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The Effect of Guardianship on Estate Plans

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COMMENTS

The Effect of Guardianship on Estate Plans

One responds to the certainty of death with dread and respect, and one lays plans for the event. Few, however, admit or even think of the possibility that they may become incompetent in their old age; hence, provision is rarely made for this possibility in estate plans.[1] The increased longevity resulting from the recent rapid strides in medicine has as its corollary an increase both in the number of persons who become incompetent before death and the duration of their affliction. This poses a challenge to estate planners and the law of guardianship.

When provision has not been made in an estate plan, a court appointed guardian fills the need for some responsible person to care for the incompetent's person and property.[2] If such a guardian is appointed as a guardian *of the person,* his duty is to attend to the personal needs of the incompetent and prevent him from physically harming himself and others.[3] If he is appointed as a guardian *of the estate,* on the other hand, his task is to manage the incompetent's financial affairs. Although these two functions may be discharged by the same person, it may be desirable that a different person undertake each responsibility. When an aged incompetent is no longer able to care for himself, a relative may be the best person to look after the incompetent's personal needs, but poorly equipped to manage the incompetent's financial affairs. A separate guardianship of the estate by a person of good business judgment and fiduciary experience may therefore be desirable.

Today the guardianship *of the person* of an incompetent does not present the law with many new problems; this comment, therefore, will be concerned exclusively with the problems associated with the guardianship of an incompetent's *estate.*

I. Background

A concern for safeguarding minors early impressed itself on the development of the American law of guardianship,[4] and this orientation survives to this day. Since minors do not ordinarily have estate

1. See Zillgitt, *Planning for Incompetency,* 37 So. Cal. L. Rev. 181 (1964); Note, *Guardianship in the Planned Estate,* 45 Iowa L. Rev. 360 (1960).

2. The leading authority in the area of guardianship is Woerner, The American Law of Guardianship (1897) [hereinafter cited as Woerner]. For more recent writings see Fratcher, *Toward Uniform Guardianship Legislation,* 64 Mich. L. Rev. 983 (1966); *Symposium on Guardianship,* 45 Iowa L. Rev. 209 (1960).

3. See Woerner §§ 47-52, 137-39; Fraser, *Guardianship of the Person,* 45 Iowa L. Rev. 239 (1960).

4. See Fratcher, *supra* note 2, at 984.

plans, it is not surprising that the law of guardianship does not speak to the effect of guardianship on estate plans. This factor, plus the very limited scope of preservative activities which present law allows the guardian to pursue, renders the law of guardianship distinctly unsuitable as applied to the aged incompetent, who may often have an estate plan worked out to a fineness of detail rivaling the old English family property settlements. Increasingly, guardians find themselves faced with a conflict between effectively managing their ward's estate, on the one hand, and respecting the plans that their wards have made for disposing of their wealth, on the other.

American law assigns to the guardian a role of very limited scope. His duties are largely the conservation of his ward's estate, the production of income from that estate, and the application of that income to his ward's needs.[5] Certain powers of a guardian, and of the court supervising him, are fairly clear. The guardian, acting without special court direction, may collect debts owed to his ward,[6] contract for the ward's necessities (with a right of reimbursement from his ward's estate),[7] make short-term leases of real estate,[8] and sell per-

5. See *id.* at 984-85.

6. Cox v. Williams, 241 Ala. 427, 3 So. 2d 129 (1941); Grant v. National Sur. Co., 7 Alaska 179 (1924); ARIZ. REV. STAT. ANN. § 14-809 (1956); Suggs v. Valentine, 204 Ark. 86, 160 S.W.2d 890 (1942); ARK. STAT. ANN. § 57-627 (Supp. 1957); CAL. PROB. CODE §§ 1501, 1530a; Cole v. Jerman, 77 Conn. 374, 59 Atl. 425 (1904); DEL. CODE ANN. tit. 12, § 3921 (1953); First Nat'l Bank v. United States, 30 F. Supp. 730 (D.D.C. 1939); Carlton v. Morgan, 68 Fla. 535, 67 So. 79 (1914); GA. CODE ANN. § 85-1505 (1937); HAWAII REV. LAWS § 338-24 (1955); IDAHO CODE ANN. § 15-1820 (1948); ILL. REV. STAT. ch. 3, §§ 276, 293 (1963); ILL. REV. STAT. ch. 22, § 5 (1963); IND. ANN. STAT. § 8.139 (1953); Jensen v. Martinsen, 228 Iowa 307, 291 N.W. 422 (1940); IOWA CODE § 668.9 (1962); KAN. GEN. STAT. ANN. § 59-1804 (1964); KY. REV. STAT. § 387.130 (1962); Stockman v. City of So. Portland, 147 Me. 376, 87 A.2d 679 (1952); ME. REV. STAT. ANN. tit. 14, § 3 (1965); ME. REV. STAT. tit. 18, § 3505 (1965); Hamill v. Hamill, 162 Md. 159, 159 Atl. 247 (1932); MASS. GEN. LAWS ANN. ch. 201, § 37 (1955); Reason v. Jones, 119 Mich. 672, 78 N.W. 899 (1899); MICH. COMP. LAWS § 703.18 (1948); Patterson v. Melchoir, 102 Minn. 363, 113 N.W. 902 (1907); MINN. STAT. ANN. § 525.56 (Supp. 1966); MISS. CODE ANN. § 440 (1957); MO. ANN. STAT. §§ 475.130, 507.110 (1956); MONT. REV. CODES ANN. § 91-4902 (1947); NEB. REV. STAT. § 38-502 (1943); NEV. REV. STAT. § 159.270 (1963); N.H. REV. STAT. ANN. §§ 462:4, :28 (1955); N.M. STAT. ANN. § 32-1-17 (1953); In the Matter of Hynes, 105 N.Y. 560, 12 N.E. 60 (1887); Coggins v. Flythe, 113 N.C. 102, 18 S.E. 96 (1893); N.C. GEN. STAT. §§ 1-64, 33-20, -28 (1953); N.D. CENT. CODE § 30-14-06 (1943); ROW v. ROW, 53 Ohio 249, 41 N.E. 239 (1895); OHIO REV. CODE ANN. § 2111.14 (Page 1953); OKLA. STAT. tit. 58, § 804 (1961); Murphy v. Whetstone, 96 Ore. 293, 188 Pac. 191 (1920); PA. STAT. ANN. tit. 20, § 320.1041 (1950); PA. STAT. ANN. tit. 50, § 3401 (Supp. 1966); S.D. CODE § 35.2001 (1939); TENN. CODE ANN. § 34-402 (1955); TEX. PROB. CODE ANN. §§ 230(b), 233 (1956); TEX. REV. CIV. STAT. ANN. art. 1981 (1963); UTAH CODE ANN. § 75-13-35 (1953); VT. STAT. ANN. tit. 14, §§ 2693, 2799 (1958); Garland v. Norfolk Nat'l Bank, 156 Va. 653, 158 S.E. 888 (1931); VA. CODE ANN. § 37-147 (1950); WASH. REV. CODE § 11.92.060 (Supp. 1956); WIS. STAT. ANN. § 319.23 (1957).

7. *E.g.*, CAL. PROB. CODE § 1502; In the Matter of Estate of Schluter, 209 Cal. 286, 286 Pac. 1008 (1930); D.C. CODE ANN. § 21-301 (1961); Williams v. Vaughan, 363 Mo. 639, 253 S.W.2d 111 (1952); In the Matter of Vieweger, 93 N.J. Eq. 527, 117 Atl. 291 (Ch. 1922); N.J. REV. STAT. § 3A:18-3, :20-8 (1951); McCormick v. Shannon, 127 App. Div. 745, 111 N.Y. Supp. 875 (1908); In the Matter of Roosevelt, 131 Misc. 800, 228 N.Y. Supp. 323 (Sup. Ct. 1928).

8. Cole v. Jerman, 77 Conn. 374, 59 Atl. 425 (1904); Kinney v. Harrett, 46 Mich. 87, 8 N.W. 708 (1881); Martin v. Smith, 214 Minn. 9, 7 N.W.2d 481 (1942); N.J. REV. STAT.

sonal property when necessary to meet the ward's expenses.[9] Outside of these activities the guardian must apply to the supervising court for authority to act. It is well settled that the guardian may not sell, exchange, or mortgage *real property* without prior court approval.[10] As to other transactions, a rule frequently advanced to distinguish between what a guardian may and may not do without court approval is expressed in terms of whether the guardian must make an "election":[11] When the guardian must elect between clearly conflicting alternatives, he must seek court direction before making the decision.[12] A guardian faces such an election, for example, when he must decide whether his ward, a widow, should assert her dower rights to her deceased husband's property, or take under his will. In practice, however, it may often be difficult to decide what constitutes an election and what is simply a claim of right belonging to the ward.

The guardian's powers of investment, either with or without court approval, are generally much more restricted than those of the trustee,[13] even though the guardian is under a duty to produce income from his ward's estate.[14] Moreover, unlike a trustee or personal representative, the guardian does not hold legal title to his ward's property; consequently, a bona fide purchaser of property from a guardian receives no legal title unless the guardian had lawful au-

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§ 3A:16-1 (1951); N.Y. MENTAL HYGIENE LAW § 106(1); OHIO REV. CODE § 2111.25 (Page 1953); PA. STAT. ANN. tit. 20, § 320.1062 (1950).

9. Cookson v. Louis Marx & Co., 23 F. Supp. 615 (S.D.N.Y. 1938); FLA. STAT. § 745.05 (1965); Hempstead v. Broad, 275 Ill. 358, 114 N.E. 120 (1916); Fletcher Trust Co. v. Hines, 211 Ind. 111, 4 N.E.2d 562 (1936); MICH COMP. LAWS § 709.1 (1948); N.J. REV. STAT. § 3A:15-14 (1951); In re Collord, 8 N.Y.S.2d 895 (Sup. Ct. 1948); OHIO REV. CODE ANN. § 2111.20 (Page 1953); PA. STAT. ANN. tit. 20, § 320.1061 (1950); PA. STAT. ANN. tit. 50, § 3441 (Supp. 1958).

10. *E.g.*, CAL. PROB. CODE § 1530; CONN. GEN. STAT. ANN. § 45-238 (1960); GA. CODE ANN. § 49-204 (1965); ILL. ANN. STAT. ch. 3, § 378 (Smith-Hurd Supp., 1966); MICH. COMP. LAWS § 709.3 (1948); N.Y. MENTAL HYGIENE LAW § 106.

11. Where an incompetent has a personal privilege to elect between alternative and inconsistent rights or claims, it has been held that the privilege does not pass to the committee of the property of the incompetent. . . . A court of equity, through its general jurisdiction over fiduciaries and its function of guardianship of incompetents, may, in the proper case, direct the committee to act in behalf of the incompetent . . . .

In the Matter of Hills, 264 N.Y. 349, 353, 191 N.E. 12, 13 (1934); *accord*, Matter of Brown, 212 App. Div. 677, 209 N.Y. Supp. 288 (1925).

12. Camardella v. Schwartz, 126 App. Div. 334, 110 N.Y. Supp. 611 (1908). See also Brooklyn Trust Co. v. Dais, 122 N.J. Eq. 182, 192 Atl. 849 (1937).

13. See Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 268-91 (1960).

14. ALA. CODE tit. 21, § 42 (1958); D.C. PROB. CT. R. 28, § 5, FLA. STAT. § 745.03 (1957); Hogshead v. State. 120 Ind. 327, 22 N.E. 330 (1889); IND. ANN. STAT. § 8-134 (1953); MD. ANN. CODE art. 93, § 192 (1957); MICH. COMP. LAWS § 709.1 (1948); MINN. STAT. ANN. § 525.56 (Supp. 1966); MO. ANN. STAT. § 475.190 (Supp. 1958); N.J. REV. STAT. § 3A:15-16 (1951); In the Matter of Staten Island Nat'l Bank & Trust Co., 156 Misc. 330, 282 N.Y. Supp. 163 (Surr. Ct. 135); N.Y. DOM. REL. LAW § 85; Armstrong v. Miller, 6 Ohio 118 (1833).

thority to sell the property.[15] Furthermore, there are certain transactions which a guardian may not undertake even with court approval. He may not, for example, lease his ward's real property if the lease will run beyond the period of the guardianship.[16] This rule was developed for the guardianship of minors, where the duration of the guardianship is readily ascertainable, usually ending when the ward reaches legal majority.[17] In the case of the guardianship of incompetents, however, this rule makes anything but a short-term lease impossible.

The rule concerning leases is really a special application of the broader rule that a guardian may not make contracts, except for necessities, which are binding on the ward.[18] A guardian's contract may be enforced against the guardian but not against the ward himself, unless the ward affirms the contract after becoming competent.[19] Moreover, a person who advances credit to the guardian for the ward's benefit may not recover his debt from the ward's estate, unless he has first exhausted the personal resources of the guardian.[20] This inability of a guardian to contract makes it nearly impossible for him to conduct an existing business of his ward's. Furthermore, in most states the supervision of guardians is vested in a court of limited jurisdiction;[21] therefore, even when the guardian is acting under a specific court directive, it is not always certain that the court possesses the authority to authorize a particular transaction. The practical result is that persons are wary of dealing with a guardian in any matter, making it very difficult for the guardian to discharge the duties of his office.

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15. WOERNER § 53, at 173 n.2 and accompanying text; Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 291-92 (1960).

16. See note 8 *supra*.

17. WOERNER § 61.

18. See cases cited in note 7 *supra*.

19. Guardianship of Cookingham, 45 Cal. 2d 367, 289 P.2d 16 (1955); Fay Improvement Co. v. DeBudge, 52 Cal. App. 695, 199 Pac. 819 (Dist. Ct. App. 1921); Rountree v. Simmons, 56 Ga. App. 678, 193 S.E. 787 (1937); Greever v. Barker, 316 Mo. 308, 289 S.W. 586 (1926); Rhodes v. Frazier's Estate, 204 S.W. 547 (Mo. App. 1918); Coxe v. Whitmire Motor Sales Co., 190 N.C. 838, 130 S.E. 841 (1925); Shepard v. Hanson, 9 N.D. 249, 83 N.W. 20 (1900); Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908); Storey v. Lonabaugh, 247 Pa. 331, 93 Atl. 481 (1915); Miller v. Vervena, 69 R.I. 285, 33 A.2d 178 (1943); Richards v. McAtee, 87 W. Va. 469, 105 S.E. 692 (1921); Melcher Lumber Co. v. Gunderson, 192 Wis. 571, 213 N.W. 300 (1927).

20. Tasker v. Cochrane, 94 Cal. App. 361, 271 Pac. 503 (3d Dist. 1928); Fay Improvement Co. v. DeBudge, 52 Cal. App. 695, 199 Pac. 819 (1921); Daird v. Steadman, 39 Fla. 40, 21 So. 572 (1897); Rountree v. Simmons, 56 Ga. App. 678, 193 S.E. 787 (1937); Lothrop v. Duffield, 134 Mich. 485, 96 N.W. 577 (1903); Rhodes v. Frazier's Estate, 204 S.W. 547 (Mo. App. 1918); Coxe v. Whitmore Motor Sales Co., 190 N.C. 838, 130 S.E. 841 (1925); Shepard v. Hanson, 9 N.D. 249, 83 N.W. 20 (1900); Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696 (1908); Miller v. Vervena, 69 R.I. 285, 33 A.2d 178 (1943); Andruss v. Blazzard, 23 Utah 233, 63 Pac. 888 (1901).

21. See Simes & Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113 (1944).

II. Guardian's Effect on Estate Plans

Given this general background, it is the purpose of this comment to explore the following questions:

(1) To what extent and under what circumstances may a guardian, with or without court approval, carry out or disturb the plans expressed in his ward's will?
(2) To what extent and under what circumstances may he exercise the power reserved by a settlor, who has since become incompetent, to revoke, amend, or invade the corpus of a trust?
(3) To what extent and under what circumstances may he surrender for cash, change the beneficiary of, or alter the terms of a life insurance policy?

Unfortunately, in most of the situations to be examined in this comment, statutory treatment is lacking, and the case law is insufficient to give a clear answer to these questions. However, some observations and predictions are possible.

A. *Wills*

A will, usually the most important part of an estate plan, does not become effective until the testator's death, and its existence may be unknown to a guardian during the testator's life. Very often such ignorance on the part of the guardian will matter to no one, since the role of the guardian is to act as a conservator of his ward's estate, and purely conservative activity will generally have little effect upon the disposition of property made by the will. However, when the ward has made a specific devise of certain property by will and the guardian finds it necessary to sell that property, the distribution plan of the will is directly affected.

Normally, when a person prior to his death disposes of property which he has specifically devised in his will, that gift is adeemed: the will is revoked as to that particular devise.[22] Likewise, when it is necessary for the guardian to sell certain of the ward's property before the ward's death, the fact that the property is the subject of a specific devise does not affect the validity of the sale. This is true regardless of whether the terms of the will are known to the guardian or court, the theory being that the only proper concern of the guardian is the benefit of his ward.[23] When property which is the subject

22. *In re* Dungan, 31 Del. Ch. 551, 73 A.2d 776 (Super. Ct. 1950); Schildt v. Schildt, 201 Md. 10, 92 A.2d 367 (1952); *In re* Robinson, 139 Neb. 707, 298 N.W. 559 (1941); Camden Trust Co. v. Cramer, 136 N.J. Eq. 261, 40 A.2d 601 (Ct. Err. & App. 1945); *In re* Ossont, 208 Misc. 449, 143 N.Y.S.2d 849 (Surr Ct. 1955); *In re* Van Duyne, 205 Okla. 440, 239 P.2d 387 (1951); Blair v. Shannon, 349 Pa. 550, 37 A.2d 563 (1944); 6 Page, Wills § 54.5 (rev. ed. 1962).

23. [T]he guardian of a person of unsound mind should, in the management of his estate, attend solely and entirely to the interests of the owner, without looking

of a specific devise is sold by a guardian, the courts are split on the treatment to be accorded the intended heir. A majority hold that since the ward, the incompetent, lacks the testamentary capacity to change the will after the specifically devised property is sold, the proceeds of that sale, to the extent they still exist in identifiable form, will be substituted for the property.[24] A minority treat a specific devise as adeemed in all cases where the property cannot be found in the estate, on the theory that the courts have no power to convert a specific devise into a general devise.[25]

Neither approach secures to the intended recipient of a specific devise the property that the testator wanted him to receive. When the terms of the will are unknown to the guardian and the supervising court, this is unfortunate but unavoidable. When the terms of a will are known, however, the guardian has at least some opportunity to preserve his ward's testamentary intention. Of course, if there is no property left in the ward's estate except property subject to a specific devise, and the ward's income is insufficient to meet his expenses, the guardian has no choice but to sell the property. This is only proper, and it may be assumed that the ward would have done the same if he were competent. Normally, however, at the time it becomes necessary to sell a part of the incompetent's estate, property which is the subject of a specific devise will not be the only property remaining. A question then arises as to which property to sell: that which is the subject of a specific devise, or that which will pass through a general devise? A strict rule that the court should direct the sale of the generally devised property first will not suffice, since the sale of such property will reduce the size of the estate going to general heirs under the will. When a guardian needs to sell only a small portion of a large estate, and his choice of property will have the effect either of obliterating a small specific devise or merely reducing the residuary estate, the plan of the estate will clearly be least upset by opting for the latter course. When the choice is between two relatively equal pieces of property, however, one subject to a specific devise and the other constituting the major part of the residue of the ward's estate, it is not at all clear which the ward would have preferred to sell. In such a case, it seems to be entirely proper for the guardian and court, since they are acting for the ward's benefit, to inquire into the motives which prompted the ward to draw up

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to the interest of those who, upon his death, may have eventual rights of succession.
WOERNER § 138, at 454.

24. Lewis v. Hill, 387 Ill. 542, 56 N.E.2d 619 (1944); *In re* Estate of Bierstedt, 254 Iowa 772, 119 N.W.2d 234 (1963); Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959); Buder v. Stocke, 343 Mo. 506, 121 S.W.2d 852 (1938); Duncan v. Bigelow, 96 N.H. 216, 72 A.2d 497 (1950); *In re* Estate of Cooper, 95 N.J. Eq. 210, 123 Atl. 245 (Ct. Err. & App. 1923); Bishop v. Fullmer, 112 Ohio App. 140, 175 N.E.2d 209 (1960).

25. *In re* Estate of Ireland, 257 N.Y. 155, 177 N.E. 405 (1931); *In re* Barrow's Estate, 103 Vt. 501, 156 Atl. 408 (1931).

his will in the way that he did. Still other factors may also require consideration. For example, the guardian may be faced with a choice between selling high income property and low income property. If the ward is expected to live for any great length of time, sale of the low income property will benefit the ward more than sale of the high income property, and may avoid complete exhaustion of the estate.

If the conflict between the directions of the ward's will and his present personal need is called to the attention of the supervising court, it is likely that the court will weigh the feasibility of maintaining the ward's testamentary purposes against the present benefit to the ward in deciding what property shall be sold. Apparently, no one acting merely to protect his interests as a prospective heir of an incompetent has ever successfully challenged a judge's decision that it was necessary to sell a particular piece of property. It is even possible that since the beneficiary named in a will is not considered to have an interest in the property devised until the will takes effect, he lacks the standing necessary to challenge such a decision. In any event, these questions will not often arise, since a guardian is likely to sell, and in some states must sell,[26] personal property, which can be done without court approval, before seeking a court's permission to sell real estate.

The most direct way for a guardian to affect his ward's testamentary plans is, of course, to rewrite his ward's will. Rewriting a will, however, does not seem to be a necessary part of the guardian's role of providing for his ward's needs while alive, and court references to the rewriting of a will by a guardian uniformly state that it is beyond the guardian's power.[27] Such references are dictum, however, since there is no reported instance of a guardian attempting to rewrite a will.

The law of guardianship has largely ignored the effects on the last will and testament of a ward resulting from the management of the ward's property. This indifference should be carefully compared with the not entirely consistent treatment which some courts have accorded other testamentary devices of the ward.

B. *Trusts*

A modern estate plan is also likely to contain an inter vivos trust. Unlike in a will, a person who creates a trust retains no more rights in the trust than the instrument itself provides.[28] Thus, if a ward is the settlor of a trust his guardian certainly has no more power

26. *E.g.*, MASS. GEN. LAWS ANN. ch. 202, § 5 (1955); ME. REV. STAT. ANN. tit. 18 § 2051 (1954); MICH. COMP. LAWS § 703.17 (1948); N.J. REV. STAT. §§ 3A:16-4 (Supp. 1966); VT. STAT. ANN. tit. 14, § 2842 (1958).

27. See, *e.g.*, *In re* Young Estate, 376 Mich. 106, 135 N.W.2d 417 (1965); Kay v. Erickson, 209 Wis. 147, 244 N.W. 625 (1932).

28. See BOGERT, TRUSTS & TRUSTEES § 992 (2d ed. 1962); RESTATEMENT (SECOND), TRUSTS § 330 (1959); 3 SCOTT, TRUSTS § 330 (2d ed. 1956).

with regard to the trust than that which the ward reserved for himself. It is settled that under a trust a guardian may enforce those of his ward's rights which are of a non-discretionary nature, such as a right to income.[29] However, the settlor of a trust frequently reserves powers to revoke, amend, or invade a trust, and since these powers are often of a strictly discretionary nature, it is questionable whether a guardian may exercise them.

1. *The Totten Trust*

The cases usually cited for the proposition that a guardian may revoke a trust deal with savings account trusts[30]—commonly known as Totten, or tentative, trusts.[31] A Totten trust is created by depositing money in a savings account in the name of the depositor as trustee for a third person. It is usually considered not to have created any absolute interest in the beneficiary until the depositor dies or takes some affirmative action in addition to opening the account.[32] Thus, the beneficiary of a Totten trust has no right to money which the creator-depositor withdraws from the account during his lifetime.[33] Since Totten trusts are *sui generis*, questions as to a guardian's power over Totten trust funds should be considered separately from the problems of other trust arrangements.

When the creator of a Totten trust becomes incompetent, his guardian is uniformly permitted to use the bank account funds for the ward's benefit.[34] Some question might be raised as to the power of courts to permit such action, since the court supervising the guardian frequently lacks jurisdiction over inter vivos trusts.[35] However, it is arguable that since the creator could have freely used these funds had he remained competent, the courts, by permitting or ordering the guardian to use the funds, are merely authorizing the exercise of a power belonging to the ward.[36]

The decision of a guardianship court to permit the use of money from a Totten trust fund is somewhat analogous to the sale of property specifically devised by will. In both cases the property is proper-

29. Witherington v. Nickerson, 256 Mass. 351, 152 N.E. 707 (1926); RESTATEMENT (SECOND), TRUSTS § 200 (1959).

30. *E.g.*, Guardianship of Cuen, 142 Cal. App. 2d 258, 298 P.2d 545 (Dist. Ct. App. 1956); *In re* Guardianship of Overpeck, 211 Minn. 576, 2 N.W.2d 140 (1942); Ganley v. Lincoln Sav. Bank, 257 App. Div. 509, 13 N.Y.S.2d 571 (App. Div. 1939); *In re* Gross, 62 N.Y.S.2d 392 (Sup. Ct. 1936); *In re* Derr, 83 Pa. D. & C. 603 (C.P. 1952).

31. The Totten trust received its name from In the Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).

32. See generally BOGERT, TRUSTS & TRUSTEES § 47 (2d ed. 1965); RESTATEMENT (SECOND), TRUSTS § 58 (1959); 1 SCOTT, TRUSTS § 58 (2d ed. 1956).

33. See In the Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904).

34. See, *e.g.*, cases cited note 30 *supra*.

35. This was true, for example, in *In re* Guardianship of Overpeck, 211 Minn. 576, 2 N.W.2d 140 (1942).

36. See *id. But see, In re* Gross, 62 N.Y.S.2d 392 (Sup. Ct. 1936).

ty that the ward, if competent, would have been free to use had he so desired, but which, if not so used, would have gone to a particular beneficiary upon the ward's death. It is frequently said that in such cases the court should direct the guardian "to act . . . in accordance with what the court finds would, in all probability, have been the choice of the incompetent if he had been of sound mind."[37] However, in practice, the guiding test applied by the courts for determining when a guardian may use Totten trust funds seems to be the present need of the ward.[38] The interest of the beneficiary in having the Totten trust fund remain untouched is usually respected by the court,[39] but it is not sacrosanct.[40] For example, in a case where there was a choice between the sale of valuable real estate and use of Totten trust funds to improve the real estate so that it would produce sufficient income to support the ward, a California appellate court, over the objection of the trust beneficiary, ordered the probate court to consider using the Totten trust money.[41]

2. *The Inter Vivos Trust*

The Totten trust is not likely to be found in a carefully worked-out estate plan;[42] instead, careful planners tend to rely more heavily on the traditional inter vivos trust device. When a ward has established an inter vivos trust prior to his incompetency, his remaining estate will usually be sufficient to cover the expenses of a guardianship. If it is not, a question arises whether the guardian may exercise a reserved power to invade or revoke the trust. It is clear that if the settlor-ward were competent and needed the money for his own necessities he would be free to exercise the reserved power to invade the trust. It should follow, as in the case of the Totten trust, that his guardian should also be able to exercise this power. In some states, moreover, it is possible to advance another line of argument to support invasion of the trust by the guardian. While the analogy is somewhat imperfect, a guardian advancing expenses or incurring personal debts subject to reimbursement from the ward's estate[43]

37. *In re* Guardianship of Overpeck, 211 Minn. 576, 583, 2 N.W. 2d 140, 144 (1942), quoting *In re* Will of Hills, 264 N.Y. 349, 353, 191 N.E. 12, 13 (1934).

38. See cases cited note 30 *supra.*

39. See Guardianship of Cuen, 142 Cal. App. 2d 258, 298 P.2d 545 (Dist. Ct. App. 1956); *In re* Guardianship of Overpeck, 211 Minn. 576, 2 N.W.2d 140 (1942). *Cf. In re Gross,* 62 N.Y.S.2d 392 (Sup. Ct. 1936).

40. Compare *In re* Derr, 83 Pa. D. & C. 603 (C.P. 1952) *and* Young v. Dollar Savings Bank, 25 Pa. D. & C. 80 (C.P. 1933), *with* Guardianship of Cuen note 39 *supra.*

41. Guardianship of Cuen, 142 Cal. App. 2d 258, 298 P.2d 545 (Dist. Ct. App. 1956). The probate court was ordered to consider, among other things, the life expectancy of the ward in making its decision. *Id.* at 262, 298 P.2d at 547.

42. For examples of the problems attendant upon a Totten trust, see BOGERT, TRUSTS & TRUSTEES § 47 (2d ed. 1956).

43. See text accompanying note 7 *supra.*

may be compared to a creditor of the settlor of a revocable trust. Normally creditors of the settlor cannot reach the trust property.[44] However, in some states there are statutes which permit a creditor to reach the trust property where a power of revocation has been reserved.[45] In those states it might be argued that a guardian who has advanced his own money for necessaries is sufficiently like a creditor to permit him to reach the trust funds, even if he could not otherwise exercise the settlor-ward's power of revocation.[46]

In most states the jurisdiction over incompetents and the jurisdiction over inter vivos trusts are vested in different courts.[47] Any attempt by a guardian to invade a trust created by his ward would therefore probably require two judicial steps: the first in the guardianship court and the second in the court supervising the trust. Assuming the guardian has the power to invade a trust created by his ward, a question arises as to which of the two courts should determine the necessity for the invasion. The guardianship court might make this determination, with the expectation that its decision would be respected by the court with jurisdiction over the trust, on the theory that it alone has the power to make decisions on behalf of its settlor-ward. However, unlike Totten trusts or wills, beneficiaries of an inter vivos trust who are not presently entitled to benefits may, in some limited instances, be empowered to seek enforcement of the trust.[48] Certainly, any beneficiary of the trust who had not participated in the guardianship court proceedings could urge the court with jurisdiction over the trust to reconsider the need to invade the trust. Moreover, equity courts supervising trusts have always asserted the power to vary the terms of a trust after a change in circumstances, in order to carry out the settlor's purpose;[49] the incompetency of the settlor might be considered to be such a change of circumstance.

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44. In the absence of fraud or a statute to the contrary it has been held that the settlor's creditors cannot reach the trust property directly, nor can they compel the settlor to exercise the power of revocation. Murphey v. C.I.T. Corp., 347 Pa. 591, 33 A.2d 16 (1943); see 3 SCOTT, TRUSTS § 330.12 (2d ed. 1956).

45. *E.g.*, ALA. CODE tit. 47, § 75 (1958); IND. STAT. ANN. § 56-610 (Burns, 1961); MICH. COMP. LAWS § 556.14 (1948); MINN. STAT. ANN. § 502.76 (1947); N.Y. REAL PROP. LAW § 139 (Supp. 1966); N.D. CENT. CODE § 59-05-35 (1960); OKLA. STAT. tit. 60, § 267 (1961); WIS. STAT. ANN. § 231.51 (1957).

46. *Cf. In re* Dett, 83 Pa. D. & C. 603 (C.P. 1952).

47. See notes 22 and 37 *supra* and accompanying text.

48. The textwriters broadly assert that any beneficiary of an inter vivos trust may enforce the trust. BOGERT, TRUSTS & TRUSTEES § 963 (2d ed. 1962); RESTATEMENT (SECOND), TRUSTS § 172, comment c (1959); 2 SCOTT, TRUSTS § 172 (2d ed. 1956). However, in many states one who is not a present beneficiary of the trust may bring an action for enforcement only if he alleges active mismanagement. See Note, 65 MICH. L. REV. 981 (1967). Nevertheless, even the existence of this limited right might lead a trustee to resist invasion of a trust more vigorously.

49. Post v. Grand Rapids Trust Co., 255 Mich. 436, 238 N.W. 206 (1931); Bennett v. Nashville Trust Co., 127 Tenn. 126, 153 S.W. 840 (1912); RESTATEMENT (SECOND), TRUSTS § 168 (1959).

There is apparently no reported case in which a guardian, seeking to exercise the settlor-ward's power of invasion or revocation, has actually appeared in a court with jurisdiction over the trust. However, at least one case has held that a court supervising a guardian may order the guardian to exercise his ward's power to invade a trust. In *Matter of Norris*,[50] a resident of New York had established a trust in Massachusetts which by its terms reserved to the settlor a power of invasion. The settlor was later adjudged incompetent and her son was appointed as her guardian. The son petitioned a New York court for an order to invade the trust in the amount of $5,000, claiming that the money was *necessary* to meet the expenses of the settlor. The New York Supreme Court, in Special Term, while conceding the power of Massachusetts to make a final determination of whether the power of invasion was purely personal to the settlor, held that since it had jurisdiction over the settlor's affairs while she was incompetent, "any property election of this description which the donor could exercise had she remained of sound mind may now be made on her behalf and in her interest by this court."[51] The court ordered the son to exercise the power of invasion and bring suit in Massachusetts if necessary to do so. It should be noted that in New York the jurisdiction over mental incompetents is vested in the Supreme Court,[52] a court of general jurisdiction,[53] rather than in a court of probate jurisdiction, as in most states.[54] Arguably, however, even if a court has jurisdiction only over an incompetent's affairs the reasoning of the *Norris* case would still seem to be applicable, because the court, despite its general jurisdiction, did not have jurisdiction over the trust in question. Nevertheless, in a state where the authority of courts of limited jurisdiction is narrowly construed the result might be different.

On a subsequent appeal, the *Norris* case was remanded with instructions to determine whether an allowance being paid to the son, an adult, was a *necessary* expense of the settlor's estate.[55] This instruction raises the question of the standards to be applied in determining whether to invade a trust. The lower court had said that it would "try, so far as reasonably practicable, to put itself in the position of the donor, and to determine what she would likely have done or would be reasonably apt to do had she remained of sound mind."[56] The court in effect was saying that it would disturb the ward's earlier plans as little as possible, since the ward had never really ex-

50. 180 Misc. 361, 41 N.Y.S.2d 156 (Sup. Ct.), *aff'd mem.* 266 App. Div. 882, 42 N.Y.S.2d 804 (App. Div. 1943).
51. 180 Misc. at 363, 41 N.Y.S.2d at 157.
52. N.Y. MENTAL HYGIENE LAW § 100.
53. N.Y. CONST. art. VI, § 1.
54. See note 22 *supra*.
55. Matter of Norris, 266 App. Div. 882, 42 N.Y.S.2d 804 (App. Div. 1943).
56. 180 Misc. at 363, 41 N.Y.S.2d at 157.

pressed any intention as to what should be done under these circumstances. In practice, a guardian probably would not go to the trouble of attempting to invade a trust until other sources of income for the ward are exhausted. This is probably all to the good: waiting until other sources of income have been exhausted would probably least upset the settlor's estate plan, since an inter vivos trust is likely to contain the most important provisions of the plan. This thinking was implicit in the appellate court's approach to the *Norris* case, in which the court, in deciding whether it was necessary to invade the trust, looked first to see if the expenses of the ward's estate could be reduced by eliminating unnecessary expenditures.[57]

The settlor may also reserve to himself a power to *amend* the trust, which, unlike powers of invasion or revocation, may be used directly to change the trust's dispositive provisions. In this respect, amending a trust is very much like rewriting a will, and the undisputed assumption that a guardian cannot rewrite a will for his ward argues for the conclusion that a guardian may not use a power of amendment to change dispositive provisions of a trust created by his ward.[58] On the other hand, it is arguable that the power to revoke or amend a trust includes within it the power to amend,[59] and if the guardian, under court direction, may exercise a power of his ward to revoke or invade a trust, as discussed above, it would seem that he should be able to use the lesser power of amendment to revoke a part of the trust for his ward's present needs.

Finally, it should be noted that a power of invasion may be given to a person other than the settlor of a trust. When such a power has been given to a *beneficiary* who subsequently becomes incompetent, it is largely a question of the settlor's intent as to whether the beneficiary's guardian may exercise the power. If the settlor was relying upon the personal judgment of the holder of the power, then no one else, including a guardian or a court, should be able to exercise that judgment.[60] If the power of invasion has been conditioned upon a showing of the beneficiary's necessity, however, and by this the settlor intended to secure the beneficiary's needs, it seems that a guardian, upon a showing of such necessity, should be able to exercise that power. When a beneficiary has been given an unconditional power of invasion, it is possible that the settlor was relying on the personal judgment of the beneficiary, but it is not unreasonable that the settlor also intended to secure the beneficiary's needs. Thus in

57. 266 App. Div. at 883, 42 N.Y.S.2d at 805 (1943).

58. See note 27 *supra*.

59. The question of whether a power to amend a trust includes the power to revoke is basically one of interpretation of the trust instrument. See 3 SCOTT, TRUSTS § 331.2 (2d ed. 1956).

60. See In the Matter of Estate of Grant, 122 Misc. 491, 204 N.Y. Supp. 238 (Surr. Ct. 1924).

a case where all of a beneficiary's personal resources have been exhausted it may be justifiable to permit a guardian to exercise the beneficiary's unconditional power of invasion. This question of whether the power is considered personal or not would clearly be in the hands of the court supervising the trust, not the guardianship court, since it involves a question of determining whether the purpose of the trust is being carried out.

C. *Life Insurance*

Insurance may also play an important part in the planning of an estate, and there are a number of attributes of life insurance which may be important to the guardian of an incompetent. If, for example, the ward's insurance policy does not provide that payment of premiums ceases upon disability of the policyholder, the guardian must decide whether to continue to pay the premiums. If he decides not to do so, he may be faced with a number of additional options, such as taking a paid-up policy with a lesser face value, or taking term insurance in the full face amount of the old policy. Where the ward, if he was competent, would have been able to elect from among such options upon non-payment of premiums, the guardian may exercise the same discretion under court direction.[61] Moreover, a guardian may surrender the policy for its cash value, or borrow against the cash value of the policy without court direction, and is subject to liability for so doing only if he has not acted with due regard to his ward's interests.[62] The guardian may likewise exchange the policy for one of less value in order to stop the accumulation of interest on a loan made by the insurance company to the ward before the ward became incompetent.[63] It should be noted that if the life insurance policy is part of an estate plan and payment to the beneficiary is in lieu of, or in addition to, a bequest under the ward's will, any of the above actions by a guardian may have the same effect as the sale of an item which has been specifically devised under a will. Yet courts have given little thought to the interest of the beneficiary when considering the guardian's use of life insurance funds.[64]

Finally, a policyholder usually has the right to change the beneficiary of a policy. Such a change has much the same effect as rewriting a will. This analogy has impressed several courts as the primary reason for refusing to permit a guardian, acting with or without

61. Pendas v. Equitable Life Assur. Soc'y, 129 Fla. 253, 176 So. 104 (1938). Court approval may not always be necessary. See Latterman v. Guardian Life Assur. Co., 280 N.Y. 102, 19 N.E.2d 978 (1939). See also Annot., 112 A.L.R. 1063 (1937), supplemented by 127 A.L.R. 454 (1940), and 136 A.L.R. 1045 (1942).

62. Maclay v. Equitable Life Assur. Soc'y, 152 U. S. 499 (1894). *Cf.* Kay v. Erickson, 209 Wis. 147, 244 N.W. 625 (1932).

63. *Ibid.*

64. See Maclay v. Equitable Life Assur. Soc'y, 152 U.S. 499 (1894); Kay v. Erickson, 209 Wis. 147, 244 N.W. 625 (1932).

court direction, to change the beneficiary.[65] There is an additional reason given for denying the guardian this power: the role of a guardian is restricted to actions taken for the present benefit of the ward, and the ward derives no present benefit from a change in the beneficiary of a life insurance policy.[66] However, at least one court has ordered the guardian of an incompetent to make such a change.[67] There the ward, prior to becoming incompetent, had taken out two policies naming his wife as beneficiary. When the ward became insane, his wife had their marriage annulled, after which the guardian petitioned the court for an order to make the ward's estate the beneficiary of the policies in place of the ex-wife. All interested parties, the ward, the guardian, the ex-wife, and the insurance company, were before the court. Relying on a statute authorizing the chancellor to direct the guardian to exercise any power of the incompetent,[68] the court said that it would "do that which it is reasonable to belief the lunatic himself would do if he had the capacity to act."[69] The chancellor, after examining the ward in court, granted the guardian's petition and ordered the change of beneficiary, giving several reasons for his decision. First, he found that the ex-wife had severed all connections with the ward and that he could have defeated her interest in the policies had he not been incompetent. Second, the same result could have been accomplished more directly by surrendering the policies for their cash value. Third, after the change the proceeds, when paid, would first be applied to the expenses of the ward's last illness and burial, and the remainder would pass intestate to his brothers and sister, who were caring for him. Finally, if the ward regained his sanity he could change the beneficiary at any time he wished.

The court made no reference to the ward's present needs. This approach is difficult to reconcile with both the notion that the guardian's role is limited to providing for his ward's present needs and

65. *E.g.*, *In re* Young Estate, 376 Mich. 106, 135 N.W.2d 417 (1965); *In re* Sellers, 154 Ohio St. 483, 96 N.E.2d 595 (1951); Kay v. Erickson, 209 Wis. 147, 244 N.W. 625 (1932).

66. *In re* Young Estate, *supra* note 65.

67. *In re* Degnan, 122 N.J. Eq. 470, 194 Atl. 789 (1937).

68. Where any power, discretionary or otherwise, is or shall be vested in or given to, or the exercise of any power is or shall be dependent upon the consent of any idiot, lunatic or person of unsound mind, upon the application by bill or petition of the guardian of any such idiot, lunatic, or person of unsound mind, or of any person interested, the court of chancery may, if it appears expedient so to do, by order authorize or direct such guardian to exercise such power or execute such consent in manner and form as shall be directed by said court, and any and every conveyance or other instrument made and executed by such guardian pursuant to such order, shall be as valid and effective as though duly made and executed by such idiot, lunatic, or person of unsound mind when of sound mind, memory and understanding.

N.J. COMP. STATS. p. 2792, § 14j (1910). The present version of this statute has not been materially changed. N.J. REV. STAT. § 3A:22-1 (1952).

69. *In re* Degnan, 122 N.J. Eq. 470, 473, 194 Atl. 789, 791 (Ch. 1937), quoting Potter v. Berry, 53 N.J. Eq. 151 (Ct. Err. & App. 1895).

the rule that a guardian may not directly change a dispositive plan. The court's primary reason for changing the beneficiary was that, under the circumstances, the ward could no longer reasonably desire that his ex-wife remain the object of his bounty.[70] It is difficult to see why this reasoning would not permit a court to order a change in an incompetent's will or trust if the ward's desires were sufficiently apparent or inferable.

IV. Conclusion

The duty of a guardian is to provide for his ward's needs and conserve his ward's estate. Normally, conscientious fulfillment of this duty will serve the interest of both the incompetent and his prospective heirs, since the heirs are also interested in retaining as large an estate as possible. Frequently, however, medical bills or the expenses of institutional care for the aging incompetent may require the guardian to dip heavily into his ward's estate. Several factors will determine which property the guardian may choose to sell first. Since the guardian has the duty to produce income,[71] high income property is unlikely to be sold first. He is also unlikely to sell property, such as real estate, for which he must go to the trouble of obtaining court approval. Moreover, if the guardian happens to be the beneficiary of the ward's life insurance policy, or if he is in line to receive particular property under the ward's will, he will not be inclined to cash in the insurance or sell such property first. If the guardian finds it necessary either to sell real estate or to invade a trust, both of which require court approval, the sale of real estate would probably be the most convenient choice administratively, in view of the uncertainty of the law surrounding the invasion of a trust. Thus, using administrative convenience as the standard, a rough order of priority for the liquidation of an incompetent's estate may be established as follows: first, personal property, second, life insurance funds, third, real estate, and finally, trust funds. It should be readily apparent that any correspondence between administrative convenience in selling property and the desires of the ward, as expressed in his estate plans, is purely fortuitous.

A supervising court is likely to consider the ward's estate plans, if it knows about them. However, since the guardian has no duty to take his ward's estate plans into consideration,[72] he may have already upset these plans before the problem ever reaches a court. As the law presently stands, the priorities of liquidation may in practice give preferential treatment to certain types of estate arrange-

70. *In re* Degnan, 122 N.J. Eq. 470, 473-74, 194 Atl. 789, 791 (Ch. 1937).
71. See authorities cited note 12 *supra*.
72. Woerner § 138, at 454.

ments.[73] For example, it is much more difficult for the guardian to make use of property which would pass to the beneficiaries of a trust than property which would pass by will or life insurance. Similarly, the interest of general legatees under a ward's will is not as likely to be consumed completely by a guardianship as is the interest of a person who is to receive specific property under the terms of the will.

Guardians and the courts which supervise them are supposed to act in the best interests of their wards. In practice, they act merely to provide for their wards' immediate needs, without regard to longer range considerations. In the case of a minor this is probably sufficient, but one of the greatest present concerns to an aged ward is what will happen to his property when he dies. There is no reason under present law for a judge not to review, either on his own initiative or at the request of a prospective heir or the guardian, the condition of the ward's assets and the nature of his estate plan in order to set guidelines for the administration of the estate which would be responsive to both the present interests of the ward and the longer range requirements of his estate plan.

A recent case illustrates what a forward-looking court may accomplish in promoting both the present interests of the ward and the interests of his prospective heirs. Under the doctrine of substituted judgment some courts have recognized that distributions out of surplus income may, in proper circumstances, be made to needy relatives.[74] In such a case, the court purports to act as it is probable the ward would have acted if he were of sound mind.[75] In a recent decision of the California District Court of Appeals, *Guardianship of Christiansen*,[76] this doctrine was broadened to permit distribution of a part of the principle to prospective heirs of the incompetent for the purpose of avoiding estate taxes. The court in *Christiansen* rejected the probate court's argument that the limited statutory authorization for the doctrine of substituted judgment[77] precluded a probate court from making such a distribution. Instead, the appellate court read two prior decisions of the California Supreme Court to mean that the statutory powers of the probate court merely supplement its inherent equity powers in the administration of an

73. See Guardianship of Cuen, 142 Cal. App. 2d 258, 298 P.2d 545 (Dist. Ct. App. 1956); *In re* Guardianship of Overpeck, 211 Minn. 576, 2 N.W.2d 140 (1942); Ganley v. Lincoln Sav. Bank, 257 App. Div. 509, 13 N.Y.S.2d 571 (App. Div. 1939); Matter of Norris, 180 Misc. 361, 41 N.Y.S.2d 156 (Sup. Ct. 1943), *aff'd mem.*, 266 App. Div. 882, 42 N.Y.S.2d 804 (App. Div. 1943); *In re* Gross, 62 N.Y.S.2d 392 (Sup. Ct. 1936); *In re* Derr, 83 Pa. D. & C. 603 (C.P. 1952).

74. This doctrine was enunciated by Lord Eldon in *Ex parte* Whitbread, 2 Merivale 99, 35 Eng. Rep. 878 (Ch. 1816). For cases in which it has been used, see, *e.g.*, *In re* Johnson, 111 N.J. Eq. 268, 162 Atl. 96 (Ch. 1932); Matter of Flagler, 248 N.Y. 415, 162 N.E. 471 (1928).

75. Guardianship of Hudelson, 18 Cal. 2d 401, 115 P.2d 805 (1941).

76. 56 Cal. Rptr. 505 (Dist. Ct. App. 1967).

77. See CAL. PROB. CODE § 1558.

incompetent's estate.[78] The court also found a trend in other jurisdictions toward permitting payments out of principle to needy relatives, provided adequate provision had already been made for the ward.[79] The court said that in determining whether payments out of principle should be made, "the guardian should be authorized to act as a reasonable and prudent man would act under the same circumstances, unless there is evidence of any settled intention of the incompetent, formed while sane, to the contrary."[80] Rejecting the argument that it could not act for the benefit of prospective heirs, the court went on to say the following:

> To refuse to permit the management of the incompetent's estate in the manner that a reasonable and prudent man would manage his estate may, in many cases, lead to the improbable conclusion that it was the intent of the incompetent to enrich the taxing authorities rather than the natural or declared objects of his bounty.[81]

Concluding that a reasonable man in planning his estate might make gifts in order to avoid unnecessary estate or inheritance taxes or expenses of administration, the court remanded the case to the probate court, listing four points that should be considered in determining whether to authorize the payments to prospective heirs.

The first point is that when the incompetent's condition is not permanent, payments are justifiable only as a continuation of the ward's practices or plans prior to incompetency.[82] The second point is that the distribution of principle should be permitted only to the extent that the remaining sum will produce sufficient income to meet the ward's probable maximum expenses.[83] The third is that the gifts should conform, as nearly as possible, to the devolution of property which would take place, either by will or intestacy, upon the incompetent's death, although the prospective heirs might, by waiver, vary this order.[84] Finally, the California court required some showing of the kind of relationship and intimacy which would have made the prospective donees the object of the ward's bounty had the ward been competent.[85]

A foresighted estate planner could avoid the problems of a guardianship by laying plans against possible incompetency which eliminate altogether the need to appoint a guardian. For example, when

78. Guardianship of Hall, 31 Cal. 2d 157, 187 P.2d 396 (1947); Harris v. Harris, 57 Cal. 2d 367, 369 P.2d 481 (1962).

79. *In re* DuPont, 41 Del. Ch. 300, 194 A.2d 309 (Ch. 1963); *In re* Guardianship of Brice, 233 Iowa 183, 8 N.W.2d 576 (1943); *In re* Fleming's Estate, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940); *In re* Bond, 198 Misc. 256, 98 N.Y.S.2d 81 (Sup. Ct. 1950).

80. 56 Cal. Rptr. at 521.

81. *Id.* at 522.

82. *Id.* at 523.

83. *Ibid.*

84. *Id.* at 524.

85. *Ibid.*

an inter vivos trust is established, special instructions to be followed by the trustee in case the settlor becomes incompetent could very easily eliminate entirely the need for a guardian of the settlor's estate. A trustee, with his more flexible powers,[86] would be able to administer the assets under his control for the settlor's benefit much more efficiently than a guardian. Unfortunately, most persons do not plan for incompetency, and in many states the only recourse is to a guardianship, with its restricted powers. Long overdue legislative action clarifying the powers of guardians and making guardians more flexible may perhaps be the answer to many of the problems raised herein.[87]

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86. See text accompanying notes 7, 13, and 21 *supra*.

87. For a discussion of guardianship provisions of the proposed Uniform Probate Code, see Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1966).