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Making Gifts from Incompetent's Estate Under the Doctrine of Substitution of Judgment to Reduce Federal Estate Taxes

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INTRODUCTION

Query: May the guardian of an incompetent distribute assets from the incompetent's estate through the medium of inter vivos gifts, solely for the purpose of reducing federal estate taxes?[1] During the past decade this question has been litigated in several jurisdictions.[2] In most instances, the inquiry has arisen when guardians of sizable estates[3] have sought to effectuate estate plans for the incompetent which would maximize tax benefits[4] to the estate, in keeping with the guardian's recognized duty to manage the estate prudently.[5]

By utilizing a novel application of the doctrine of substitution of

1. The tax advantages to be realized by making such gifts may be stated as follows: Under the Internal Revenue Code of 1954, non-charitable gratuitous transfers are taxed. However, the tax rates for inter vivos transfers are lower than the rates for testamentary transfers. INT. REV. CODE of 1954, §§ 2001, 2502. A reduction of the estate during life through inter vivos transfers, taxed at the more favorable rate, will reduce the taxable estate passing at death and thereby minimize the estate tax so that the donees or legatees receive the largest possible amount from the estate of their benefactor. (The theory is that since the gift tax and estate rates are graduated, a gift of part of the property inter vivos and a part testamentarily will result in the donee receiving more than by giving all the estate to him testamentarily.) Even if gratuitous inter vivos transfers should be found to be includable in the gross estate through the operation of section 2035, (bringing transfers made in contemplation of death into the gross estate for federal estate tax purposes), the gift taxes previously paid pursuant to section 2502 would be credited toward the estate tax liability under section 2001, although at a diminishing rate. *Id.* § 2012. An additional advantage is that the gross estate recapture under section 2035 would not include the amount of the gift taxes paid under section 2501. For a more thorough analysis of these interrelationships see C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES §§ 5.13, 38.1-47.12 (2d ed. 1962); Sharpe, *A Guide to Gifts in Contemplation of Death*, 1 P-H SUCCESSFUL ESTATE PLANNING IDEAS AND METHODS ¶ 2007.1 (1968). For the applicability of section 2035 to recapture see City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594 (1945); 11 VILL. L. REV. 150, 157 (1965).

2. Courts in New York, Delaware, North Carolina, Pennsylvania, California, Texas, Massachusetts, and New Hampshire have confronted the issue.

3. In most cases, the size of the estate has ranged from $160,000 in *In re* Morris, — N.H. —, 281 A.2d 156 (1971), to $176,000,000 in *In re* duPont, 41 Del. Ch. 300, 194 A.2d 309 (Ch. 1963).

4. *See* text accompanying note 13 *infra*.

5. For an analysis of the management duties of a guardian, see 39 C.J.S. *Guardian and Ward* § 76 (1944).

judgment,[6] the law of guardianship has been broadened to allow the Probate Court to authorize[7] distributions from estates of incompetents for tax purposes. This Note will place particular emphasis on non-charitable distributions rather than on charitable gifts,[8] since new interpretations have had a greater impact in the non-charitable context, and controversy still exists in this area.

History of the Doctrine of Substitution of Judgment

The doctrine of substitution of judgment originated in the English Chancery case of *Ex Parte Whitbread*,[9] in which impoverished collateral kinsmen[10] of the incompetent petitioned the court[11] to grant allowances for their support from the surplus income[12] of the ward's estate. In granting such allowances the court reasoned:

> The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.
>
> . . . . [I]t is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.[13]

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6. Succinctly stated, the doctrine of substitution of judgment permits the court to exercise its discretion in making distributions from the incompetent's estate which the incompetent would have made himself had he the capacity to act. It is based on the theory that the incompetent is a ward of the court and therefore the court must act in his stead.

7. For an analysis of the supervisory powers of the court, see 39 C.J.S. *Guardian and Ward* § 4 (1944).

8. For a general overview of charitable contributions which are permissible under the doctrine of substitution of judgment, see Annot., 99 A.L.R.2d 946 (1965).

9. 35 Eng. Rep. 878 (Ch. 1816); *see In re* Darling, 39 Ch. D. 208, 213 (1888); *In re* Earl of Carysfort, 41 Eng. Rep. 418 (1840).

10. Collateral kinsmen are those who descend from the same common ancestor, but not from one another.

11. Lord Eldon's opening paragraph indicates that the court has jurisdiction over the incompetent's property. 35 Eng. Rep. at 879.

12. Surplus income is that income in excess of the amount required for the care, support and maintenance of the incompetent.

13. 35 Eng. Rep. at 879.

The basic criterion espoused in *Whitbread* seems to require a showing that the incompetent would have disposed of his estate in a similar fashion had he been of sound mind.[14]

The English doctrine first found acceptance by American courts in New York[15] and New Jersey.[16] American and English courts shared the fundamental conviction that equity had inherent jurisdiction over the person and property of the incompetent.[17] Exercising this jurisdiction, courts in subsequent decisions have clarified and expanded the *Whitbread* theory of substitution of judgment.

Several jurisdictions have adopted the *Whitbread* theory through a broad interpretation of existing statutory language, notwithstanding the absence of specific legislative reference to the doctrine.[18] In contrast, Massachusetts[19] and Maryland[20] incorporated the doctrine by amendments of existing probate codes. In Pennsylvania, the application of the doctrine was regulated by statute,[21] while in California the courts' inherent jurisdiction was legislatively affirmed.[22] Clearly, a substantial number of jurisdictions[23] now recognize that the *Whitbread* doctrine provides the Probate Court with the latitude necessary to deal providently with the estate of the incompetent.[24] It is important to note, however, that the doctrine of substitution of judgment has been rejected in some jurisdictions, including Rhode Island and Texas.[25]

14. For the basis of the doctrine's "intent" requirement, see note 6, *supra*.

15. *See, e.g., In re* Heeney, 2 Barb. 326 (N.Y. Ch. 1847); *In re* Willoughby, 11 Paige's Ch. 257 (N.Y. Ch. 1844); *In re* Fleming's Estate, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Jud. Ct. 1940); *In re* Flagler, 126 Misc. 764, 214 N.Y.S. 631 (Sup. Jud. Ct. 1926).

16. *See, e.g.*, Potter v. Berry, 53 N.J.Eq. 151, 32 A. 259 (Ct. Err. & App. 1895); *In re* Johnson, 111 N.J.Eq. 268, 162 A. 96 (Ch. 1932).

17. 35 Eng. Rep. 878.

18. *See, e.g., In re* Brice's Guardianship, 233 Iowa 183, 8 N.W.2d 576 (1943); Sheneman v. Manning, 152 Kan. 780, 107 P.2d 741 (1940); *In re* Buckley's Estate, 330 Mich. 102, 47 N.W.2d 33 (1951); State *ex rel.* Kemp v. Arnold, 234 Mo. App. 154, 113 S.W.2d 143 (1938).

19. MASS. GEN. LAWS ANN. Ch. 201, § 38 (1958), *as amended*, ch. 422 (Supp. 1969).

20. MD. ANN. CODE (1957) Art. 16, § 135A (Cum. Supp. 1963).

21. PA. STAT. tit. 50, § 3644 (1969).

22. CAL. PROB. CODE § 1558 (West 1957).

23. For a general discussion of jurisdictions which have adopted the doctrine, see Annot., 24 A.L.R.3d 863 (1969).

24. *See* note 7 *supra*.

25. *See, e.g.*, Binney v. Rhode Island Hosp. Trust Co., 43 R.I. 222, 110 A. 615 (1920); *In re* Estate of Neal, 406 S.W.2d 496 (Tex. Civ. App.), *aff'd per curiam*, 407 S.W.2d 770 (Tex. 1966).

Application of the Doctrine for Tax Purposes

Early Acceptance

Although *Whitbread* and its progeny established the principle that a guardian could expend estate funds for purposes other than the maintenance of the incompetent, it was not clear whether such expenditures could be made for the sole purpose of avoiding excessive estate taxes. The earliest case in a modern line of decisions dealing with this question was *In re Carson*.[26] There, the executor of the deceased incompetent petitioned the court to vacate its previous order authorizing gifts from the principal of the incompetent's estate to her son and daughter. Initially, the court recognized the doctrine of substitution of judgment:

> [I]n a proceeding of this character, the court itself is called upon, in legal theory, to don the mental mantle of the incompetent and 'direct the committee to act in behalf of the incompetent in accordance with what the court finds would, in all probability, have been the choice of the incompetent if [she] had been of sound mind.' [27]

The court accordingly upheld its previous order authorizing gifts from the corpus of the incompetent's estate to her son for the purpose of saving estate taxes. However, it denied allowance to the daughter, even though the gifts were a mere duplication of the incompetent's estate plan, because a reservation clause in the will withheld such disposition until a later date.[28]

Having accepted the will as an expression of the incompetent's intent, the court apparently felt constrained to accept it in its entirety and therefore refused to contravene the testator's clearly intended limitations concerning the legacy of her daughter.

The court based its decision on the following findings: (a) the incompetent was *in extremis* (she died seven days after the initial orders authorizing the gifts); (b) the incompetent's intent was manifest from her will; (c) the remaining assets of her estate were sufficient to generate enough income for her support and care; and (d) there were demonstrable savings in taxes and administration expenses.[29]

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26. 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Jud. Ct. 1962).

27. 241 N.Y.S.2d at 289, *quoting from In re* Hills' Will, 264 N.Y. 349, 353-54, 191 N.W. 12, 14 (1934).

28. 241 N.Y.S.2d at 290. The reservation clause withheld disposition of the daughter's legacy until she reached 40 years of age.

29. 241 N.Y.S.2d at 288.

From these findings the court concluded:

> To say that this incompetent, if sane, would not have given the same direction this court gave would completely overlook the underlying motive for the very instrument which gave life to these executors.
>
> To do otherwise would lead to a result increasing estate costs to a point hardly consistent with our modern concept of estate planning for tax and other legitimate estate benefits.[30]

Shortly after *Carson*, a Delaware court similarly permitted non-charitable distributions (gifts by way of an inter vivos trust) to be made from the incompetent's estate. In *In re duPont*,[31] the distribution was permitted on the following grounds: (a) The incompetent's condition was permanent; (b) If the distribution had been effectuated in the ward's lifetime, significant tax savings would have resulted; (c) The ward intended to make such distributions prior to his incompetency; (d) The distributions would duplicate the ward's testamentary plan; and (e) The property remaining in the ward's estate would be sufficient to maintain the incompetent in the manner to which he was accustomed.[32] In response to a jurisdictional challenge, the court concluded:

> The jurisdiction of the Court of Chancery over the property of aged, mentally infirm, and physically incapacitated persons is conferred by [state statute]. While the Court of Chancery has long asserted jurisdiction over the persons and property of the mentally ill, it is generally agreed that such jurisdiction is derived solely from legislative enactments.[33]

The court then concluded that the pertinent statutes[34] clothed it with broad powers of supervision over the estates of incompetents:

> In 12 Del. C. § 3710 the legislature of this state gave recognition to the principle announced in *Ex parte Whitbread* in empowering the Court of Chancery to authorize charitable contributions from

30. 241 N.Y.S.2d at 290.

31. 41 Del. Ch. 300, 194 A.2d 309 (Ch. 1963).

32. *Id.*

33. 194 A.2d at 312. The court referred to DEL. CODE ANN. tit. 12, § 3914 (1953), which gives the court broad discretion in the appointment of guardians of an incompetent's property once the notice and hearing requirements are fulfilled.

34. DEL. CODE ANN. tit. 12 §§ 3701, 3705, 3710, 3914 (1953).

> the income of an incompetent's estate. Sub-section (c) of § 3710 expressly provides that that section shall not be construed as abridging the existing powers of the Court over the estates of such persons.[35]

After reviewing *Whitbread* and distinguishing prior Delaware law, the court found that "under [state statutes] this court is empowered to invoke the so-called substitution of judgment doctrine here." [36]

Thus, *Carson* and *duPont* independently developed[37] the following common criteria for evaluation before authorizing distributions, for tax purposes, that would duplicate the incompetent's estate plan: permanency of the incompetent's condition; intent; sufficiency of the remaining estate to support the incompetent; and demonstrable tax savings.

In *In re Kenan*,[38] the guardian sought authorization to make certain gifts to charities for tax purposes. The court concluded that such authorization could be granted only if it could be proved that the incompetent would have made the gifts himself if he were of sound mind.[39] On second appeal[40] the North Carolina Supreme Court found from the evidence that: (a) It was improbable that the incompetent would recover; (b) The incompetent had executed a will, evidencing testamentary intent and, therefore, the enhancement of legacies was a consistent purpose; (c) The proposed donees, some of whom were charitable, were proper; (d) The incompetent probably would have taken such action if not incapacitated; (e) The gifts would realize considerable tax savings; and (f) The remaining estate was sufficient to provide for the incompetent's support and future needs.[41] Thus, the North Carolina Supreme Court utilized the *Carson-duPont* criteria to invoke the doctrine of substitution of judgment in affirming the lower court's order granting such allowances.

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35. 194 A.2d at 316.

36. 194 A.2d at 317 The court referred to sections 3705 and 3914(d).

37. *DuPont*, which succeeded *Carson*, does not cite *Carson*. Rather, the *duPont* court formulated its reasoning from earlier New York authority.

38. 261 N.C. 1, 134 S.E.2d 85 (1964).

39. *Id.* at 9, 134 S.E.2d 91, holding that the petitioner failed to meet the burden of proof necessary to make such gifts. Leave to amend was also granted. The court stated: "A court may authorize a fiduciary to make a gift of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, at a hearing of which interested parties have notice, that the lunatic, if then of sound mind, would make the gift." *Id.*

40. 262 N.C. 627, 138 S.E.2d 547 (1964).

41. *Id.*

Denial of the Doctrine's Extension to Tax Considerations

Two decisions, *Bullock's Estate*[42] and *In re Estate of Neal*,[43] have rejected the use of the doctrine of substitution of judgment to effectuate tax savings for the estate of an incompetent. *Bullock*, often cited as the principal opposing authority,[44] was overruled by a subsequent decision which applied the doctrine to grant tax-saving distributions.[45] *Neal* has been distinguished or rejected by the courts of other jurisdictions.[46]

Initially, the Pennsylvania court in *Bullock* rejected an application by the incompetent's wife, the sole beneficiary in his will, for payments to herself and two daughters for the purpose of reducing future inheritance and estate taxes. Basing the rejection on lack of statutory authority, the court stated: "In any event, incompetence is not the legal equivalent of death, and tax avoidance is not a sufficient legal ground for the intestate distribution of any part of an incompetent's estate while he is putatively testate and actually alive." [47]

However, *In re Groff's Estate*[48] recognized the applicability of the doctrine in Pennsylvania and employed it to authorize gifts from the incompetent's estate to reduce estate taxes, notwithstanding *Bullock*. The *Groff* court interpreted § 3644 of the Pennsylvania Incompetent's Estate Act[49] to be a limitation on the distributive powers of a guardian, but found: "[N]othing is expressly stated there or elsewhere in the act to circumscribe the power of the court." [50] The decision distinguished *Bullock* and concluded that the substitution of judgment doctrine should be applied by the court to permit the proposed gifts in order to effectuate a sound estate plan.[51]

The Pennsylvania result leaves Texas as the sole jurisdiction to have

42. 10 Pa. D. & C.2d 682 (Orphan's Ct. Del. County 1957).

43. 406 S.W.2d 496 (Tex. Civ. App. 1966) It is probable that Rhode Island also would deny tax-saving distributions. *See* Binney v. Rhode Island Hosp. Trust Co., 43 R.I. 222, 110 A. 615 (1920). Those jurisdictions that have accepted the doctrine of substitution of judgment probably would employ it to allow such distribution.

44. *See, e.g., In re* Christiansen, 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (Ct. App. 1967).

45. *In re* Groff's Estate, 38 Pa. D. & C.2d 556 (Orphan's Ct. Montg. County 1965).

46. *In re* Christiansen, 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (Ct. App. 1967).

47. 10 Pa. D. & C.2d at 685.

48. 38 Pa. D. & C.2d 556.

49. PA. STAT. tit. 50, § 3644 (1969).

50. 38 Pa. D. & C.2d at 569.

51. The *Groff* court noted that the doctrine of substitution of judgment was not considered in *Bullock* and that there was meager evidence supporting the grant of such gifts, 38 Pa. D. & C.2d at 568.

specifically denied employment of the *Whitbread* doctrine to reduce estate taxes. The Texas Court of Appeals in *In re Estate of Neal*[52] denied an application to transfer trust property to the incompetent's heirs, even when approval of the transfer would have duplicated the testamentary plan of the incompetent. The court reasoned:

> The enactment of Section 398 of the Probate Code would not have been necessary if the Probate Court could have exercised the power granted therein without such enactment. Moreover, such section sets out in detail the conditions under which the charitable gift may be made, and would seem to negative the doctrine of substitution of judgment. It is our view that this section of the Probate Code strongly indicates the legislative intent to confer upon the court a power and authority, which it was believed the court did not have prior to such enactment, namely, to make gifts out of the income from the Ward's estate.
>
> We have found nothing in the Probate Code or the Statutes of this State expressly or impliedly conferring upon the court the power and authority to make a gift such as that proposed by appellant. . [53]

The Christiansen Criteria

The most progressive application of the doctrine of substitution of judgment to permit distributions from an incompetent's estate based solely on tax considerations is *In re Christiansen*.[54] There the incompetent's son, as guardian of the estate, appealed from an order denying his petition to make gifts to the incompetent's children and grandchildren from the corpus of the estate. The purpose of such gifts was to reduce "the burden of excessive taxes against the estate and to permit enjoyment of the property of the incompetent by her family during her lifetime." [55] In *Christiansen*, the incompetent had no will.

The California court's analysis of the problem was thorough. After tracing the common law development of the doctrine of substitution of judgment, relevant statutory provisions were analyzed and the court concluded:

> [T]he courts of this state, in probate proceedings for the administration of the estates of insane or incompetent persons, have

52. 406 S.W.2d 496 (Tex. Civ. App. 1966).
53. *Id.* at 502.
54. 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (Ct. App. 1967).
55. 56 Cal. Rptr. at 507.

> power and authority to determine whether to authorize transfers of the property of the incompetent for the purpose of avoiding unnecessary estate or inheritance taxes or expenses of administration, and to authorize such action where it appears from all the circumstances that the ward, if sane, as a *reasonably prudent man*, would so plan his estate, there being no substantial evidence of a contrary intent.[56]

In addition, the court promulgated criteria for the proper exercise of trial court discretion.[57] These criteria included: permanency of condition;[58] needs of the ward;[59] devolution of the property;[60] and donative

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56. 56 Cal. Rptr. at 522-23 (emphasis supplied). In so holding, the California court adopted the reasoning of the *Carson, duPont,* and *Kenan* decisions. Opposing views espoused in *Bullock* and *Neal* were specifically rejected.

57. 56 Cal. Rptr. at 511.

58. 56 Cal. Rptr. at 523. This criterion requires:

> . .[T]he proof must show that the insanity is incurable before the court can authorize a gift or transfer. . . . The necessity for permanency of condition may also vary in inverse proportion to the sufficiency of the evidence of the practice or custom of the incompetent, i.e., keeping up an established weekly contribution to a church or a planned series of gifts for tax avoidance.

59. *Id.* This requires:

> The payment of the ward's debts and the satisfaction of the obligations for the support of the ward and those who, as members of his family, are entitled to support from his estate, in an amount not disproportionate to the value of his estate and his station in life. No thought can be given to transfer for any purpose until these obligations are met.

60. 56 Cal. Rptr. at 524:

> Since on recovery the incompetent would be free to make or change his will, no transfers should be authorized for tax saving purposes alone unless there is no probability of this eventuality
>
> Where there is a will, the incompetent has furnished evidence of the objects of his bounty, and the manner in which he wishes them to share in his estate. . . Where the testator's wish demonstrates that a legacy is to be delayed, it may be given effect by denial of the gift, as in the case of that to the daughter in *Carson.*
>
> In the instant case the discrepancies between gift and inheritance need not necessarily be fatal if all other circumstances were present. In the exercise of its discretion the court could accept or reject the proposition that the members of the first generation were not only the natural, but the actual, objects of the incompetent's bounty. If the latter, they should be able to waive their rights to equal shares of any amount properly available for distribution to them, and consent to its distribution to the second generation in any shares they desired. No one of the latter, as the recipient of not only the bounty of his grandmother, but also of the waivers of heirs ap-

intent.[61] Applying these criteria, the court found:

> The sum and substance of weighing these factors is to determine whether the incompetent as a reasonably prudent aged lady would make the gifts proposed so as to pass a greater share of her estate to her descendents. There is sufficient evidence to support, without requiring, the exercise of the lower court's discretion to find that the children and grandchildren would be the natural objects of her bounty, that she would deem it to her advantage to make the gifts to effect the proposed tax savings if she could afford to do so without prejudice to her own welfare, and that she would have no hesitancy because there might be some difference between the shares given and the shares that would be received had the same amount of property passed by intestacy [62]

Christiansen's significance is multifold. First, it broadened the *Carson* and *duPont* holdings by de-emphasizing the need to duplicate existing estate plans, indicating instead that ". . . discrepancies between gift and inheritance need not necessarily be fatal. . . ." [63] Second, the court enumerated and carefully defined the criteria the court should consider before exercising its discretion and authorizing the distributions. Third, and most important, the court injected the prudent man standard into the rule of its holding.[64] As noted by the court, the adoption of such an objective standard had long been urged by interested commentators.[65]

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parent, could be heard to complain over a discrepancy between what he received as a gift and what he otherwise might have inherited . . . On the other hand, in the absence of such consent, or intent, it would appear that the gifts would have to go to the branches of the family in the shares in which they would inherit.

61. *Id.* This requires:
. . . Even in the absence of a showing of former practice or conduct, [that] there must be, . . . some showing of the relationship and intimacy of the prospective donees with the incompetent in order to show that they would be objects of the incompetent's bounty by any objective test. Here again the matter is relative, and dependent on reasonable standards.

62. 56 Cal. Rptr. at 525.

63. 56 Cal. Rptr. at 524.

64. It would seem that the court is suggesting a standard of a reasonable man conducting his own affairs rather than the reasonable investor standard of the trust laws.

65. *See, e.g.*, Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 335 (1960); Comment, 17 CALIF. L. REV. 175 (1929); 14 CORNELL L. REV. 89 (1928); 78 HARV. L. REV. 1483 (1965); 9 UTAH L. REV. 464 (1964); 11 VILL. L. REV. 150 (1965).

Post-Christiansen Era

The impact of *Christiansen* immediately became evident in the New York case of *In re Myles' Estate*,[66] in which the incompetent's son and daughter petitioned the court for permission to make equal gifts to themselves from the incompetent's estate for the purpose of reducing the burden of excessive taxes against the estate and to permit the enjoyment of property of the incompetent by her family during her lifetime.[67] Finding that it had the power to authorize such gifts, the court adopted the doctrine of substitution of judgment as advanced by *Christiansen*. Before adopting the *Christiansen* view that "the testamentary plan of the incompetent [is] an important but not necessarily a determinative issue,"[68] the court encountered the warnings of *Carson* and acknowledged that great weight should normally be given to the testamentary scheme of an incompetent. The incompetent's testamentary intent was problematic in *Myles' Estate* because the will in question specifically provided that no property should vest in the petitioners unless and until they survived the testatrix-incompetent. To resolve the apparent inconsistency between the petitioners' request and the incompetent's testamentary scheme, the court invoked the *Christiansen* analysis which would, under the proper circumstances, allow distribution notwithstanding such restrictive conditions in the incompetent's will.[69] Thus, New York joined the growing number of jurisdictions following *Christiansen*.

In *Strange v. Powers*,[70] a constitutional challenge was leveled against a Massachusetts statute[71] which specifically granted the Probate Court the power to authorize the application of funds not required for the ward's maintenance and support toward establishment of an estate plan to minimize taxes or for gifts to likely donees. A three-pronged attack against the statute claimed that (1) It was an unconstitutional deprivation of property without due process; (2) It was an unconstitutional delegation of power to the Probate Court, and (3) A guardian or conservator was not the proper recipient of such gifts.[72]

66. 57 Misc.2d 101, 291 N.Y.S.2d 71 (Sup. Jud. Ct. 1968). Petitioners were the sole heirs to the Myles estate, which approximated $2 million. The incompetent "donor" was 86 years of age, and the proposed gifts would have reduced the estate by one-half.

67 291 N.Y.S.2d at 72.

68. 291 N.Y.S.2d at 73.

69. 56 Cal. Rptr. at 524.

70. 260 N.E.2d 704 (1970).

71. MASS. GEN. LAWS ANN. ch. 422 (1969), *amending* ch. 201, § 38 (1958)

72. 260 N.E.2d at 707

Drawing from *duPont* and *Kenan* for explanation of the substitution of judgment doctrine; *Monds v. Dugger*[73] for the decided constitutionality of such gifts; and *Christiansen* for support of both propositions, the Massachusetts supreme court stated:

> We agree with the modern trend of cases both in England and in the United States. There is no reason why an individual, simply because he happens to be a ward, should be deprived of the privilege of making an intelligent common sense decision in the area of estate planning, and in that way forced into favoring the taxing authorities over the best interests of his estate.[74]

In rejecting the due process argument, the court found that the statute provided for notice to all interested parties, and that failure to give proper notice would preclude such action.[75] To the second constitutional challenge, concerning an unlawful delegation of power by the legislature, the court concluded: "The subject of [the statute] is one particularly within the experience and competence of the Probate Court, which may properly be depended upon to handle the various questions which may come before it without detailed provision . . . ." [76]

To the third contention, that a guardian or conservator cannot be the recipient of such distributions, the court referred to the language of the act itself which permits distributions to persons who would be "likely recipients of donations from the ward." [77] Thus, the court upheld the constitutionality of the Massachusetts statute which specifically grants power to approve gifts from the estate of an incompetent ward for the purpose of generating tax savings and effectuating sound estate planning.

In *In re Reuben Turner*[78] the incompetent's wife and three children petitioned the court for an order permitting annual gifts of $3,000 in order to reduce the impact of federal estate taxes. The petitioners alleged that such amounts would not be subject to federal gift taxes and would be used to defray household and schooling expenses. The court

73. 176 Tenn. 550, 144 S.W.2d 761 (1940). The court said: "Since in a case of this sort the court acts in the incompetent's stead, an appropriation of the incompetent's estate is equivalent to a voluntary appropriation of that estate by a person of sound mind. Such an appropriation, as though voluntary, is not a taking of property contrary to the constitutional provisions named." 144 S.W.2d at 763.

74. 260 N.E.2d at 709.

75. 260 N.E.2d at 711.

76. *Id.*

77. *Id.*

78. 61 Misc. 2d 153, 305 N.Y.S.2d 387 (Sup. Jud. Ct. 1969).

noted its jurisdictional basis and power to authorize such allowances,[79] and then stated:

> [T]he factors deemed determinative in the cases discussing the gift versus estate tax problem are: (1) the extent of the incompetent's estate; (2) medical testimony: (i) regarding the permanency of the incompetent's illness and his chances of recovery, (ii) concerning the needs of the incompetent for the balance of his illness, (iii) relating to the life expectancy of the incompetent; (3) the gift giving disposition of the incompetent prior to his illness; (4) the testamentary scheme provided by the incompetent; and (5) the tax consequences of the gifts. Furthermore, at least one court in this State has permitted a gift to be made to a next of kin solely on the ground that tax advantages would accrue to the estate of the incompetent [*In re Carson*]. [80]

The evidence in *Turner* tended to prove that the principal of the incompetent's estate was insufficient to generate enough income to meet the annual expenses of the incompetent and his family so that some annual depletion of principal was necessary. The evidence also indicated that the incompetent manifested an intent to postpone distribution of his children's share in his estate until their twenty-fifth birthday, and that the incompetent's life expectancy was unknown.[81] Applying its previously-enumerated criteria to the evidence, the court concluded that the petitioners failed to establish "by a fair preponderance of the evidence that the incompetent, were he *prudent* and of sound mind, would make these gifts despite the tax advantages to the ultimate beneficiaries." [82]

The *Turner* holding is significant for two reasons. First, the court incorporated "prudent" into the substitution of judgment test, thereby aligning itself with the *Christiansen* rationale. Second, it would seem that "fair preponderance of the evidence" means weighing the evidence in the light of each of the criteria separately, rather than a mathematical weighing wherein the satisfaction of a majority of the criteria would be sufficient to support making of gifts under the doctrine.

The recent New Hampshire case of *In re Morris*[83] dealt with the

79. 305 N.Y.S.2d at 389.
80. *Id.* at 390.
81. *Id.* at 387
82. *Id.* at 391 (emphasis supplied).
83. 281 A.2d 156 (1971).

same question—whether a probate court is empowered to permit gifts by a guardian from the principal of a ward's estate for the purpose of relieving excessive estate tax burdens. The guardian sought permission to make equal gifts to each of the ward's four children. As in *Christiansen*, the ward had not drawn a will which could have been used to aid the court in determining his intent.

The New Hampshire court adopted the reasoning of *Strange* and *Christiansen* and held:

> We think that the portion of [the statute] imposing a duty on the guardian to devote the estate's income to maintenance of the ward and his family does not prohibit him from making other prudent and sound expenditures. On the contrary, the portion of the statute directing him to improve the estate "frugally and without waste" implies the power to make gifts which will prevent waste of the estate's assets.[84]

Model Legislation: Uniform Probate Code

The Uniform Probate Code (U.P.C.)[85] is a comprehensive statute which seeks ". . . to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons."[86] Article V of the Code, entitled "Protection of Persons under Disability and Their Property," divides the area along functional lines. Two subdivisions are devoted exclusively to guardians of incapacitated persons and the protection of the incompetent's property.[87]

The most fundamental distinction made by the U.P.C. is the separate treatment given care of the person and management of his property. Under the Code, from a definitional and functional standpoint, guardians deal with the care and custody of the person,[88] while conservators are charged with the management of the property.[89] Appointments of guardians and conservators therefore normally arise in separate factual

84. 281 A.2d at 158. The court reversed a lower court decision and remanded the case for disposition consistent with *Christiansen*.

85. The official text and comments were approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August, 1969. Although not adopted by any state, the Uniform Probate Code [hereinafter cited as U.P.C.] was cited as authority by *In re* Morris, 281 A.2d 156, 157 (N.H. 1971).

86. U.P.C. § 1-102(b)(1).

87. U.P.C., Art. V, General Comment. Part 3 is devoted to guardians of incapacitated persons; Part 4 deals with protection of their property.

88. U.P.C. §§ 5-312(a)(1), -304, Comment.

89. U.P.C. §§ 1-102(b), 5-401.

contexts,[90] although both inquiries may be joined in the same court proceeding.[91] The procedure for determining incapacity[92] and appointing a guardian is governed by section 5-303. The powers of a guardian are enumerated in section 5-312, with different limitations expressly applicable when there is also a conservator.[93] Where there is also a conservator, the guardian's powers vis à vis the ward's property are understandably limited to those necessary for the support, care, and education of the ward.[94] This scheme represents an important departure from the current state of the law, in which a guardian frequently is responsible for both the care of the person and conservation of his property.

Protective proceedings, controlled by section 5-401 are a separate inquiry from guardianship proceedings, and thus may be instituted with or without a corresponding guardianship. Section 5-408 enumerates the powers of the court which may be exercised either "directly or through a conservator, in respect to the estate and affairs of protected persons."

The question whether a gift may be made from the ward's assets for the purpose of reducing estate taxes is answered in section 5-408(3), which states: "[T]he Court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to power to make gifts, . . ." In the Comment to this section the drafters state that the supervising court is given all the powers which the individual would have if he were of full capacity. The general duty of the conservator is ". . to act as a fiduciary and . . . observe the standards of care applicable to trustees as described by § 7-302."[95] That standard is one which ". . . would be observed by a prudent man dealing with the property of another . . "

90. U.P.C. § 5-303 (Procedure for Court Appointment of Guardian of an Incompetent), § 5-401 (Protective Proceedings).

91. U.P.C. § 5-102(b).

92. "Incapacitated person" as defined by section 5-101(1) means " . any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person; "

93. U.P.C. §§ 5-312(4), (6).

94. U.P.C. §§ 5-312(a)(1)-(6).

95. U.P.C. § 5-417

Additionally,

> If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 percent of the income of the estate.[96]

A final duty of both the conservator and the court when managing the protected person's property is that they "should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated." [97]

Clearly, the Uniform Probate Code affirms the principles of the *Whitbread-Carson-Christiansen* line of cases. A substitution of judicial judgment for that of the incompetent is implicit in the power of the courts to dispose of the incompetent's estate as discussed in those cases. The Code adopts a prudent man standard for conservators, thereby rejecting constrictive guardianship standards which now exist. It promotes realistic management of the protected person's property for his benefit and that of his family, in accordance with sound principles of estate planning and his manifested intent.

Conclusion

In the past decade the thesis question of this Note has elicited affirmations from seven jurisdictions[98] and denial from one.[99] Striking similarities appear frequently in the litigation of these questions; most commonly, the cases concern a moderately wealthy individual who has become incapacitated before arrangements were made for a satisfac-

96. U.P.C. § 5-425(b).

97. U.P.C. § 5-427.

98. *In re* Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (Ct. App. 1967); *In re* duPont, 41 Del. Ch. 300, 194 A.2d 309 (Ch. 1963); Strange v. Powers, 260 N.E.2d 704 (N.H. 1970); *In re* Morris, 281 A.2d 156 (N.H. 1971); *In re* Rueben Turner, 61 Misc. 2d 153, 305 N.Y.S.2d 387 (Sup. Jud. Ct. 1969); *In re* Myles' Estate, 57 Misc. 2d 101, 291 N.Y.S.2d 71 (Sup. Jud. Ct. 1968); *In re* Carson, 39 Misc.2d 544, 241 N.Y.S.2d 288 (Sup. Jud. Ct. 1962); *In re* Kenan 262 N.C. 627, 138 S.E.2d 547 (1964); *In re* Groff's Estate, 38 Pa. D. & C.2d 556 (Orphan's Ct. Montg. County 1965).

99. *In re* Estate of Neal, 406 S.W.2d 496 (Tex. Civ. App. 1966).

tory estate plan.[100] Since large estates frequently are involved, tax implications are central to a viable disposition of the ward's property. Recognizing this, zealous guardians, conservators and beneficiaries have petitioned the courts to alleviate excessive tax burdens in a manner that would be consistent with the ward's own desires. The courts are divided between their duty to oversee the care of the incompetent's person and the conservation of his estate. They have strained to effectuate both.

The answer in several jurisdictions has been to resurrect the common law doctrine of substitution of judgment enunciated by *Whitbread*. Because of the courts' duty to protect and conserve the incompetent's estate, it became necessary to formulate minimum criteria to determine appropriate instances for the exercise of judicial judgment in substitution for that of the ward. *Christiansen* seems to have provided these standards. While *Christiansen* and other cases have formulated a workable tool for the implementation of sound estate planning for incompetents, the potential value of the Uniform Probate Code cannot be overstated. Legislative action could minimize the possibility of confusion concerning the wisdom of *Whitbread* and *Christiansen*, and a widespread adoption of the Code would have the desired effect of creating a uniform body of interpretive law which would be available to all courts charged with the responsibility of handling this delicate problem. In a time when tax considerations often are controlling in estate planning, the need to provide incompetents with the same alternatives available to competent persons is clear. It is also evident that gifts provide a viable means of effectuating a testamentary scheme while avoiding excessive tax burdens and expenses of administration. As long as this situation prevails, it is imperative that incompetents and their families be permitted to benefit from such alternatives to the same extent other families do. Indeed, court supervision would be seriously deficient if substitution of judgment were restricted to pre-*Christiansen* standards. The preservation of the doctrine through adoption of the Uniform Probate Code merits serious consideration.

100. *See, e.g., In re* Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (Ct. App. 1967), where no estate plan had been drawn before incapacity For an example of incapacity occurring before implementation of the estate plan, *see In re* duPont, 41 Del. Ch. 300, 194 A.2d 309 (Ch. 1963).