for his incompetent wife, he could dispose of his property as he pleased); First Nat'l Bank v. MacDonald, 100 Fla. 674, 681-82, 130 So. 596, 598 (1930) (same); *In re* Estate of Kees, 239 Iowa 287, 292, 31 N.W.2d 380, 383 (1948) ("Courts generally appear to be somewhat reluctant in this class of cases to reject the provisions of the will if adequate to meet the probable wants of the incompetent spouse."); *In re* Estate of Connor, 254 Mo. 65, 93, 162 S.W. 252, 260 (1914) (stating that testator has a right to dispose of his property as he pleases, so long as he amply provides for his incompetent wife).

38. Many majority courts inquire into whether the will adequately provides for the incompetent widow, even though they do not expressly assert a public policy for doing so. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 602, 185 N.E.2d 888, 889 (1962) (stating that the court should consider whether the will made ample provision for the incompetent widow); Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 904 (Okla. 1953) (considering whether the incompetent widow was amply provided for); Van Steenwyck v. Washburn, 59 Wis. 483, 509, 17 N.W. 289, 295 (1884) (upholding the will because it amply provided for the incompetent widow).

39. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 602, 185 N.E.2d 888, 889 (1962) (stating that what the incompetent would have done if competent is relevant to her best interests); *In re* Estate of Carey, 194 Minn. 127, 143, 260 N.W. 320, 327 (1935) (inquiring into the incompetent husband's likely election if he had been mentally competent to act); Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 904 (Okla. 1953) (considering what the incompetent widow would have done had she been competent).

40. *See, e.g.*, Harris Estate, 351 Pa. 368, 383, 41 A.2d 715, 722 (1945) (stating that not every widow disregards her husband's last wishes "merely because she would obtain a greater quantum of his estate by so doing; sentiment enters into such situations"); *In re* Hansen's Guardianship, 67 Utah 256, 262, 247 P. 481, 484 (1926) ("The widow may be influenced in making her election, not only as it affects her pecuniary interests, but likewise by a desire on her part to have the wishes and will of her husband carried to

widow's hypothetical intent, courts often look to whether the widow knew and approved of the contents of the will prior to her incompetency, as evidenced by her own testamentary design[41] or by other evidence.[42]

Majority courts also recognize the irrelevance of certain factors to the election decision. In this regard, majority courts find it inappropriate to consider third-party interests, such as those of the incompetent widow's children and heirs.[43] Such courts

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execution.").

41. *See, e.g.*, Edwards v. Edwards, 106 So. 2d 558, 564 (Fla. 1958) (stating that where prior to her incompetency, widow executed a will by which her husband had the power to use and dispose of her property during his life, the court could infer from these facts that the widow would not have chosen to prevent execution of her husband's testamentary plan); Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 903 (Okla. 1953) (stating that where incompetent widow had bequeathed her entire estate to her husband prior to her incompetency, it was "hardly conceivable that she would, if normal, want to disregard his will"). *But see* Dougherty v. Federal Nat'l Bank & Trust Co., 377 P.2d 963, 965 (Okla. 1962) (reversing order directing incompetent widow to take under her husband's will, even though wife had bequeathed her entire estate to her husband).

42. Sometimes written evidence other than the incompetent widow's will establishes the incompetent's intent. *See, e.g.*, First Nat'l Bank v. McMillan, 12 Ill. 2d 61, 68, 145 N.E.2d 60, 65 (1957) (husband and wife had discussed, by memoranda, their respective rights in the property prior to his incompetency, and husband therein declared his intent to abide by the provisions of the statute). However, courts typically rely merely on the happy marriage of the incompetent and her spouse. *See, e.g.*, Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 902 (Okla. 1953) (stating that couple had "lived together in complete domestic harmony for approximately a half century, with like interests, like impulses, like business ingenuity, and like sentiments toward charities and educational institutions, and always with great respect for each other's ideas and actions"); *see also* Huntington College v. Moore, 5 F. Supp. 541, 546 (W.D. Mich. 1933) (wife knew of the provisions of her husband's will, was in full accord with the provisions, and there was no evidence that she had ever changed her mind about them). This reliance may take the form of a presumption that the surviving spouse knew and approved of the decedent's estate plan. *See, e.g.*, State *ex rel.* Percy v. Hunt, 88 Minn. 404, 412, 93 N.W. 314, 317 (1903) ("[I]t should be assumed that this will was made by the husband, if not after actual consultation with his wife, at least with a view of meeting her wishes in respect to the property and the family."); Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 903 (Okla. 1953) (requiring the guardian to introduce direct testimony in order to establish that the incompetent widow would want to disturb her husband's estate plan).

43. *See, e.g.*, Edwards v. Edwards, 106 So. 2d 558, 564 (Fla. 1958) (stating that "in the case of an incompetent widow the best interest[s] of her heirs are not to be considered."); First Nat'l Bank v. MacDonald, 100 Fla. 675, 681, 130 So. 596, 598 (1930) (holding that enriching the incompetent widow's estate is not a proper matter for consideration); Kinnett v. Hood, 25 Ill. 2d 600, 602-03, 185 N.E.2d 888, 889 (1962) (stating that consideration of the best interest of the incompetent's estate and heirs may operate to the "possible detriment to the personal welfare, comfort and best interest of the incompetent"); Grammer v. Bourke, 117 Ind. App. 151, 155, 70 N.E.2d 198, 200 (1946) (stating that testator's intent should not be defeated for the benefit of the incompetent widow's heirs); *In re* Estate of Kees, 239 Iowa 287, 292, 31 N.W.2d 380, 382 (1948) (stating that "the matter of benefit to the kin of the survivor, or of the testator, has little if any bearing upon the controlling question what is for the best interests of the survivor"); Manufacturers Bank & Trust Co. v. Kunda, 353 Mo. 870, 874-75, 185 S.W.2d 13, 14 (1945) (holding that the interests of the incompetent widow's heirs are irrelevant to the

consider these concerns irrelevant to the proper focus of their inquiry, i.e., the best interests of the incompetent widow.

B. Pecuniary Approach

A minority of courts follow a pecuniary approach, under which the court awards the incompetent widow the share of her husband's estate that has the largest monetary value.[44] Courts adopting this approach reason that the best interests of the incompetent widow will in most cases require election of the larger share.[45] Rather than answer the detailed and time-consuming questions required by the majority approach, these courts have adopted a simpler rule to ensure the financial security of the incompetent surviving spouse.

II. ADVANTAGES OF A PECUNIARY APPROACH

In many cases, majority courts also award the incompetent widow the share of her husband's estate with the greater monetary value.[46] Application of a pecuniary approach will clearly not

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court's inquiry); *In re* Estate of Connor, 254 Mo. 65, 95, 162 S.W. 252, 261 (1914) (stating that mercenary interests of the incompetent widow's sisters cannot be considered by the court).

44. *See, e.g.*, Emmert v. Hill, 226 Ill. App. 1 (1922), *criticized in* Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962); *In re* Estate of Clarkson, 193 Neb. 201, 226 N.W.2d 334 (1975); Morse v. Trentini, 100 N.H. 153, 121 A.2d 563 (1956); Wentworth v. Waldron, 86 N.H. 559, 172 A. 247 (1934); *In re* Estate of Callan, 101 Ohio App. 114, 135 N.E.2d 464 (1956).

45. *See, e.g., In re* Estate of Clarkson, 193 Neb. 201, 206, 226 N.W.2d 334, 337 (1975) ("[T]he best interests of an incompetent in most instances will require the election which will result in the larger pecuniary value."). Even majority courts recognize this proposition. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 603, 185 N.E.2d 888, 889 (1962) ("Certainly the factor of value is important and in many cases would outweigh all others."); Van Steenwyck v. Washburn, 59 Wis. 483, 507, 17 N.W. 289, 295 (1884) (to award the incompetent the share that is the most valuable affords "a just and proper rule upon which to proceed in most cases").

46. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962) (upholding will where it authorized trustee to invade the principal of trust that consisted of over three-fourths of decedent's estate, without limit, to maintain the incompetent widow's usual position in life); First Nat'l Bank v. McMillan, 12 Ill. 2d 61, 145 N.E.2d 60 (1957) (reversing denial of leave to renounce the will where incompetent would take $1.00 under the will but would receive approximately $10,000 if permitted to renounce); *In re* Estate of Kees, 239 Iowa 287, 31 N.W.2d 380 (1948) (affirming order directing the incompetent widow to take under her husband's will where the will represented a larger monetary share); *In re* Estate of Carey, 194 Minn. 127, 143, 260 N.W. 320, 327 (1935) ("[E]ven if we were to look at the matter from the purely money [sic] and materialistic values, it would have been to the husband's interest to take under the will rather than against

change the result in such cases.[47] However, the majority courts' preference for deferring to the testator's intent, especially where the testator adequately provides for the incompetent widow, may result in upholding the will even as against a larger statutory share.[48] Because of the possibility of such a result, a pecuniary approach should be adopted in determining the incompetent widow's best interests. Preference for such a result rests on two independent grounds: dissatisfaction with the rationale underlying the majority approach,[49] and prudential concerns relating to clarity of the law and judicial efficiency.[50]

A. Deficiencies of the Majority Approach

1. Freedom of testation— The traditional view, that continual judicial interference with the disposition of private property runs counter to both our legal tradition and to social sensibilities, retains its prominence.[51] Consistent with this philosophy, courts should give great deference to the husband's will whenever possible. Nevertheless, even majority courts recognize that the testator has no absolute right to dispose of his property as he wishes.[52] The tradition of protecting the surviving spouse, competent as well as incompetent, is a product of an overriding state policy concern that justifies restricting testamentary freedom.[53]

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it."); State *ex rel.* Percy v. Hunt, 88 Minn. 404, 412, 93 N.W. 314, 317 (1903) (taking under the will was the best election from either a monetary standpoint or from consideration of many factors); *In re* Hansen's Guardianship, 67 Utah 256, 247 P. 481 (1926) (granting incompetent widow her share under will where she would receive $5,000 if she took her distributive share, but would have the entire income of her husband's estate available during her lifetime by the terms of her husband's will). *But see infra* note 47.

47. This assertion assumes that each share is properly valued. *See infra* notes 116-35 and accompanying text.

48. *See, e.g.*, Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897 (Okla. 1953) (upholding the will where the wife would get entire estate under the statute and was bequeathed one-half of the estate).

49. *See infra* notes 51-85 and accompanying text.

50. *See infra* notes 86-100 and accompanying text.

51. *See supra* notes 33-36 and accompanying text.

52. *See supra* notes 36-37 and accompanying text.

53. *See, e.g.*, Emmert v. Hill, 226 Ill. App. 1, 9 (1922) ("The right which a husband has to dispose of his property by will is only a legal one and it is subject to the paramount rights of his widow in his estate."), *criticized in* Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962); Wentworth v. Waldron, 86 N.H. 559, 563, 172 A. 247, 250 (1934) ("[T]he right of a husband to dispose of his property by will is subject to the paramount legal rights of his widow in the estate . . . ."); *see also* W. MACDONALD, *supra* note 2, at 39 ("The fact is that over the centuries freedom of testation has been the exception rather than the rule."); Kurtz, *supra* note 5, at 1061 (stating that the law has recognized

State legislatures could have declined to provide an incompetent widow with the right to elect a share other than that provided by her husband's will.[54] Instead, legislatures extended to the incompetent widow a right to elect substantially identical to that of the competent surviving spouse.[55] By providing the incompetent widow with such a right, state legislatures plainly refused to give the husband's desires controlling weight. Moreover, by mandating election in the "best interests" of the incompetent widow, the legislatures implied the irrelevance of the testator's intent in such cases.[56] In this application, forced-share laws represent the legislative judgment that the deference generally given to preservation of the testator's intent must give way to the policy of protecting the incompetent widow.

2. *Adequate provision*— The primary disagreement between the pecuniary and majority approaches arises when the statutory share has a larger monetary value than the will's provision. In this circumstance, majority courts might still determine that the will adequately provides for the incompetent widow.[57] However, a determination that the will's provision is "adequate" does not clearly comport with the legislative mandate to make an award in the best interests of the incompetent widow. The existence of the incompetent widow's right of election establishes her legal entitlement to the statutory share of her husband's estate.[58] The

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that "a testator's freedom of testation should be circumscribed whenever that freedom collides with society's greater interest in protecting a surviving spouse from disinheritance"); Mahoney, *supra* note 7, at 99 (stating that freedom of testation is central to a system based on private property, but is circumscribed by overriding social goals).

54. Friedman, *supra* note 1, at 401 (noting that the right to elect could have been denied in the absence of a competent mind, and indeed was in many cases of 19th Century America).

55. *See, e.g.*, ALA. CODE § 43-8-71 (1975); FLA. STAT. ANN. § 732.210 (West 1983); N.J. STAT. ANN. § 3B:8-11 (West 1983). The incompetent widow is not given precisely the same share as the competent surviving spouse, however, where the statute predicates the incompetent widow's election on her need. *See infra* note 64.

56. Emmert v. Hill, 226 Ill. App. 1, 9 (1922) ("No matter how kindly disposed the courts may be towards the beneficent bequests contained in a will," the incompetent widow's best interests must be protected "without concern as to whether or not the general scheme and plan of the testator's will is interfered with."), *criticized in* Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962); *In re* Estate of Clarkson, 193 Neb. 201, 206, 226 N.W.2d 334, 337 (1975) (stating that testamentary desires have "little or no importance in relation to the best interests of the surviving spouse"). The husband must be viewed as a third party in the context of a determination of the best interests of the incompetent widow, and as such his interests are irrelevant to the court's inquiry. *See infra* notes 78-80 and accompanying text.

57. *See supra* note 48 and accompanying text.

58. One might argue that the incompetent widow is not legally entitled to the statutory share because the exercise of her right is governed by judicial or legislative standards relating to her "best interests" or "need." *See supra* note 23 and accompanying text; *see also infra* note 64. The existence of the statutory right to elect, however, pro-

incompetent widow should not be relegated to merely adequate care when the law provides her with the option of enjoying better care. Although more money may not ensure better care, one may reasonably assume the higher likelihood of receiving better care if the incompetent has access to a larger store of funds.[59] It is difficult to envision deprivation of this benefit as being in the best interests of the incompetent widow.

Majority courts often justify allowing the incompetent widow less than the statutory share on the ground that the incompetent has no conception of the value of money and thus would not benefit by a larger award.[60] Because the incompetent widow would not know the difference, such courts reason that merely adequate provision is sufficient. This view, however, conflicts with the mandate to act in the best interests of the incompetent widow. Her best interests should not depend upon perceptive capacity;[61] the incompetent's security is the paramount consideration.[62] Providing the incompetent widow with the larger statutory share gives her added security, and thus must be more in

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vides the incompetent widow with the opportunity to show that she is entitled to that statutory share. She is in this sense "entitled" to the statutory share.

59. One might argue that where the incompetent widow is already receiving the best of care, or is happy where she is, providing her with additional funds would not provide her with better care. One may reasonably assume, however, that most incompetents will be in a position in which upgrading the quality of their care is possible.

Even where improvement in the quality of care seems currently unnecessary, denying access to more funds on this ground dismisses as unimportant the benefit derived from the added security generated by the additional funds. *See supra* notes 9 & 21 and accompanying text. Access to such funds would protect the incompetent widow from inflation and rising health care costs, in addition to providing the ability to obtain better care.

60. First Nat'l Bank v. MacDonald, 100 Fla. 675, 681, 130 So. 596, 598 (1930) ("[A] permanently insane widow knows nothing of the value of money, cannot use it with discretion and has no need for money nor property save to furnish ample comforts and needs . . . ."); Kinnett v. Hood, 25 Ill. 2d 600, 605, 185 N.E.2d 888, 890 (1962) ("[A]nything beyond her maximum needs would be worthless. She could not use it, give it away or dispose of it by will."); Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 901 (Okla. 1953) (citing *First Nat'l Bank v. MacDonald* with approval); *In re* Hansen's Guardianship, 67 Utah 256, 267, 247 P. 481, 485 (1926) (stating that the incompetent widow "is unable to use or enjoy any property, except such as is necessary for her personal comfort and conveniences"); Van Steenwyck v. Washburn, 59 Wis. 483, 508, 17 N.W. 289, 295 (1884) (stating that the incompetent widow "can have no conception of the value or use of money . . . . She cannot use money; she cannot manage it; its possession would be of no earthly benefit or advantage to her.").

61. Mead v. Phillips, 135 F.2d 819, 829 (D.C. Cir. 1943) ("It begs the question to say that, being incompetent, she would, perhaps, never know the difference. Perhaps she would never know whether she herself was being properly cared for; would this argue in favor of dispossessing her during her lifetime?"). The concern as to perceptive capacity stems from concern with preserving the testator's intent. This cannot be an overriding consideration. *See supra* notes 52-53 and accompanying text.

62. *See supra* notes 9 & 21 and accompanying text.

her interest than a smaller testamentary amount.

The statutory scheme confirms this conclusion. Because of the relatively fixed proportion of the statutory share, the size of the decedent's estate, rather than the needs of the incompetent widow, determines the extent of the incompetent's protected interest.[63] This emphasis on the size of the decedent's estate, rather than on the incompetent widow's needs, indicates the legislature's lack of concern that the widow might receive more than she needs.[64] Although one may disagree with this approach as a matter of policy,[65] because the legislature developed the protective scheme, the legislature, and not the courts, should un-

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63. *See supra* note 14; *see also* W. MACDONALD, *supra* note 2, at 22 ("Relief is standardized; no attention is paid to individual equities or unusual circumstances.")

64. This is arguably not the case in those states that condition the incompetent widow's right to elect upon a judicial finding that election of the statutory share is "necessary to provide adequate support" for the incompetent widow during her lifetime. *See, e.g.*, ALA. CODE § 43-8-71 (1975); ALASKA STAT. § 13.11.080 (1972); ME. REV. STAT. ANN. tit. 18-A, § 2-203 (1964); N.J. STAT. ANN. § 3B:8-11 (West 1983). The position of these states tracks that of the UNIFORM PROBATE CODE [hereinafter cited as U.P.C.] § 2-203 (1969). Although the arguments in the text relating to the statutory mandate of "best interests" of the incompetent widow do not apply to these states, the application of a pecuniary approach even in these states may still be justified.

For example, the states which follow the U.P.C. in this regard have also typically adopted the concept of an augmented estate, advanced in U.P.C. § 2-202. *See, e.g.*, ALASKA STAT. § 13.11.075 (1975); ME. REV. STAT. ANN. tit. 18-A, § 2-202 (1964); N.J. STAT. ANN. § 3B:8-3 (West 1983). The augmented estate generally consists of:

> decedent's net probate estate increased by (1) the value of certain lifetime transfers of property by the decedent during marriage to donees other than the surviving spouse, and (2) the value of all property owned by the surviving spouse at decedent's death and certain lifetime transfers of property by the surviving spouse during marriage to donees other than the decedent, to the extent the owned or transferred property is derived from the decedent.

Kurtz, *supra* note 5, at 981-82. In the Comment to U.P.C. § 2-202, the drafters advance the dual purpose underlying the augmented-estate concept: "(1) to prevent the owner of wealth from deliberately defeating the right of the surviving spouse . . . and (2) to prevent the surviving spouse from electing a share of the probate estate when the surviving spouse has received a fair share of the total wealth of the decedent . . . ." If the court relies on such a determination of the probate estate, it is arguably unnecessary to inquire into the needs of the incompetent widow because the determination of the probate estate has already precluded the possibility of the surviving spouse obtaining more than a fair share. Thus, application of a pecuniary approach should not result in unfairness. Courts in the relevant jurisdictions could rely on the legislative judgment that a determination based upon an augmented-estate concept will not allow the incompetent widow to receive an unfair share in her husband's estate under the statute, and thus could act pursuant to a pecuniary approach in making the ultimate election in the best interests of the incompetent widow. For a more detailed discussion of the augmented-estate concept, see generally Kurtz, *supra* note 5.

65. *See, e.g.*, W. MACDONALD, *supra* note 2, at 41 (arguing that the share of estate made available to surviving spouse should be more closely tied to her needs). *See generally* Kurtz, *supra* note 5 (arguing that the augmented-estate concept is a legislative rather than judicial attempt to unite the size of the surviving spouse's share in her husband's estate with her actual needs).

dertake any changes.[66]

Furthermore, courts that have rejected the majority approach have persuasively reasoned that the logical extension of the principle of adequate provision would prevent renunciation of the will in situations where the incompetent widow herself possessed ample means; in such cases even the smallest bequest by her husband would adequately provide for her.[67] This result may not seem troubling because the legislative concern for the incompetent widow's security in such a case seems satisfied.[68] Many legislatures, however, do not predicate the statutory right of election upon individual need or upon a determination of what constitutes an "adequate" provision.[69] Where legislatures have mandated action in the "best interests" of the incompetent widow, courts should avoid the complex and confusing inquiry into what is "adequate." Although the term "best" may be subject to ambiguities similar to those that plague determination of "adequate provision,"[70] a "best interests" standard preserves the notion of resolving ambiguities in favor of the protected party, thereby more effectively advancing the legislative policy of protecting the incompetent widow.[71]

One might argue that a court of equity may properly limit an incompetent surviving spouse's share to an "adequate" amount. The flexible guidelines set forth by the legislature may authorize the court to do so.[72] Such an approach, however, effectively penalizes the widow for being incompetent.[73] If the widow were

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66. Of course, where the legislature directs the court to inquire as to the incompetent widow's needs, courts may properly do so. *But see supra* note 64 (even where the statute directs an inquiry into the incompetent widow's needs, application of a pecuniary approach may not be foreclosed).

67. Emmert v. Hill, 226 Ill. App. 1, 10 (1922), *criticized in* Kinnett v. Hood, 25 Ill. 2d 600, 602-03, 185 N.E.2d 888, 889 (1962).

68. Where the incompetent widow has independent resources, one might argue that the state need not interfere with the husband's will. *See, e.g.*, Edwards v. Edwards, 106 So. 2d 558, 564 (Fla. 1958) (considering the fact that the incompetent widow's own properties were substantial); Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 904 (Okla. 1953) (finding that incompetent widow's own estate was "sufficient to more than meet her needs").

69. For relevant statutes advancing a "best interests" standard, see *supra* note 23.

70. One might argue that what is "best" for the incompetent is also subject to independent judgment. This indeed is the position taken by the majority courts.

71. *See, e.g., In re* Estate of Clarkson, 193 Neb. 201, 205, 226 N.W.2d 334, 337 (1975) (recognizing that the "best interests" standard "narrow[s] the range of consideration").

72. This is true especially where the statute mandates such an inquiry. *See supra* note 64. The argument for judicial power is similarly strong where judicial, rather than legislative, standards govern the incompetent widow's election, as in Illinois. *See supra* note 23.

73. Emmert v. Hill, 226 Ill. App. 1, 10 (1922), *criticized in* Kinnett v. Hood, 25 Ill. 2d 600, 602-03, 185 N.E.2d 888, 889 (1962).

competent, the husband could not cut off her statutory right to elect a share in his estate simply by providing for her every equitable need.[74] To hold that a court may so limit the share of an incompetent widow is thus illogical and inequitable, especially because the incompetent widow is in a sense the ward of the court and thus should receive every consideration by the court in its administration of her rights.[75]

3. The choice of a competent widow— Majority courts often base their decisions on what they believe the widow would have done had she been competent.[76] Such courts sometimes reason that had the widow been competent, she would have chosen to abide by her husband's will because of the love and respect she bore for him.[77] This reasoning presents several problems.

First, the same courts that advance this reasoning quite properly preclude judicial consideration of whether the incompetent widow, had she been competent, would have chosen to benefit her children and heirs because of the love she felt for them.[78] It is logically inconsistent to inquire into what the incompetent widow would have done in consideration of her husband but not with respect to her heirs.[79] Both inquiries involve consideration of the incompetent widow's relationship to third parties, which is inappropriate in the context of an inquiry properly focused on the best interests of the incompetent widow.[80]

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74. Emmert, 226 Ill. App. at 9-10.

75. *See, e.g.*, Miller v. Keown, 176 Ky. 117, 123, 195 S.W. 430, 433 (1917) (finding denial of the incompetent surviving spouse's right in her husband's estate a "grave injustice and glaringly inequitable" because the incompetent widow is "not only the ward of the court, but . . . [one] who in every other particular has [her] rights as well as [her] property guarded and administered by the protecting and vigilant hand of the [court]"), *overruled on other grounds*, Lockhard v. Brown, 536 S.W.2d 318 (Ky. 1976). *See supra* note 19 and accompanying text.

76. *See supra* notes 39-42 and accompanying text.

77. *Id.*

78. *See, e.g.*, Edwards v. Edwards, 106 So. 2d 558, 564 (Fla. 1958); Kinnett v. Hood, 25 Ill. 2d 600, 602-05, 185 N.E.2d 888, 889-90 (1962).

79. This inconsistency refers to the rationale used by majority courts in permitting inquiry into the incompetent widow's hypothetical intent and in excluding consideration of the incompetent widow's heirs. One might argue in support of the majority approach that the husband merits concern not as a third party but because he is a testator. Therefore, his intent warrants judicial deference. Such deference is not absolute, however, and thus cannot take precedence over the interests of the incompetent widow. *See supra* notes 52-53 and accompanying text.

Moreover, concern for the husband's intent often translates into a concern for the interests of the husband's heirs, because they will often benefit from the husband's will. This perspective more effectively reveals the "third party" nature of these concerns. *See, e.g.*, Mead v. Phillips, 135 F.2d 819, 829 (D.C. Cir. 1943) ("We see no reason for assuming that the intent of the legislators was to protect the heirs of a husband, any more than the heirs of the [incompetent widow].").

80. *See, e.g.*, Emmert v. Hill, 226 Ill. App. 1, 8-9 (1922) (interests of heirs of incompe-

Second, a court can do no more than speculate as to what the widow would have done had she been competent.[81] Only in rare cases will the court have evidence of the widow's intent immediately prior to her incompetency, and, by definition, her mental state precludes discovery of her desires once she becomes incompetent.[82] In the absence of concrete evidence of the incompetent widow's earlier state of mind,[83] a court should not engage in speculation.

Furthermore, basing decisions on what the incompetent widow would have done had she been competent often will fail to advance her best interests. Had the widow been competent, she could have chosen a ridiculously smaller share and the court could not interfere.[84] Her incompetence requires the court to determine her best interests objectively, rather than speculate upon what she might have done under other circumstances.[85]

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tent widow not a proper subject for the court's consideration), *criticized on other grounds* Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962); *In re* Estate of Clarkson, 193 Neb. 201, 206, 226 N.W.2d 334, 338 (1975) (stating that "interests of possible heirs of the incompetent should play no part" in the court's decision.). Majority courts recognize this principle as well. *See supra* note 43 and accompanying text.

Some courts recognize the relevance of the interests of the incompetent widow's heirs to the determination of the incompetent widow's best interests. *See, e.g.*, Mead v. Phillips, 135 F.2d 819, 829 (D.C. Cir. 1943) (stating that the incompetent widow is likely to derive comfort and happiness from knowing that her dependents will be protected and secure); N.H. REV. STAT. ANN. § 464A:34 comment (1979) (permitting inquiry into benefit to incompetent widow's heirs).

81. *See, e.g.*, State *ex rel.* Percy v. Hunt, 88 Minn. 404, 412, 93 N.W. 314, 317 (1903) (stating that incompetent widow's best interest "cannot be determined alone by deciding what the survivor would do if sane, because such a condition is impossible"); *In re* Estate of Clarkson, 193 Neb. 201, 207, 226 N.W.2d 334, 338 (1975) ("No one can ever say exactly what the incompetent widow would have done if competent.").

82. Majority courts tend to rely upon speculation or upon inferences arising from the incompetent widow's estate plan. *See supra* notes 41-42 and accompanying text. For a more concrete method of ascertaining the incompetent widow's previous intent, see *infra* notes 136-44 and accompanying text.

83. *See infra* notes 136-44 and accompanying text.

84. *See, e.g.*, Grammer v. Bourke, 117 Ind. App. 151, 154-55, 70 N.E.2d 198, 199 (1946) ("A widow not under disability may elect to take under the law or not, as she chooses, though her choice might be detrimental to her best interests."); *In re* Estate of Clarkson, 193 Neb. 201, 207, 226 N.W.2d 334, 338 (1975) ("While a competent surviving spouse may elect to take against the will, even if it would seem obviously against her best interests to do so, a court in making the choice for an incompetent does not have that privilege."); *see also* Friedman, *supra* note 1, at 415.

85. *See* Friedman, *supra* note 1, at 415:

> On the surface this [inquiry into what the incompetent widow would have done had she been competent] seems very reasonable. But the fact is she is *not* competent; incompetent is not competent and the difference may go to the heart of the matter. If competent, she might (if she wished) take all her money and spend it at the races—that is entirely her own business. But if she is incompetent, her money must be prudently invested, not because *she* would do so (she probably would not: how many people are prudent?) but because of a positive

B. *Clarity and Efficiency*

In addition to these disagreements with the basic underpinnings of the majority approach, several other reasons support a preference for a pecuniary approach. The majority approach necessitates a complex inquiry into some difficult, if not irresolvable, factual matters.[86] A pecuniary approach, by contrast, requires no such inquiry; instead, a bright-line rule replaces the multi-factor analysis, thus eliminating the need for lengthy litigation which may significantly deplete the estate.[87] In addition, a bright-line rule facilitates effective estate planning.[88] This in turn enables the testator to tailor his will to reflect society's interest in protecting the incompetent widow, as well as his own interest in the disposition of his property. These goals of clarity and efficiency hold central positions in the law and in probate law in particular.[89]

1. Clarity— In order for a legal system to be effective, its laws must facilitate conduct that conforms to its mandates.[90] By providing society with a clearly ascertainable code of conduct, the law enables individuals to structure their affairs accordingly. The need for clarity has special importance in the planning of estates. An individual with an interest in the ultimate disposition of his property needs straightforward rules that enable him to develop and effectuate his testamentary design.[91] Moreover, because deference to testamentary intent plays a major role in estate law,[92] courts should also prefer rules that enable the indi-

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rule of law. Similarly, her election must be based on policy.
(emphasis in original).

86. These matters include questions of adequate provision, which requires an analysis of projections of income and need, and also questions regarding the incompetent widow's probable intent. *See supra* notes 39-42; *infra* note 120 and accompanying text.

87. *See, e.g.*, Friedman, *supra* note 1, at 417 (asserting that the costs associated with the election process are often substantial under the majority approach).

88. *See infra* notes 90-96 and accompanying text.

89. The need for clarity and efficiency in probate law is codified in U.P.C. § 1-102(b)(1) and U.P.C. § 1-102(b)(3), respectively.

90. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt.1)*, 74 YALE L.J. 775, 836 (1965) (arguing that, in order to serve its underlying values, the law must induce affirmative conduct that is consistent with the self-interest and capabilities of private individuals).

91. *See, e.g.*, Emmert v. Hill, 226 Ill. App. 1, 11 (1922) ("Every sane person considers the natural objects of his bounty [and also gives thought to] a just and proper distribution of his estate upon his death."), *criticized in*, Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962). *See infra* note 94 and accompanying text.

92. *See supra* notes 33-35 and accompanying text; *see also* U.P.C. § 1-102(b)(2) (stating that one underlying purpose of the U.P.C. is "[t]o discover and make effective the intent of a decedent in the distribution of his property").

vidual to design his will with clarity so that others may correctly discern his intent.[93]

In addition, simple and understandable rules enable the individual to play a major role in developing his estate plan.[94] A clear and predictable probate system thus keeps the locus of control over private property in the hands of the individual owner rather than in those of the legal technician. This result clearly comports with the importance that society places on allowing an individual to dispose of his property as he wishes within the constraints imposed by public policy.[95]

By placing controlling emphasis on the monetary value of the statutory and testamentary shares of the husband's estate, the pecuniary approach provides certainty and clarity to the estate planner. The husband can thus avoid subsequent judicial disruption of his testamentary design by bequeathing his wife a share of his estate with a monetary value equal to or greater than that of her statutory share.[96] The clarity of the rule will thus encourage the testator to bequeath in the best interests of his wife. As a result, testamentary intent and the best interests of the incompetent widow will more often coincide. The pecuniary approach thus secures advantages that elude adherents of the majority approach.

2. *Efficiency*— In addition to providing clarity, a pecuniary approach serves the prudential concerns of speed and efficiency in the ultimate disposition of private property.[97] Unlike the majority approach, the pecuniary approach does not involve the

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93. Because courts defer to the testator's intent where such deference does not contravene public policy, rules that enable the individual to clearly set forth his estate plan aid the court in discovering the testator's intent. This promotes efficient use of judicial resources. *See infra* notes 97-100 and accompanying text.

94. Although most individuals will seek the aid of an attorney to prepare their estate plans, the benefit of clear rules is not thereby diminished. The individual will be included to a greater extent in the development of his will if he is able to understand the relevant principles of law. Furthermore, clear rules will aid the attorney in his efforts to satisfy his client's wishes. Thus, simplicity and clarity will facilitate effective estate planning, which is an important policy goal. *See* U.P.C. §§ 1-102(b)(1), (2).

95. *See supra* notes 51-53 and accompanying text.

96. One can accomplish this by virtue of an emergency power to invade the corpus of a sufficiently large trust fund; a blanket monetary grant is not required. *See infra* notes 116-25 and accompanying text. Thus, the ability of the testator to control the disposition of his property is not sacrificed under the pecuniary approach, and yet the policy of protecting the incompetent widow retains its prominence.

97. The goals of speed and efficiency are codified by U.P.C. § 1-102(b)(3). *See also* Bork, *supra* note 90, at 835 ("[I]t is surely preferable that the policy read into a law be one which the law by its structure and coverage is able to implement efficiently."); Wellman, *Recent Developments in the Struggle for Probate Reform*, 79 MICH. L. REV. 501, 510 (1981) ("[T]he inheritance process should occur with a minimum of red tape, cost and delay.").

courts in a lengthy and complex inquiry into the incompetent widow's needs and thus avoids the costs associated with such judicial inquiry.[98] These unnecessary administrative costs burden both the individual litigant and society as a whole; the litigants must bear the cost of extended legal proceedings, and society suffers wasted judicial resources and increased probate administration costs.[99] The cost to the litigants takes on added importance when one remembers that the incompetent widow herself must bear these costs. The court is charged with protecting the incompetent widow's best interests, and thus should strive to minimize the costs involved in the election process.[100] By reducing these costs, the pecuniary approach operates in the incompetent widow's best interests.

C. *Addressing Criticisms of the Pecuniary Approach*

Despite the benefits of a pecuniary approach, many courts and commentators have criticized it. Although some of the criticisms are well-taken, others are not. Before attempting to accommodate reasonable criticisms,[101] it will be useful to discuss those criticisms that are not as meritorious.

Perhaps the most common criticism of the pecuniary approach is that it places undue emphasis on the incompetent widow's estate and her heirs who may benefit from a larger statutory share.[102] These critics maintain that such an emphasis does not comport with the statutory mandate that limits the permissible scope of the inquiry to the interests of the incompetent widow.[103] They further argue that this emphasis conflicts with the underlying purpose of the statutory right to elect,

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98. *See supra* notes 86-87 and accompanying text.

99. *See generally* Wellman, *supra* note 97, at 510 (discussing costs incurred in probate administration).

100. *See, e.g.*, Kernan v. Carter, 132 Md. 577, 592, 104 A. 530, 535 (1918) (stating that it would be "disastrous if settlements of estates [were] to be kept in uncertainty for years, probably throughout the lives of insane widows and husbands").

101. *See infra* notes 114-45 and accompanying text.

102. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 602, 185 N.E.2d 888, 889 (1962) (placing the election purely upon monetary considerations puts too much emphasis on the best interests of the incompetent widow's estate, from which her heirs will benefit). This concern of majority courts is also acknowledged in *In re* Estate of Clarkson, 193 Neb. 201, 206, 226 N.W.2d 334, 338 (1975). The incompetent widow's heirs benefit by an election of the larger share where the unused portion of the share passes on to the incompetent widow's estate upon her death.

103. *In re* Estate of Clarkson, 193 Neb. 201, 206-07, 226 N.W.2d 334, 337-38 (1975). *See also supra* note 43 and accompanying text.

namely, to protect the incompetent widow, but only during her lifetime.[104]

These critics correctly note that application of the pecuniary approach will often enrich the incompetent widow's estate and thereby benefit her heirs.[105] This result, however, does not constitute unjust enrichment. Courts applying the pecuniary approach would award the incompetent widow the larger share to ensure her security.[106] No impermissible emphasis on third-party interests results from any incidental benefit to the incompetent widow's heirs. Thus, incidental benefit can in no way justify relegating the incompetent widow to a share that does not serve her best interests.[107]

Many courts also criticize the pecuniary approach on the ground that if the court must elect the share with the greatest monetary value, it will exercise no discretion.[108] The definition

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104. *See supra* note 43 and accompanying text. The court in Kinnett v. Hood, 25 Ill. 2d 600, 602, 185 N.E.2d 888, 889 (1962), stated that election of the larger share of the decedent's estate might operate to the incompetent widow's detriment. This may occur where the court fails to consider the possible tax burden associated with a renunciation of the will. *See, e.g.*, Friedman, *supra* note 1, at 419-21. For example, the testator might design the will so that although it appears to represent a smaller share of his estate than that available under the statute, the testamentary scheme actually maximizes the benefit that the incompetent widow would receive by relieving her of an onerous tax burden. The court should not, however, have to examine the possible tax effects of its award on the incompetent's estate; indeed, the court may be ill-equipped to do so easily. Rather than have the court weigh the tax costs associated with the respective shares in the decedent's estate, the husband should use a waiver of his wife's rights in his estate. Where the testator carefully plans his estate with respect to tax issues, one may reasonably require him to similarly plan for the welfare of his wife in the event of her incompetency, i.e., by securing a waiver of her rights. *See infra* notes 138-144 and accompanying text. Use of the waiver in this manner should alleviate concerns arising from the impact of estate taxes on the judicial valuation process.

105. *See supra* note 102.

106. *See supra* notes 9 & 21 and accompanying text.

107. The best interests of the incompetent widow are of paramount consideration, and thus courts should attempt to reach the result that best serves that goal, regardless of any side effect. *See supra* notes 9 & 21 and accompanying text. Although the disruption of the husband's estate plan may be undesirable, his interest does not outweigh that of the incompetent widow. *See supra* notes 52-53 and accompanying text.

The criticism carries even less weight given the ability of the husband to prevent enrichment of the incompetent widow's estate by providing in the will for an emergency power to invade the corpus of the estate. *See infra* notes 116-25 and accompanying text. The incompetent widow would have access to the corpus only during her lifetime, thus ensuring her security without enriching her heirs. This procedure would preclude any dissatisfaction arising from a concern regarding third party interests, including fraud on the part of such interested individuals.

108. *See, e.g.*, Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 903 (Okla. 1953) (stating that if the court must elect solely on the basis of monetary value, "the matter of election would be merely a question of mathematics"); Harris Estate, 351 Pa. 368, 383, 41 A.2d 715, 722 (1945) (stating that court should not be controlled by "mere mathematical calculations" when acting on behalf of the incompetent widow); Van Steenwyck v.

of "election," however, tempers the need to exercise judicial discretion. "Election" means "the right and power to choose without restriction,"[109] and thus more aptly describes the situation confronted by the competent spouse, who may elect upon any consideration whatsoever.[110] In the case of an incompetent spouse, the courts and legislature have restricted the permissible scope of the court's inquiry to the best interests of the incompetent widow.[111] Thus, in determining the incompetent widow's best interests, the court's role should be limited.

Judicial discretion becomes unnecessary where a rule of easier application can achieve the desired results. If a pecuniary approach does indeed essentially reduce the incompetent widow's election to "a task for appraisers and accountants,"[112] this would simply represent the by-product of the application of a prudent rule of law. The exercise of judicial discretion possesses no inherent benefits that the efficient use of judicial resources may not outweigh. Indeed, a pecuniary approach serves the beneficial function of minimizing the court's role in the distribution of the estate, thereby allowing individuals to retain their privacy in estate matters.[113]

III. RECONCILING THE MAJORITY AND PECUNIARY APPROACHES

Regardless of any theoretical preference for either the majority or pecuniary approach, the results that these approaches produce represent the ultimate test of their validity. The internal inadequacies of the majority approach's rationale, in conjunction with the greater cost-effectiveness of the pecuniary approach,[114] suggest that a pecuniary approach will produce better results. Unfortunately, judicial application of the pecuniary approach has suffered from improper valuation of various interests, and has thus produced some questionable results.[115] Refinements in

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Washburn, 59 Wis. 483, 509, 17 N.W. 289, 295 (1884) (stating that if the court must elect the more valuable interest, "without reference to any other consideration, then it really will exercise no discretion").

109. Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 903 (Okla. 1953).

110. *See supra* notes 84-85 and accompanying text.

111. *See supra* notes 23, 84-85 and accompanying text.

112. Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897, 903 (Okla. 1953).

113. *See, e.g.*, Wellman, *supra* note 97, at 509 (asserting that "most persons believe that succession to the wealth of a spouse, parent, or other close relative or friend should be a private matter").

114. *See supra* notes 46-113 and accompanying text.

115. These failures consist primarily of failures to properly value an emergency

valuing the incompetent widow's interests, as well as the recognition of a valid waiver of the right to elect, will better protect both testamentary intent and the incompetent widow, meet the criticisms of majority courts, and increase the appeal of a pecuniary approach.

A. Valuation

1. Emergency power to invade the corpus— Many cases involve a will provision that establishes a trust, consisting of all or part of the decedent's estate, in favor of the incompetent widow.[116] The income generated by the trust goes to the incompetent widow as beneficiary.[117] In addition, the will typically provides for an emergency power to invade the corpus of the trust in the event that additional funds are needed for the incompetent widow's care and support.[118] Critics fault those courts applying a pecuniary approach for failing to consider the value of an emergency power to invade the corpus in their valuation.[119] This failure results in an underestimation of the value of the widow's share under the will.[120] Pecuniary courts often justify this result on the ground that the incompetent widow will probably not exercise the emergency power, and therefore the power has no ascertainable value to her.[121]

This justification admittedly represents an unduly narrow application of the pecuniary approach. The power to invade the corpus clearly has value to the incompetent widow. The emergency power enhances the incompetent widow's security by giv-

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power. *See infra* notes 116-25 and accompanying text.

116. *See, e.g.*, Edwards v. Edwards, 106 So. 2d 558, 562 (Fla. 1958); Kinnett v. Hood, 25 Ill. 2d 600, 604, 185 N.E.2d 888, 890 (1962); Emmert v. Hill, 226 Ill. App. 1, 3-4 (1922); *In re* Estate of Connor, 254 Mo. 65, 73-74, 162 S.W. 252, 253 (1914); *In re* Estate of Clarkson, 193 Neb. 201, 202, 226 N.W.2d 334, 335-36 (1975); *In re* Estate of Callan, 101 Ohio App. 114, 116, 135 N.E.2d 464, 466 (1956).

117. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 185 N.E.2d 888 (1962).

118. *Id.* Thus, where the will establishes both a testamentary trust consisting of the entire estate, and an emergency power to invade the corpus of the trust, the incompetent widow has the entire estate at her disposal if necessary, subject to the administration of the trustee. This situation is often referred to as that of the "deepest reservoir." *See, e.g.*, Friedman, *supra* note 1, at 414.

119. *See* Friedman, *supra* note 1, at 414.

120. *Id.* An emergency power arises pursuant to the will rather than under the forced-share statute. If a court fails to properly value the emergency power, the value of the testamentary share is correspondingly lower.

121. *See, e.g., In re* Estate of Callan, 101 Ohio App. 114, 121, 135 N.E.2d 464, 469 (1956).

ing her access to additional funds should she require them.[122] Because the security of the incompetent widow constitutes a paramount consideration in determining her best interests,[123] courts should make the value of that security a factor in determining the value of the incompetent widow's share in her husband's estate under the will.

In determining the value of the emergency power, the court should not estimate the likelihood that the incompetent widow will use the emergency power.[124] Such a calculation would unnecessarily involve the court in a complex and speculative inquiry into the incompetent widow's needs and financial status.[125] Instead, the court should apply a more objective and workable standard that clearly relates to the benefit received by the incompetent widow. Courts should consider the value of the corpus itself as the value of the emergency power, because the corpus reflects the amount of funds at the incompetent widow's disposal. Therefore, the value of the corpus accurately measures the security that the emergency power gives to the incompetent widow.

2. Life interest versus fee title— Frequently, the widow receives a life estate in land under the will but would obtain a fee title under the applicable statutory provisions.[126] Courts applying the pecuniary approach have deemed the fee title to be of greater value than the life estate.[127] Those who criticize this distinction argue that because the widow's incompetence prevents

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122. *See supra* note 118.

123. *See supra* notes 9 & 21 and accompanying text.

124. If the emergency power presented unduly harsh conditions for its use, a court could properly consider this in valuing the testamentary share. For example, if the will provided that the emergency power could be exercised on the incompetent widow's behalf only before a given date, a court could justifiably view such an emergency power as conveying less benefit than one which provided unqualified access to the decedent's estate. However, in the absence of such an unusual limitation, an inquiry into the likelihood of use of the emergency power would be needlessly burdensome. *See infra* note 125 and accompanying text.

125. For example, the court would have to examine the security and stability of the incompetent widow's holdings, which would at least require econometric projections of all economic sectors in which the widow was involved. The incompetent widow's health and life expectancy would also have to be examined in order to reach a proper determination. Although this is not necessarily problematic, the increased costs must be considered in determining the cost-effectiveness of such an approach.

126. Forced-share statutes generally provide for an unencumbered interest in the decedent's properties. *See supra* note 12.

127. *See* Friedman, *supra* note 1, at 414 (criticizing the pecuniary approach for assuming that "it makes a difference to the incompetent widow whether she holds things in fee or does not"). Some majority courts agree with the pecuniary viewpoint. *See, e.g., In re* Estate of Kees, 239 Iowa 287, 292, 31 N.W.2d 380, 382 (1948) ("[O]f course a life estate is ordinarily of much less value than a fee in the same property.").

her from selling or bequeathing the property, it is of little moment whether she holds in fee or not.[128] Nevertheless, even these critics must recognize that in the case of necessity, the incompetent's guardian can sell the property on the incompetent's behalf.[129] As in the case of the emergency power to invade the corpus,[130] the additional security that this option provides to the incompetent widow clearly represents value to the incompetent widow, and courts should therefore include the value of this security in any determination of benefit. Thus, courts applying the pecuniary approach have correctly deemed a fee title to be of greater value to the incompetent widow than a life interest.[131]

When valuing a fee interest, courts look to the fair market value of the interest.[132] Fair market value also corresponds to the degree of security given the incompetent widow, because that represents the amount to which she will have recourse in the event of necessity.[133] Thus, as in the case of an emergency power to invade the corpus,[134] courts should use the fair market

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128. *See, e.g.*, Kinnett v. Hood, 25 Ill. 2d 600, 605, 185 N.E.2d 888, 890 (1962) (arguing that additional property does not benefit the incompetent widow because she cannot "use it, give it away or dispose of it by will"); *see also* Friedman, *supra* note 1, at 414.

129. *See, e.g.*, Gelin v. Hollister, 222 Minn. 339, 349, 24 N.W.2d 496, 502 (1946) (recognizing the firmly established general rule that a guardian has no authority to sell the real estate of a ward without a court order, in the absence of a statute expressly or impliedly granting him such authority); Webber v. Spencer, 148 Neb. 481, 491, 27 N.W.2d 824, 829 (1947) (stating that a guardian has no authority to sell the real property of a ward without a court order, "in the absence of a statute expressly or by implication conferring the power or authority otherwise conferred upon him, as by will"); Perkins v. Middleton, 66 Okla. 1, 3, 166 P. 1104, 1106 (1917) ("The authority of a guardian to sell his wards' real estate rests entirely upon the statutes, and such real estate cannot be sold or conveyed by the guardian except for the purposes and upon the terms and conditions prescribed by the statutes."). *See, e.g.*, ALA. CODE § 26-4-140 (1975); IOWA CODE § 633.652 (1983). The guardian is often authorized to sell the property of the incompetent; where a court order is still required, one may reasonably assume that in a case of true necessity, such as a threat to evict the incompetent from her home, a court would grant the order.

130. *See supra* notes 116-25 and accompanying text.

131. The value of a life estate, by definition, is limited to the income that it will produce during the holder's lifetime. Where the holder is an elderly incompetent, *see supra* note 27 and accompanying text, this is a critical limitation. Although one may sell a life interest, it may be difficult to find a willing buyer for a life estate held by a woman so advanced in years; even if a buyer could be found, the fair market value of such an interest will be low, because it will reflect the remaining lifespan of the incompetent widow.

By contrast, a fee interest carries an absolute right in the land. Thus, it can be sold outright, with no limitation in value arising from the incompetent widow's age or infirmity. Thus, a fee interest is of greater alienability and is more valuable than a life estate. *See generally* T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 26-31, 37-41 (1966).

132. *See supra* note 131.

133. *See supra* note 118 for discussion of the "deepest reservoir" theory.

134. *See supra* notes 116-25 and accompanying text.

value of the fee interest to measure the value of the statutory share because it reflects the value of the assets made potentially available to the incompetent widow.[135]

B. Recognizing a Valid Waiver of the Right to Elect

Proponents of the majority approach object to an automatic award of the share with the larger monetary value as unfairly interfering with the testator's intent. As discussed above, this criticism, if taken too far, is flawed because probate statutes preclude absolute deference to the testator's intent.[136] Nevertheless, a majority court applying a forced share statute may properly defer to testamentary intent to the extent that the result does not conflict with the legislative policy choice to protect the incompetent widow's best interests.[137] Consistent with that view, the estate plan could be preserved under a pecuniary approach even in the face of an automatic award of a larger statutory share by recognizing a valid waiver of the right to renounce the will.[138] In effect, the wife could agree in advance to waive any

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135. In valuing the statutory interest, a court may also consider the expense associated with a sale of the property in which the incompetent widow would receive an interest. If the property is not readily divisible, the property may have to be sold and the proper share of the proceeds given to the incompetent widow so that she may receive the benefits of the statutory award. *See, e.g., In re* Estate of Kees, 239 Iowa 287, 293, 31 N.W.2d 380, 383 (1948) (stating that the court might order the sale of indivisible real estate and the share of the proceeds to which the incompetent widow is entitled under the statute given to the incompetent widow's guardian). Before it considers such costs, the court should require the introduction of evidence that demonstrates that the property *must* be sold in order for the incompetent widow to receive her share; the court should not alter the valuation of the statutory share merely upon a speculative assertion that the property would need to be sold. If the court finds that the evidence demonstrates that it is more probable than not that the property must be sold, then the court should reduce the value of the statutory share by the amount of the attendant costs.

Some assert that the statutory share will also involve greater management costs than would the testamentary share. *See, e.g.*, Friedman, *supra* note 1, at 419 (arguing that when the court renounces the will, the incompetent widow will incur additional expenses associated with a guardianship estate). However, because most testamentary property received by an incompetent will also have attendant management expenses, the management costs associated with each share will presumably be substantially similar. As a result, these costs will rarely be a critical factor in the valuation process.

136. *See supra* notes 52-53 and accompanying text.

137. *Id.*; *see supra* notes 36-37 and accompanying text.

138. A "valid" waiver is executed after "fair disclosure." *See, e.g.*, U.P.C. § 2-204. Thus, any question of fraud on the part of the testator in securing his wife's waiver of her rights in his estate may be dealt with under the "validity" requirement.

Many states authorize such a provision for the competent surviving spouse. *See, e.g.*, ALASKA STAT. § 13.11.085 (1972); ME. REV. STAT. ANN. tit. 18-A, § 2-204 (1964); NEB. REV. STAT. § 2316 (1979); *see also* N.H. REV. STAT. ANN. § 464A:34 (1974) (granting guardian

right to a larger statutory share in the event of her incompetency. Recognition of a valid waiver would provide an incentive to carefully plan one's estate,[139] because to obtain a knowing waiver, the testator and his wife would have to discuss and satisfy the wife's expectations about the will. Thus, in order to avoid judicial intervention, the testator must plan his estate so as to promote the best interests of his wife in the event of her incompetency.

Two potential criticisms of a waiver element to a pecuniary approach merit discussion. First, a husband whose wife is incompetent at the time he plans his estate could not avail himself of this option because an incompetent cannot execute a valid waiver of her right to renounce the will. As a result, the court would apply the pecuniary approach and award the incompetent widow the share with the larger monetary value. Although this may seem to penalize the husband who has an incompetent wife and yet seeks to protect his testamentary design, the husband can still avoid judicial disruption by leaving his incompetent wife a share in his estate with a value at least as great as that of the statutory share.[140] Application of a pecuniary approach would thus require an award of the testamentary share, thereby preserving the testator's intent.

Second, recognition of a valid waiver may operate harshly where a change in circumstances occurs and the incompetent widow then needs the additional resources that could be provided by an election of the larger statutory share.[141] Recognizing a valid waiver, however, will reduce the likelihood of such situations, as a result of better estate planning and spousal discussion attending the drafting of the will. Because the waiver will be part of the estate plan, the parties will presumably have sought the advice of independent counsel in effecting their testamen-

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same rights that incompetent surviving spouse would have if competent). The U.P.C. also supports the notion of relying on a waiver of rights to avoid complexities in administration of estates. *See* Comment to U.P.C. § 2-202 (stating that augmented-estate scheme should not complicate administration in well-planned and routine cases because of the waiver provisions of the U.P.C.).

139. This is a goal of probate law. *See supra* notes 90-96 and accompanying text.

140. This option is similarly available to the testator whose competent wife refuses to waive her rights in his estate. Therefore, when the testator cannot obtain a waiver, the clarity of the pecuniary approach will still induce the testator to provide at least as great a share as that provided by statute, so as to preserve his testamentary design.

141. Refusing to uphold the waiver in changed circumstances would involve the court in the same complex inquiry into adequate provision previously rejected by the pecuniary approach, as well as into the substantial and foreseeable nature of the changed circumstances. *See supra* note 86 and accompanying text. Prudential concerns warrant against engaging in such an inquiry. *See supra* notes 97-100 and accompanying text.

tary design.[142] The wife's attorney is capable of ensuring the adequacy of the will's provision for the wife upon her possible incompetency after the death of her husband.[143] Recognition of a valid waiver thus preserves incentives for the testator to provide for the incompetent widow's security, rather than requiring judicial intervention to achieve the same result.[144]

CONCLUSION

Courts have taken two approaches in deciding whether to grant an incompetent surviving spouse a statutory share that is larger in value than that provided for her by her husband's will. While the majority approach considers all surrounding facts and circumstances, courts applying a pecuniary approach have adopted a bright-line rule, awarding the statutory share whenever it exceeds that provided by the testator. A pecuniary approach better advances the legislative intent to promote the best interests of the incompetent widow, and also provides clear guidance for estate planning and reduces the costs associated with the election process. Minor refinements in the pecuniary approach as currently applied by courts also satisfy its critics by better preserving testatmentary intent.

—*Susan P. Barnabeo*

142. The parties should each have their own counsel. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14, EC 5-15, EC 5-16, DR 5-105 (1979).

143. In the event that such provision turns out to be inadequate, an action for malpractice against the attorney might be possible, and thus the incompetent widow would obtain the needed funds. Only where the change in circumstance was not foreseeable might the court refuse to uphold the waiver of the statutory share. This would preserve the desired estate planning guidance. *See supra* notes 91-98 and accompanying text.

144. Thus, the pecuniary approach secures the advantages of clarity and efficiency. *See supra* notes 86-100.