



1979

Premature Probate: A Different Perspective On Guardianship for the Elderly

George J. Alexander

Santa Clara University School of Law, gjalexander@scu.edu

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Law Commons](#)

Automated Citation

George J. Alexander, *Premature Probate: A Different Perspective On Guardianship for the Elderly*, 31 STAN. L. REV. 1003 (1979),
Available at: <http://digitalcommons.law.scu.edu/facpubs/647>

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Premature Probate: A Different Perspective on Guardianship for the Elderly

George J. Alexander*

The management of an individual's property and health is, in large part, left to that person's discretion. The law considers most people competent to make the necessary decisions in these areas. However, for those who lack that competence, largely the elderly,¹ the law provides for the imposition of surrogate management in the form of guardianship or its equivalent.² Yet the substitution of a guardian's judgment as to what is best for the ward's health or property creates a grievous potential for abuse.

The guardian may make health treatment decisions for the ward which are contrary to the ward's wishes. For example, the guardian may hospitalize the ward for the ward's "protection." The hospital

* A.B. 1953, J.D. 1959, University of Pennsylvania; LL.M. 1964, J.S.D. 1969, Yale Law School. Dean and Professor of Law, University of Santa Clara Law School. The author wishes to acknowledge the contributions of his research assistants, Barbara J. Nelson and Daniel M. Wall, and the aid of Lynne N. Henderson, and thanks them for their extraordinary help and thoughtful criticism.

On April 23 and 24, 1979, the author chaired the Task Force on Protecting Human Rights, at the National Conference on Mental Health and the Elderly held by the United States House of Representatives Select Committee on Aging. The staff of the Select Committee circulated a prior draft of this article to the Task Force which then recommended that "appropriate legislative bodies . . . provide for legislative implementation of the right of individuals to file binding statements, while competent, to govern disposition of their person and property during incompetency." The proposal was unanimously accepted by the Conference.

1. One study showed that 80% of the persons placed under guardianship in the Los Angeles County central district from July 1, 1973 to June 30, 1974 were over 65. *See* National Senior Citizens Center, Empirical Study of Guardianship and Conservatorship Filings in Los Angeles County (1977) (unpublished data on file with author) [hereinafter cited as Senior Center Study]. This study, conducted by the National Senior Citizens Center, a federally funded legal services center concerned with the legal problems of the elderly poor, included examination of 1,010 cases filed under CAL. PROB. CODE §§ 1460-1470 (West 1956) (amended 1959, 1976, 1978), and *id.* §§ 1701-2207 (West Supp. 1979) in the Los Angeles County central district.

2. *See, e.g.*, CAL. PROB. CODE §§ 1460-1463, 1701-2207 (West Supp. 1979).

may use a form of treatment, such as electroconvulsive therapy, which the ward may particularly fear. Or the guardian may involuntarily commit the ward to an institution if the guardian feels the ward is suicidal or dangerous to others.

The guardian may also deny the ward the benefit of possessions or savings, or require the ward to receive those benefits as a dole from an appointed manager. The guardian may manage the property in a way that channels funds away from individuals the ward would like to benefit, and toward persons the guardian prefers. Alternatively, the guardian may restrict the ward's expenses with an eye to enlarging the estate that will pass on death.

Since the law conceives of surrogate management as a benefit to the ward, the law imposes such management in a nonadversary setting. Consequently, claims to the ward's property are not openly raised and adjudicated, but instead are subsumed in litigation on the single issue of the ward's competence.³ Moreover, although the importance of benefit to the ward in the competency determination causes that proceeding to become laden with a concern for due process—on the assumption that such procedures will guarantee fairness—that guarantee is uncertain, and shocking inequities often come to light.

Although guardianship of property and health have much in common, the two forms of surrogate management raise different problems. In Part I of this article, I consider the problems attending guardianship of property, and examine the approaches used to protect the ward's property interest. I conclude that the "living will" suggested by probate law provides the best substitute for the present model of guardianship. In Part II, I look at the problems raised by the surrogate management of health needs—principally the excessive use of involuntary commitment—and I conclude that a living will also allows individuals to control their *treatment* in the event of incompetence.

3. See, e.g., *id.* §§ 1460–1461. "In most jurisdictions, the petition [for guardianship] may be filed by either the disabled person or by one or more of his friends or relatives." Rohan, *Caring for Persons Under a Disability: A Critique of the Role of the Conservator and the "Substitution of Judgment Doctrine"*, 52 ST. JOHN'S L. REV. 1, 6 (1977). Moreover, "[s]everal jurisdictions impose the additional requirement that notice be furnished to the spouse, 'descendants, ascendants and next of kin' of the proposed conservatee," *id.*, thus including in the proceedings the vast majority of potential heirs.

I. THE LIVING WILL AND SURROGATE MANAGEMENT OF PROPERTY

The fall of a wealthy man demonstrates the scope of possible personal tragedy inherent in a guardianship proceeding.⁴ Ben Weingart was ordered into conservatorship, the rough equivalent of guardianship, in October 1974.⁵ At that time, he appeared to own property valued at about one-half billion dollars.⁶ The petition for surrogate management alleged that he was likely to be imposed on by "artful and designing" persons, naming the woman with whom he had lived for 16 years.⁷ The petitioners, who would become the managers of Mr. Weingart's property, were personally indebted to him for sub-

4. Shakespeare often wrote about the tragedies of kings rather than of common folk. "The pangs of despised love and the anguish of remorse, we say, are the same in a peasant and a prince; but . . . the story of the prince, the triumvir, or the general, has a greatness and dignity of its own . . . [W]hen he falls suddenly from the height of earthly greatness to the dust, his fall produces a sense of contrast, of the powerlessness of man, and of the omnipotence—perhaps the caprice—of Fortune or Fate, which no tale of private life can possibly rival." Bradley, *The Substance of Shakespearean Tragedy*, in *APPROACHES TO SHAKESPEARE* 1, 5-6 (N. Rabin ed. 1964).

But most guardianship proceedings do not concern the wealthy. See G. ALEXANDER & T. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* 71-72, 159 (1972) (table 5). Information from Onondaga County, New York records revealed that the total average estate involved in guardianship proceedings was approximately \$24,000. *Id.* The vast majority of petitions for guardianship, those concerning state hospital patients, involved an average estate of approximately \$19,000. *Id.* And guardianship proceedings sometimes involve only the right to make decisions about publicly provided benefits. "[T]he incompetent poor have almost as many meaningful decisions to be made for them as have incompetents with property." Zicklin & Libow, *The Penultimate Will*, 47 N.Y. St. B.J. 31, 32 (1975). Studies in California and New York revealed that a state hospital was the petitioner for an adjudication of incompetency in a vast majority of the cases examined. See G. ALEXANDER & T. LEWIN, *supra*, at 12; Senior Center Study, *supra* note 1. State hospitals institute such proceedings to secure reimbursement for the costs of care, maintenance, and medical treatment of the patient. G. ALEXANDER & T. LEWIN, *supra*, at 67-69; see OFFICE OF THE ATTORNEY GENERAL, STATE OF NEW YORK, *HANDBOOK OF INSTRUCTIONS FOR COMMITTEES OF PATIENTS OF STATE INSTITUTIONS* (1968). Regardless of the theoretical solicitude of the law toward small estates, those persons classed as relatively indigent are not accorded the same procedural opportunities and safeguards as their more affluent counterparts. See Senior Center Study, *supra* note 1.

5. *In re Weingart*, No. P-607498 (Super. Ct. Prob. Div. L.A. County, Cal. Oct. 29, 1974); see Hamill, *For the Ben Weingarts, There Oughtta Be a Law*, L.A. Herald Examiner, Jan. 10, 1979, § A, at 3, col. 1; Hamill, *The 'Cinderella' Who Loved Ben Weingart*, *id.*, Jan. 8, 1979, § A, at 3, col. 1; Hamill, *Ben Weingart: Rags to Riches . . . Back to Rags*, *id.*, Jan. 5, 1979, § A, at 3, col. 1; Hamill, *They Spoke for His Money, Not Him*, *id.*, Jan. 3, 1979, § A, at 3, col. 1; Hamill, *Tycoon's Millions Began with 35¢ Loan*, *id.*, Dec. 31, 1978, § A, at 1, col. 1; Hamill, *Her Fight Over a Tycoon's Millions*, *id.*, Dec. 29, 1978, § A, at 1, col. 1.

6. Hamill, *Her Fight Over a Tycoon's Millions*, *supra* note 5, at 3.

7. Mr. Weingart's generosity to his cohabitant, Laura Winston, precipitated the conservatorship proceedings. Eight days prior to the institution of the proceedings, Ben Weingart tried to increase the corpus of a trust he had set up for Laura Winston from \$1 million to \$2

stantial amounts of money.⁸

The court declared a temporary conservatorship in October 1974,⁹ and permanent conservatorship that November.¹⁰ Mr. Weingart was present at neither proceeding.¹¹ To excuse his absence, the petitioners presented the court with a medical certificate stating that Mr. Weingart had a moderately severe organic brain syndrome and was, for that reason, not able to attend the hearing.¹² Once appointed, the managers stopped all payments to the woman who had been living with Mr. Weingart and barred her from seeing him.¹³ They also transferred substantial sums of money from their control as conservators—subject to conservatorship accounting to the court—to a trust of which they were trustees.¹⁴

The story of Ben Weingart abounds in procedural unfairness, hidden conflicts of interests, and tragic disregard for the wishes of the ward. Those who, unlike Mr. Weingart, escape surrogate management, ultimately dispose of all of their property through probate. Both surrogate management and probate principally affect the elderly. Both processes often benefit spouses and children—surrogate management by conserving property so that it might later pass to these heirs through probate, and by sometimes increasing the allowances given to them during the ward's life. But unlike probate, surrogate management denies the ward the right to determine the use of property, since it does not follow the ward's previously expressed intent. I argue in this part that even though guardianship proceedings have been conducted with an increasing regard for procedural due process, they fail to protect the ward's property interests. I suggest that better results are possible by substituting probate for the present model of guardianship. Such a change would stress certainty of result, and shift the focus from what is "best" for the ward to implementation of the ward's previously stated objectives as expressed in a "living will."

million. The petitioners for conservatorship alleged that Ms. Winston coerced Mr. Weingart's attempt. See Hamill, *The 'Cinderella' Who Loved Ben Weingart*, *supra* note 5.

8. Hamill, *Her Fight Over a Tycoon's Millions*, *supra* note 5, at 3.

9. *Id.* at 1.

10. *Id.* at 1, 3.

11. *Id.* at 1.

12. *Id.*

13. *Id.* at 3.

14. *Id.*

A. *Inadequacy of Present Guardianship Law*

A court imposes guardianship¹⁵ on individuals when it finds that they are unable to care properly for themselves.¹⁶ When a court makes such a determination, it may then appoint a guardian to care for the ward's health.¹⁷ The same guardian, or another court appointee, may assume management control of the ward's property.¹⁸ Both health and property guardianships label the ward as unable to manage,¹⁹ and substitute a surrogate to act in the ward's best interests.²⁰ But because of broadly drawn standards of incompetence and illusory procedural safeguards in guardianship statutes, courts frequently find an individual incompetent and appoint a guardian where the alleged incompetent is still capable of managing property. And even where a ward is incompetent and does require a guardian, present guardianship statutes do not ensure that the guardian will manage the ward's property in accordance with the ward's wishes. Nor do these statutes ensure that the court will recognize the conflict of interests between the petitioners and the ward. In this section I examine these inadequacies of guardianship statutes.

15. The history of guardianship is closely linked to the law of insanity. If insane, an individual could be deprived of various rights, including those of property management, through guardianship proceedings. See Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 218-19 (1975); Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 570-73 (1972). A later statutory distinction between old age and insanity showed that many legislatures believed that aging itself might bring about functional disabilities creating property management problems. See, e.g., CAL. PROB. CODE § 1435.2 (West 1956) (amended 1976) (word incompetent defined to include "insanity as well as incompetency arising by reason of old age, disease, weakness of mind, or other cause rendering a person unable, unassisted, properly to manage and take care of himself or his property").

In some states, separate provisions exist for the management of the insane—or mentally ill—and of those incompetent by reason of functional disability not traceable to mental illness. The older practice of treating the groups alike was known as guardianship. See, e.g., *id.* §§ 1435.2, 1460-1462 (amended 1959, 1976, 1977, 1978). The newer process of conservatorship, used for the surrogate management of those incompetent by reason of functional disability, is intended to recognize the difference between insanity and disfunction. See, e.g., *id.* §§ 1701-2201 (West Supp. 1979). See generally G. ALEXANDER & T. LEWIN, *supra* note 4, at 81-124. Since the two terms have become confused, this article will refer to the two processes as guardianship.

16. See CAL. PROB. CODE § 1435.2 (West Supp. 1979). While this standard may seem overly vague, it is common in the statutes.

17. *Id.* § 1460 ("Any superior court to which application is made . . . may appoint a guardian for the person and estate or person or estate of an incompetent person . . ."). For further discussion of the surrogate management of health needs, see notes 92-123 *infra* and accompanying text.

18. CAL. PROB. CODE §§ 1460, 1500 (West Supp. 1979).

19. See *id.* §§ 1435.2, 1460.

20. *Id.* §§ 1460, 1500.

1. *Adjudicating incompetency.*

Broadly drawn standards of incompetence. The California Probate Code under which *In re Weingart* was tried,²¹ like the current probate statutes of many other states, allowed surrogate managers to be appointed on the basis of broadly drawn standards of incompetence.²² The standards used in these current statutes, like the standards in the California statute prior to its amendment, presumably reflect a belief that the guardianship process principally benefits the ward. The spe-

21. The California law of guardianship was revised after *In re Weingart*. While the old law allowed a court to appoint a conservator based on broadly drawn standards of incompetence, the new law focuses on the ward's ability to function. Compare CAL. PROB. CODE §§ 1435.2, 1460 (West 1956) (amended 1976) (incompetency can arise "by reason of old age, disease, weakness of mind, or other cause rendering a person unable, unassisted, properly to manage and take care of himself or his property") with *id.* (West Supp. 1979) (person incompetent when "unable properly to provide for his own personal needs for physical health, food, clothing or shelter, and . . . substantially unable to manage his own financial resources"). The new law also no longer allows a court to appoint a conservator for individuals unable to resist "artful and designing" persons, but instead only directs that courts be concerned about whether the ward is capable of resisting "undue influence." Compare *id.* §§ 1460, 1751 (West 1956 & Supp. 1975) (amended 1976) with *id.* (West Supp. 1979). Moreover, while under the old law courts often considered emotional or psychological instability as valid reasons for the alleged incompetent's absence from the court proceeding, see notes 29-30 *infra* and accompanying text, the new law provides that these are not valid reasons in most instances, see CAL. PROB. CODE § 1461 (West Supp. 1979) (absence permitted only if "attendance at the hearing is likely to cause serious and immediate physiological damage"). If a potential ward's absence is excused, the court must send an official to the potential ward to explain his or her rights. *Id.* §§ 1461.1, .5; see *id.* § 1461 (official must explain to potentially incompetent person "that he shall have the right to legal counsel of his own choosing, including the right to have legal counsel appointed for him by the court if he is unable to retain one"). The new law strengthens the provision for representation by counsel, see *id.* § 1461.5, makes counsel more readily available, see *id.* (court may appoint attorney if alleged incompetent does not have attorney), and provides for automatic periodic review by court investigators, see *id.* § 1500.1 (1 year after inception of guardianship and biennially thereafter). These new provisions combine a concern for due process in the determination of incompetence with a direction that the court hear the potential ward.

Because of the breadth of discretion allowed by the statute, however, the statute is less effective than it appears on its face. In a case tried by the author under the new law, the trial judge, the Honorable Gerald E. Regan, refused to hear closing argument explaining the new law or applying it to the facts. Disregarding a trial memorandum referring to the new provisions, he found the ward to be susceptible to "artful and designing" persons. Told that this standard was no longer used in the law, the judge instead considered the ward's ability to manage property. Upon asking the conservator whether the ward met the statutory standard of competence and getting a simple "no" in reply, the judge continued the conservatorship. The same judge controlled the appointment of counsel for trial and for any possible appeal. *In re Blatteis*, No. 58476 (Super. Ct. San Mateo County, Cal. Nov. 17, 1977); see *Guardianship of Boxley*, 115 Cal. App. 2d 483, 486; 252 P.2d 348, 350 (2d Dist. 1953) (incompetent may not contract for services of attorney when seeking to remove guardian).

22. See CAL. PROB. CODE §§ 1435.2, 1460 (West 1956) (amended 1976); Regan, *supra* note 15, at 603-05.

cific standards are broad, *e.g.*, "old age," and tend to encourage value judgments rather than neutral factfinding. For instance, while there is a good deal of controversy on the relevance of age to disfunction,²³ the statutory language allows the trier of fact to stereotypically link age and incompetence.²⁴ Similarly, although the elusive concept of mental illness evokes prejudice among lay persons,²⁵ the judge or jury can use mental illness in its most prejudicial sense when it becomes a reason for supposedly beneficial intervention through guardianship.

23. "[Old] people . . . cannot be judged to be incompetent. They know what they are doing, . . . and [want] to live the way they are living. Still, from our present sociological way of thinking they need care; some of them their estates, most of them their persons." McAvinchy, *The Not-Quite-Incompetent Incompetent*, 95 TRUSTS & EST. 872, 873 (1956).

24. See generally T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963).

25. Though there might be some agreement on what constitutes old age, mental illness is a more shifting concept. "Mental illness is [currently] defined so broadly that every human being is at times mentally ill." Turner & Carr, *Towards an Enlightened Commitment Law*, in *Hearings on Constitutional Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong., 1st & 2d Sess. 392, 415 (1969-1970). The edition of AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968) then in effect provided powerful examples of such inclusiveness:

"307.4 Adjustment reaction of late life. Example: Feelings of rejection associated with forced retirement and manifested by social withdrawal.

"301.82 Inadequate personality. This behavior pattern is characterized by ineffectual responses to emotional, social, intellectual and physical demands. While the patient seems neither physically nor mentally deficient, he does manifest inadaptability, ineptness, poor judgment, social instability, and lack of physical and emotional stamina.

"301.6 Asthenic personality. This behavior pattern is characterized by easy fatigability, low energy level, lack of enthusiasm, marked incapacity for enjoyment, and oversensitivity to physical and emotional stress. This disorder must be differentiated from Neurasthenic neurosis (q.v.).

"301.81 Passive-aggressive personality. This behavior pattern is characterized by both passivity and aggressiveness. The aggressiveness may be expressed passively, for example by obstructionism, pouting, procrastination, intentional inefficiency, or stubbornness. This behavior commonly reflects hostility which the individual feels he dare not express openly. Often the behavior is one expression of the patient's resentment at failing to find gratification in a relationship with an individual or institution upon which he is over-dependent."

Responding, perhaps, to criticism, the A.P.A. has eliminated all but the "passive-aggressive" classification from the latest version of its *Manual*, see *id.* (3d ed. 1978), and labelled that category as "controversial" and subject to future elimination, *id.* at K:27. However, the mutability of these definitions underscores the elusiveness of the concept of mental illness. *Id.*

One commentator has noted the shifting definition of mental illness as illustrated by the A.P.A.'s changing characterizations of homosexuality. Prior to 1973, he notes, the A.P.A. "considered homosexuality per se a mental disorder. In that year, by a vote of its membership, the Association decided that homosexuality was not a mental disorder. The nature of homosexuality did not change, nor were there any startling breakthroughs in the scientific understanding of homosexual behavior. . . . What changed were the values of a professional group empowered to affix labels of deviancy." Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 557 (1978).

Illusory procedural safeguards. California law, like current statutes in other jurisdictions, also provided Mr. Weingart with procedural safeguards. But, as for most alleged incompetents, these procedural safeguards were of no help to Mr. Weingart. For example, the law specifically provided for his presence at the hearing,²⁶ representation by counsel to controvert the petition,²⁷ and a judicial determination of incompetence.²⁸ But Mr. Weingart did not appear at either of his two hearings and was not represented by counsel opposing the petition.²⁹ His case was typical: According to a study by the National Senior Citizens Center, 93 percent of the respondents were not in court when their cases were tried.³⁰ Petitioners in each case presumably presented medical certificates similar to the one filed in *In re Weingart*, stating that the respondent was unable to withstand the rigors of a courtroom proceeding. In a sense, the medical certificate predetermined a finding of incompetency. The doctor's signature on a statement that the respondent's debility prevented an appearance at the hearing provided the first evidence of incompetency for the trial court. Also, like Mr. Weingart, 97 percent of those in the National Senior Citizens Center's study were unrepresented at their hearings.³¹ It should not be surprising to find that potential wards who were themselves shunted away from the competency hearing would allow themselves to go unrepresented as well.

2. *Ward's wishes and conflicts of interests.*

Even where a court properly finds an individual incompetent, guardianship statutes do not ensure that the guardian will follow the ward's wishes or that the court will recognize the conflict of interests between the petitioners and the ward. That the ward earned the money and owns the property subject to the proceedings, and that the ward may have definite and competent plans for its disposition, are of no consequence if the court determines that the ward is *presently* incompetent to manage property. While knowledge of what the

26. See CAL. PROB. CODE § 1461 (West 1956) (amended 1976) (alleged incompetent, "if able to attend, must be produced at the hearing, and if not able to attend by reason of physical inability, such inability must be evidenced by the affidavit of a duly licensed physician or surgeon").

27. Act of Sept. 17, 1973, ch. 546, 1973 Cal. Stat. 1066 (current version at CAL. PROB. CODE § 1461.5 (West Supp. 1979)).

28. See CAL. PROB. CODE §§ 1460, 1751 (West 1956 & Supp. 1975) (amended 1976).

29. Hamill, *For the Ben Weingarts, There Oughtta Be a Law*, *supra* note 5.

30. Senior Center Study, *supra* note 1.

31. *Id.*

ward would have done when competent may illuminate the question of what is in the ward's best interest, the guardian and the supervising court have responsibility for determining how the money is to be spent.³²

Moreover, nothing in the typical guardianship proceeding recognizes or addresses the potential conflict of interests between petitioners, who may be future beneficiaries of the estate and thus want the estate preserved, and the potential ward, who may want to spend money from the estate.³³ Any one of a large number of persons may bring a proceeding to examine the competence of a person alleged to need a guardian.³⁴ The petitioners are typically members of the family, or near relatives, who are quite likely to benefit from a guardianship which will preserve assets which can be distributed to them when the ward dies.³⁵ Several competing beneficiaries may join in initiating proceedings, agreeing that the estate must be preserved undiminished, but expecting later to contest each other's claims.

In fact, the California Probate Code under which Mr. Weingart's case was tried, like the current probate statutes of many other states,³⁶ actually encouraged the court to ignore this conflict of interests between the petitioners and the potential ward, since it allowed the court to appoint a conservator for those persons who by reason of old age or other condition were unable to resist "artful and designing" persons.³⁷ While a provision of this nature appears at first blush to focus on the concern that a debilitated person may be victimized, the other provisions concerning mismanagement of property would probably suffice to handle that concern. Instead, the specific reference to "artful and designing" persons calls the court's attention to the relationship between the potential ward and the potential ward's present beneficiaries, and diverts the court's attention from the conflict between the potential ward's interests and the interests of the petitioners.³⁸ Thus, the court in *In re Weingart* presumably focused its

32. See CAL. PROB. CODE §§ 1500-1607, 1650-1669 (West 1956 & Supp. 1979).

33. See *id.*; Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676, 676-78 (1964).

34. See, e.g., CAL. PROB. CODE § 1461 (West Supp. 1979); Rohan, *supra* note 3, at 6.

35. G. ALEXANDER & T. LEWIN, *supra* note 4, at 71-75.

36. See Alexander, *Surrogate Management of the Property of the Aged*, 21 SYRACUSE L. REV. 87, 129 (1969).

37. CAL. PROB. CODE §§ 1435.2, 1460, 1751 (West 1956 & Supp. 1975) (amended 1976).

38. As the author has pointed out elsewhere, the "artful and designing" person language is a singularly instructive example of a statutory invitation to value judgment. Alexander, *On Being Imposed Upon By Artful and Designing Persons—The California Experience with the Involuntary Placement of the Aged*, 14 SAN DIEGO L. REV. 1083, 1089-90 (1977). The clear focus of the test

attention on whether Mr. Weingart's younger roommate was "designing," while newspaper reports on the proceedings focused on the avarice of the petitioners.³⁹ While both considerations bear on the potential ward's need for a surrogate manager, the law appears to exclude from the court's consideration those interests of petitioners which might conflict with those of the potential ward.

Consequently, it appears that present guardianship law is inadequate, both because courts too readily find individuals incompetent, and because there is no guarantee the ward's wishes will be followed even if the ward actually is incompetent. In the next section I explore whether these deficiencies in present guardianship law can be cured under the due process clause of the 14th amendment.

B. *Limits of the Due Process Model*

Considering the effect of guardianship on a ward, it seems surprising that there is a dearth of cases holding its invocation unconstitutional.⁴⁰ Two reasons may explain this void. First, the proceedings have not been viewed as depriving the ward of property; quite to the

is on protecting the potential ward's heirs and keepers from the overreaching of third parties and, like the pattern of statutory schemes in the guardianship area, on preserving the assets of the alleged incompetent's estate. Moreover, actual depletion of the estate is not necessary; it is sufficient that a threat of loss exists. *Id.* at 1089. Seeking to "protect" the alleged incompetent from the influence of a perceived "artful and designing" person, a judge may place the ward's estate in the hands of the petitioners, who may or may not protect the interests of the ward. *See, e.g.,* Guardianship of Estate of Brown, 16 Cal. 3d 359, 546 P.2d 298, 128 Cal. Rptr. 10 (1976). In *In re Cassidy's Guardianship*, 95 Cal. App. 641, 273 P. 69 (1st Dist. 1928), the court found that the ward's desire to invest in the building business on assurance of "big money" available, in spite of inexperience in the building business, together with inability to carry on a long conversation, formed adequate grounds to appoint a guardian. In *In re Olson's Guardianship*, 236 Wis. 301, 295 N.W. 24 (1940), the trial court had appointed a guardian for the alleged incompetent solely on the testimony of the petitioner, his niece, in the face of contrary testimony by those who saw him most frequently. The trial court had stated, "If [appointment of a guardian] isn't done now, won't it have to be done sometime in the near future? Probably." *Id.* at 303, 295 N.W. at 25. The court of appeals reversed, stating "'Only with great hesitation should courts, by the appointment of a guardian, interfere with the discretion of elderly people, owing no legal duty of support to anyone, in devoting the property accumulated by them to their comfort according to their own tastes.'" *Id.* at 304-05, 295 N.W. at 26 (quoting *In re Guardianship of Warner*, 232 Wis. 467, 473, 287 N.W. 803, 805 (1939), which quotes in part *In re Guardianship of Welch*, 108 Wis. 387, 390, 84 N.W. 550, 551 (1900)). The language of this court is the very point of this article. *See In re Lyon*, 52 A.D.2d 847, 382 N.Y.S.2d 833 (1976); *In re Guardianship of Waite*, 14 Cal. 2d 727, 731, 97 P.2d 238, 240 (1939).

39. *See* note 5 *supra*.

40. The related question of civil commitment has only recently emerged as one of constitutional importance. *See O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1271-1316 (1974) [hereinafter cited as *Civil Commitment*].

contrary, they have been seen as preserving the property for the ward.⁴¹ Second, legislation has been altered to provide the kinds of protection in guardianship proceedings which courts often impose when they reach constitutional issues affecting individual rights: notice, hearing, and the right to counsel.⁴² In this section I explore the constitutionality of surrogate management. Since surrogate management can be seen as a deprivation of liberty or property, I consider its constitutionality under both theories.

1. *Surrogate management as a deprivation of property.*

The imposition of surrogate management is probably not an unconstitutional deprivation of property under the due process clause of the 14th amendment. In the recent past, the Supreme Court has given little protection to property interests, in contrast to the considerable protection it has afforded life and liberty interests. At least since the late 1930s, the Court has accepted a generalized fairness standard of protection for property interests, while insisting on individualized fairness for life and liberty concerns,⁴³ even though the Constitution speaks *equally* of life, liberty, and property as protected by due process.⁴⁴ Thus, the state may deprive a person of life and liberty only after a sufficient—and sometimes quite elaborate—individualized procedure,⁴⁵ while courts normally validate states' legislative determinations as to the disposition of property, even though they may cause individual hardship, if they are rational and basically fair to the entire group governed.⁴⁶ Consequently, if surrogate man-

41. The protection of assets is also stressed in state conservatorship laws. Rohan, *supra* note 3, at 12.

42. See generally G. ALEXANDER & T. LEWIN, *supra* note 4; Alexander, *supra* note 38. Peter M. Horstman has argued that a full adversary hearing on the issue of incompetency would provide the protection needed by those facing guardianship. Horstman, *supra* note 15, at 231-78. While this protection would be an important step, it suffers from the continuing possibility that the property owner's will may nonetheless be thwarted, since the ward is stripped of control of his property once he is adjudged incompetent.

For further discussion of the due process model and its applicability to civil commitment proceedings, see Task Panel, President's Comm'n on Mental Health, Mental Health and Human Rights: Report of the Task Panel on Legal and Ethical Issues (Feb. 15, 1978), reprinted in 20 ARIZ. L. REV. 49 (1978); *Civil Commitment*, *supra* note 40, at 1271-1316.

43. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 413-70, 564-72 (1978).

44. U.S. CONST. amends. V, XIV.

45. See, e.g., *In re Gault*, 387 U.S. 1 (1967).

46. Justice Black accurately summarized this development in his opinion for the Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963): "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular

agement is characterized as a deprivation of property, courts will probably hold that it is constitutionally permissible, even without the same procedural safeguards provided in a criminal trial. The state need merely adopt a general scheme of guardianship which rationally balances competing economic considerations.

2. *Surrogate management as a deprivation of life/liberty.*

But even the life/liberty due process model, with its individualized justice, cannot ensure fairness in guardianship proceedings, since its standard is uncertain and totally dependent on *procedural* vindica-

economic or social philosophy. . . . The doctrine that prevailed in *Lochner*, *Coppage* [and] *Adkins* . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 729-30.

To be sure, the Supreme Court once took a more protective view of property interests. *See, e.g.,* *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905). Presently, however, the property interests that are protected tend to be interests of the "new" rather than the "old" property, where the focus is not so much on the thing owned as on the owner. *See* *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Reich, The New Property*, 73 *YALE L.J.* 733 (1964). Thus, welfare entitlements may be protected because of the desperate needs of the recipients. *See* *Goldberg v. Kelly*, 397 U.S. at 261-64. Debtors may be protected against seizure of their property by creditors, presumably because debtors, also, are uniquely vulnerable as a group. *See* *Fuentes v. Shevin*, 407 U.S. 67 (1972). Accused violators of trade ethics are protected from the power of their accusers not because their interests sound in property, but because they are relatively helpless. *See* *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

It is difficult to state a litmus test to distinguish between property and life/liberty interests, since many economic relationships affect basic personal liberties, and liberty has an economic component. Further, the present dichotomy may not properly represent the original rationale behind the distinction. Chief Justice Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), introduced the dichotomy: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . ."

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Id.* at 152 n.4 (citations omitted).

Stone's point was to distinguish between rights which legislatures would likely champion because they affect a significant political constituency and rights which could only rarely command a legislative majority. Economic concerns of the sort the Court had addressed in its due process heyday were an illustration of the former. The then nascent individual rights of minority groups and persons accused of crime seem to fit the latter. While the present-day distinction between property interests and life/liberty interests, which gives greater protection to life/liberty interests, is consistent with Justice Stone's dichotomy, it may misrepresent the rationale behind the dichotomy. For a further discussion of the relationship between property and liberty, see *Reich, supra*, at 771-74.

tion. As Justice Frankfurter pointed out in *Joint Anti-Fascist Refugee Committee v. McGrath*:⁴⁷ "Fairness of procedure is 'due process in the primary sense.' It is not a yardstick. It is a delicate process and adjustment inescapably involving the exercise of judgment" ⁴⁸

Procedural due process is an attempt to individualize justice. It accommodates the general interests of society to the individual needs and limitations of the person affected, forbidding that which is unfair, indecent, or shocking to the conscience. Such notions seem to work well in guaranteeing the fairness of the criminal justice system, the principal field of the application of procedural due process. The events relevant to the charged conduct have all taken place in the past and will not change; no one is required to predict the future. The standard of criminality is sharply drawn in most situations. The questions of fact often are questions which average people can answer routinely in their normal lives. The substantive issues are well articulated and procedural protections ensure fairness. But similar procedural protections cannot ensure fairness in guardianship proceedings. As *In re Weingart* poignantly demonstrates, such standards leave untouched the fundamental unfairness inherent in guardianship proceedings, the subordination of the ward's wishes to the judgment of others.

Moreover, even if one could hope to approximate the ward's intent through guardianship, the adjudication of incompetency simply does not lend itself to precision through procedural protection. In this section I discuss the two reasons why guardianship proceedings do not lend themselves to procedural protection. First, the standards used in guardianship proceedings, unlike those used in criminal trials, cannot be defined. Second, the court in a guardianship proceeding must predict the future, while the criminal justice system examines events which have taken place in the past.

Problem of nebulous standards. The ambiguous standards of the substantive law in guardianship proceedings preclude effective application of procedural due process analysis to guardianship proceedings. In particular, the standard of what is an appropriate ability to manage property is unclear.⁴⁹ Are persons who manage to meet the

47. 341 U.S. 123 (1951).

48. *Id.* at 161, 163 (Frankfurter, J., concurring) (citation omitted). Justice Brandeis noted in his dissent in *Burdeau v. McDowell*, 256 U.S. 465 (1921), that "in the development of our liberty insistence upon procedural regularity has been a large factor." *Id.* at 477.

49. "The problem of determining the kind of performance which represents good or poor management is . . . easy at the extremes; in the middle ground no amount of scientific

challenges of daily life with assistance from friends and family incompetent because they could not do it alone? Are they incompetent when they make decisions preventing the dissipation of their property but are noticeably less effective than those who managed it before? Are they incompetent if their property management skills are marginal, irrespective of their prior abilities? What does the word "properly" mean in the statutes relating to property management? Do persons whose survival is not in question manage "improperly" if they fail to live up to standards the trial court finds appropriate? How does the court decide on an appropriate standard?

The statutory standards seem to allow definitions of functional ability ranging from simple improvidence in occasional transactions⁵⁰ to incapacity to provide for food or medical care for extended periods of time. Since one can almost always find property managers who can improve on a particular owner's management, it is unclear when it becomes appropriate to impose such a manager on an unwilling recipient.⁵¹

Problem of predicting the future. Even if the underlying standards could be clarified, due process procedural protection must still fail to ensure fairness. Guardianship laws necessarily attempt to predict *future* conduct, in contrast to those areas of law concerned with *prior* events, where the due process approach has been successful. For example, in the typical criminal trial the central question is whether the defendant committed a specific criminal act. As difficult as it may be to reconstruct the past, it is far easier than predicting the future. While the law generally prohibits the state from setting stan-

evidence will be helpful. It is a question of what kinds of performance 'count' as good management or poor management, and this is a matter of personal taste since the rules of language are flexible enough to allow either judgment in the middle area." Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Skeptical Inquiry Into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564, 567 (1963).

50. See Note, *supra* note 33, at 682-83.

51. This inherent problem is further exacerbated by the needlessly ambiguous language found in many of the present guardianship statutes. The "artful and designing" person standard is a prime example of such a statute. Because Mr. Weingart and Ms. Winston were not married, she can be described as an "artful and designing" person. Viewed from that perspective, the question becomes less one of the sincerity of his intentions to support the relationship, and more one of his ability to resist it. What might in other circumstances be described as Mr. Weingart's love, making him want to be near her and to provide for her, becomes his inability to resist her and a statutory reason for guardianship. The needlessness of the "artful and designing" person standard is illustrated by California's rejection of this standard in 1976. See note 21 *supra*.

dards of criminality that depend on the prediction of future behavior,⁵² the focus in guardianship is *necessarily* prospective. The court is instructed to discern how the potential ward would manage without a guardian. Prior acts provide the basis for initiating proceedings and assist in the prognostication, but the important question is how the respondent will behave after the hearing.

Courts often rely on experts, at least in cases warranting the expense, to help make predictions of future conduct. Physicians (especially psychiatrists) and psychologists often testify. The great weight given to expert testimony introduced by a party when the issues in question are relatively precise has been frequently criticized.⁵³ When, as in guardianship, the issues are hard to define, the influence of experts is probably magnified. Moreover, it is unclear that a scientific basis for prediction exists. Empirical studies demonstrate substantial prediction failures.⁵⁴ For example, experts have frequently overapplied diagnoses of irreversible chronic brain syndrome.⁵⁵ A recent review of expert testimony about future dangerousness casts grave doubts on the predictive ability of these experts.⁵⁶ There is no reason to believe that experts can better predict the ability to manage property in the future.⁵⁷

Certainly greater procedural protection may reduce the likelihood of improper adjudication of incompetency. Yet even with the greatest possible procedural protection, the adjudication of incompetency may still be inaccurate. And, if inaccurate, great unfairness is possible under guardianship, where the ward's wishes are so easily lost in the fray. Since present guardianship law cannot be declared

52. "In both [criminal confinement and civil commitment] cases the state decides that society at large will benefit from deprivation of the individual's liberty. But criminal imprisonment normally is imposed only after a defendant has committed or attempted a dangerous act. If a sociologist predicted that a person was eighty per cent likely to commit a felonious act, no law would permit his confinement." Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1289-90 (1966).

53. Recent articles have pointed to the problems arising from the use of partisan experts, whose viewpoints are established in response to "pecuniary stimulus." See, e.g., Moenssens, *The 'Impartial' Medical Expert: A New Look at an Old Issue*, 25 MED. TRIAL TECH. Q. 63 (1978); Molinari, *The Role of the Expert Witness*, 9 FORUM 789 (1974). Often the finder of fact may simply be determining which party has the better experts. Moenssens, *supra*, at 65-66; Molinari, *supra*, at 791.

54. See Ennis & Litwak, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711-16 (1974); Morse, *supra* note 25, at 595-99.

55. See Alexander, *supra* note 38, at 1096; Regan, *supra* note 15, at 577-79, 590-91. See also Horstman, *supra* note 15, at 275 & n.269.

56. Ennis & Litwak, *supra* note 54, at 711-16.

57. Morse, *supra* note 25, at 596.

unconstitutional, and since its failings cannot be cured by a procedural approach, a more radical restructuring by the legislature is needed. In the next section I examine probate law as a possible substitute for guardianship proceedings.

C. *The Probate Model: Substitution of a Living Will for Guardianship Proceedings*

Guardianship proceedings brought by members of the family against an elderly parent or spouse often look superficially like probate proceedings. The judge very often is a probate judge, and the participants in the proceedings tend to introduce evidence of a failure to properly provide for them as an indication of fiscal mismanagement. But since the ward is still alive probate would be premature. If the issue were posed as a question of traditional inheritance, much of the controversy would be quickly resolved either by the presence of a will or by intestate succession. In this section I contrast probate law with present guardianship law, and suggest how the legislature could use probate law as the basis for authorizing creation of a "living will"—a document which would allow individuals to direct the management of their property in case of future incompetence. If adjudicating incompetency must inevitably be inexact, we can at least ensure that in all cases the wishes of the ward are paramount and explicit.

1. *Formalities of probate as advancing the testator's intent.*

Certainty of result is a significant, if not the primary, feature of the law of inheritance. Consequently, fixed rules are commonplace and tend to apply even in the face of countervailing considerations of fairness. For example, in *Estate of Moore*,⁵⁸ the California Court of Appeals invalidated a will which had been signed at the beginning rather than at the end, although the will complied with all other statutory requirements. There was no question that the document was the decedent's will, yet the court refused to allow it into probate. The court recognized the probable specific unfairness to the decedent's estate, but relied on a broader view of justice, noting that when they are strictly construed, "statutes in the long run promote justice—which is their sole object—by shutting out opportunities of fraud. When they defeat one honest purpose they prevent unnumbered frauds, which in their absence would be feasible and measura-

58. 92 Cal. App. 2d 120, 206 P.2d 413 (3d Dist. 1949).

bly safe.”⁵⁹ It is easy to find similar examples in the law of formalities which when disobeyed apparently thwart a drafter’s intent in the interest of avoiding fraud.⁶⁰

Although insistence on correct form appears at first to thwart the accomplishment of a property owner’s wishes, the purpose of that insistence may actually be the opposite. By providing for a certain result, such rules enable those willing to take the trouble to adopt the proper form to be certain about the outcome of their actions. The formality prevents competing claims of unfairness from becoming issues. If form were not so important, courts would continuously be confronted with the invitation to balance countervailing interests against the precision of the property owner’s statement of intent. But instead a court can reject a document when improperly expressed—however “unfair” that rejection may be—and accept a property owner’s statement made in the proper form—however “unfair” its disposition of property may be. In that light, one can understand the court’s decision in *Estate of Moore*, even if the “unfairness” in that case is extreme. Ironically, individual fairness is better effected by rules leading to certain outcomes than by individual adjudication.

2. *Application of probate law to guardianship: the living will.*

Probate may be an appropriate model for the disposition of property belonging to allegedly incompetent individuals. Legislatures have already committed similar issues involving events after death or incapacity to will-like processes. For example, it is now possible, in some states, to donate one’s body, or parts of one’s body, upon death.⁶¹ Some jurisdictions also recognize written declarations directing that life-sustaining techniques be abandoned when death is inevitable.⁶² Further still from the point of death, some states allow

59. *Id.* at 124, 206 P.2d at 415; *accord*, *Estate of Seaman*, 146 Cal. 455, 462–63, 80 P. 700, 702–03 (1905).

60. The Statute of Frauds, which requires that a broad range of contracts be in writing, is one such doctrine outside of probate law. *See, e.g.*, U.C.C. §§ 1-206, 2-201; RESTATEMENT (SECOND) OF CONTRACTS §§ 178–224 (1973). Other examples include recording statutes, *see, e.g.*, CAL. CIV. CODE §§ 1169–1218 (West 1954 & Supp. 1979), and the requirement that deeds be delivered by the grantor to the grantee, R. POWELL, THE LAW OF REAL PROPERTY ¶ 896 (rev. ed. 1979). Perhaps the most colorful example was the common law method of conveyancing by feoffment with livery of seisin, whereby the parties to a transaction would call together a jury of neighbors and in their presence exchange a twig or clod of dirt to evidence the transfer of title. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 82–83 (2d ed. 1898).

61. The model statute is the Uniform Anatomical Gift Act. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 7150–7157 (West 1970 & Supp. 1979).

62. *See, e.g., id.* §§ 7185–7195 (West Supp. 1979) (California Natural Death Act).

individuals to file a will-like document nominating a guardian, should there ever be a need to appoint one.⁶³ A similar device is the power of attorney, which delegates authority for specified acts to named persons;⁶⁴ the delegation survives later incompetency of the maker in states which have authorized such instruments. All such statutes leave discretion with the court to choose a guardian, but they allow a person to take responsibility by proposing an arrangement for a fiscal caretaker, should one be required in the future.⁶⁵ If a similar device existed by which those now alleged to be incompetent could have recorded their wishes concerning the disposition of their property while they were competent, courts might be spared the type of fraud which the court in *Estate of Moore* said it avoided,⁶⁶ but which is certainly possible in today's guardianship proceedings.

Contrast between probate and guardianship. The contrast between probate and present guardianship law is great. First, the intent of a ward is less likely to be followed than is the intent of a decedent. A decedent's previously expressed wishes control the distribution of the estate in probate, except to the extent that there are interests legally enforceable by others against the estate.⁶⁷ But while guardianship also purports to effectuate the true wishes of the ward,⁶⁸ the ward's wishes are not necessarily heeded in practice.⁶⁹ Second, probate and guardianship also differ because *death* prevents decedents from enjoying their property, while the *law* prevents wards from enjoying theirs. Third, in a probate proceeding, those who contest the will do

63. See Regan, *supra* note 15, at 616.

64. UNIFORM PROBATE CODE § 5-501; Lombard, Miller, Gother & Houghton, *Legal Problems of the Aged and Infirm—The Durable Power of Attorney*, 13 REAL PROP., PROB. & TR. J. 1, 2-11 (1978).

65. See, e.g., CAL. PROB. CODE § 1463 (West Supp. 1979).

66. See note 59 *supra* and accompanying text.

67. Both individuals and entities not named in a will can make claims against a decedent's estate. Creditors' claims receive high priority in distribution and a wide range of procedural safeguards. See, e.g., UNIFORM PROBATE CODE §§ 3-605, -607, -801 to -816, -909, -1004, 6-107. Government claims to estate and inheritance taxes are protected, see, e.g., I.R.C. § 2001; CAL. REV. & TAX. CODE §§ 13401, 13601 (West 1970), and the testator's family is protected through such devices as homesteads, exemptions, and allowances, see, e.g., UNIFORM PROBATE CODE §§ 2-401 to -403.

68. For example, guardianship provisions protecting wards from "artful and designing" persons ostensibly protect the ward's true wishes by eliminating undue influence. See notes 36-38 *supra* and accompanying text.

69. Under UNIFORM PROBATE CODE § 5-424, for example, the conservator is given broad powers to manage the property, subject only to the rare need for court approval. There is no check by the incompetent on the power of the conservator.

so openly, as adversaries.⁷⁰ In guardianship proceedings, however, their interests may be hidden behind their roles as petitioners. Finally, third parties cannot generally question the propriety of the distribution of a decedent's estate unless they claim a statutory interest. But in guardianship, "wasteful" earlier distributions can become a principal reason for the declaration of incompetency and for thwarting the ward's intent.

The main difference between probate law and guardianship law, and the principal advantage of probate law, is that while guardianship does not necessarily follow a ward's intent, probate courts seldom interfere with a testator's wishes for property disposition. As we have seen, a primary principle of probate law is to follow the testator's *stated* intention.⁷¹ Wills pass property from the estate to beneficiaries selected by the decedent. Assuming competency to make a will,⁷² a testator is free to exercise sound judgment or whim. Except in limited circumstances,⁷³ a court will not review the property disposition for fairness, or to substitute the court's judgment for that of the testator.⁷⁴ Third parties who believe that they should have been preferred to those named in the will are not allowed to contest the court's distribution.⁷⁵

Probate and the living will. The advantages and disadvantages of allowing a probate-like prior determination to control the management of property are similar to those of allowing wills to control the

70. Under most modern statutes, the administrator's role resembles that of the defendant in a collection action. *See, e.g.*, UNIFORM PROBATE CODE §§ 3-801 to -816.

71. This is the basic rule of construction in interpreting wills. *See* UNIFORM PROBATE CODE § 2-603.

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

73. For an explanation of those instances in which courts deviate from the terms of a will, *see* note 67 *supra* and accompanying text.

74. Even in the absence of a written document, the law prefers not to give courts discretion in the distribution of a decedent's property. Intestacy law provides mechanical formulae for the apportionment of property where a decedent did not leave a will meeting statutory criteria, and courts do not undertake to adjust these formulae in light of what might appear to be fair under the circumstances. *See, e.g.*, UNIFORM PROBATE CODE §§ 2-101 to -113 (intestacy provisions). An intestacy statute is the legislature's determination of what is generally fair. In order to reduce litigation and promote judicial economy, this standard is imposed even in the cases where, because of unusual circumstances, inequities result.

75. But the right to pass property by will in a relatively unfettered manner is not unlimited; the state regulates the process in several ways. For example, it provides that interests may be claimed "against the will" because of a desire to protect certain types of people from the testator's total discretion. *See* note 67 *supra*. Also, legal claims against the decedent may generally be collected from the estate. *Id.* Beyond such limits, however, the testator's choice controls.

distribution of property after death. There is, of course, the opportunity for improvidence. Even so, one knows that the disposition was determined by the person most able to understand appropriate uses of the ward's wealth and the ward's possible needs for management help—the ward's prior self. The ward's written directions would bind the surrogate manager appointed by the living will, or if the instrument were silent on a particular point, the surrogate would act as he or she believed the incompetent would have intended. Incompetents would have had an opportunity to spell out such concerns in whatever detail they deemed appropriate at an earlier point in life.

In common with a decedent, the incompetent may have legal obligations to others. Present probate laws may be useful in determining these obligations. For example, it is clear that creditors may bring claims against a debtor's estate.⁷⁶ Similarly, spouses have claims to the estate, whether by way of community property or through an elective share.⁷⁷ The state exacts taxes, which may be claims against the estate.⁷⁸ Probate laws protect other interests by giving homestead exemptions to surviving spouses or dependent children,⁷⁹ providing spouses and minor children with family allowances,⁸⁰ and granting property allowance exemptions generally, which preserve property for spouses and children in preference to other beneficiaries.⁸¹

If the law allowed individuals to prepare living wills directing the course of their possible future guardianships, then statutes could allow overriding claims to be met as they presently are met by probate law. For example, if a husband made no provision for his wife during his guardianship, the state would direct that the guardian support her. In addition, the continuing needs of the ward might necessitate claims by the ward on others; it might be desirable for a statute to recognize a parent's claim for emergency medical funds from children. In any event, the legislature has ample precedents should it ever choose to recognize claims against living wills which are not presently allowed against decedents' wills.

Further, the living will might significantly reduce adjudicated incompetence. Statistics are difficult to find, but anecdotes indicate that incompetency proceedings are sometimes improperly used to ad-

76. See UNIFORM PROBATE CODE §§ 3-801 to -816.

77. *Id.* §§ 2-201 to -207.

78. See I.R.C. § 2001; CAL. REV. & TAX. CODE §§ 13401, 13601 (West 1970).

79. See UNIFORM PROBATE CODE § 2-401.

80. *Id.* § 2-403.

81. *Id.* § 2-402.

just property concerns among competing claimants. *In re Weingart* is a case in point. The debts of the conservators and Mr. Weingart's generosity to his roommate were fundamentally altered.⁸² It seems possible that if individuals were unable to benefit from a determination of incompetence, they would be less likely to bring such proceedings. Perhaps living wills would shift the concern in incompetency proceedings from control of property to the welfare of the alleged incompetent, a type of case which the apparently self-serving nature of present guardianship proceedings brought by members of the family may actually inhibit. At the very least, the living will would reduce the grievous potential for abuse caused by the inevitably imprecise adjudication of incompetency.

D. *Creating and Enforcing a Living Will*

The "living will" suggested by this article would direct the course of the testator's guardianship, should such a guardianship become necessary. Enforcement of living wills would hinge on meeting formalities similar to those used in the law of decedents' wills. If the formalities were met, the testator would be certain that the wishes expressed in the living will would be followed. The need to meet a set of formal requirements would usually promote reliance on professional help to write the living will, because of the complexity of competing concerns in arranging a possible future guardianship. This section examines the creation and enforcement of a living will.

1. *Formalities.*

Many questions which would otherwise plague the interpretation of living wills, such as the requisite formalities or rules of interpretation, can be satisfied by reference to the law of wills. As we have seen, the law of wills provides a good guide to forced shares of the estate when spousal shares and benefits to pretermitted children and spouses are at issue.⁸³ For instance, just as the surviving spouse is entitled to a share of the decedent's estate, the ward's mate should be able to keep part of the ward's property even if the living will provides otherwise. However, if the testator's statutory duty of support⁸⁴

82. See notes 8, 13-14 *supra* and accompanying texts.

83. See notes 77, 79-81 *supra* and accompanying texts.

84. Statutes often impose upon certain family members the duty to support specified kin. For example, a parent must support minor children, CAL. CIV. CODE § 196 (West Supp. 1979), and, in certain circumstances, a child must support needy parents, *id.* § 206. See generally *id.* §§ 241-254 (imposing civil liability for such support); *id.* § 246 (establishing criteria for amount of support due).

exceeds the income from the forced share, the greater obligation seems appropriate, since it is the amount that would be due from the ward if competent.

But while the maker of a living will may be directly affected by the instrument's provisions, decedents derive no personal benefit from the carrying out of their wills' directions. The maker of a living will, therefore, has a different concern about that instrument than does the testator of a will effective only at death. Consequently, the formalities required for living wills should deviate from those applied to decedents' wills. First, makers of living wills should be encouraged to file them with a public authority, and the act of filing should provide legally binding notice to those who might wish to contest the document. Second, a process should be established to permit individuals to challenge living wills before they become operative. This would allow concerned persons to protest what they considered to be undue influence or overreaching which might indicate functional debility; it would also help to establish that the will was competently made, if no challenge occurred for a substantial time after the will's execution and filing.⁸⁵

A concern for privacy dictates that only the fact of filing, and not the content of the living will, be made public. Family harmony might suffer from greater disclosure, and few testators would welcome the pressures brought to bear by those with contrary views urging modification of the living will.⁸⁶ However, since the proposed dispositions might indicate confusion or other functional lapses, in extraordinary cases courts should have the power to permit inspection of the document by others, after *in camera* review. Modification and revocation would be required to meet the filing requirements and the principles of the law of decedents' wills.

85. Adoption of the insurance concept of incontestability might also be desirable. The law presumes that the holder of a life insurance policy did not intend to defraud the insurer by committing suicide, if 5 or more years passed between the initial signing of the policy and the suicide. Similarly, the law might provide that if a person executes a document and is not declared incompetent within a certain period from the date of execution, the competency of the person would be incontestable for purposes of effecting the document. Such a rule would certainly entail some risk, as it does when used in insurance policies. But it would both mitigate the difficulty of establishing prior competence and further the goal of allowing personal responsibility. Also, it would avoid a good deal of litigation and promote relative certainty of result.

86. *In re Weingart*, No. P-607498 (Super. Ct. Prob. Div. L.A. County, Cal. Oct. 29, 1974), is a case in point.

2. *Discretion of the guardian.*

The living will need not dispose of all the testator's property. It could provide, for example, that certain family members were to continue an existing business, manage the stock portfolio, or the like. It could provide for or against support of children in enterprises they might undertake. It might specify the support of loved ones. It could forbid the sale by the guardian of certain assets particularly important to the maker. It could name those to be given management roles and those to be excluded, or it could specify only limited management roles for certain individuals.

But however detailed the living will, it must leave many issues unresolved.⁸⁷ Much discretion will necessarily pass to the guardian; a provision nominating an appropriate list of alternative guardians is probably equally crucial to avoid the naming of a possibly undesirable guardian by the court. Given the specific directions of other provisions, the surrogates would be free to fill in what they assumed to be the maker's intention.

3. *Challenges to the living will.*

Third parties might challenge the living will, as they can a decedent's will, on the grounds that the testator was incompetent or under undue influence when the instrument was executed. Such challenges to a living will, however, should be as generally unsuccessful as they are when made to decedents' wills.

The law requires that to be valid a will must be executed while the maker is competent. Although one might argue that a testator's self-doubts about competency at the time of execution might be the motive for making a living will, the mere act of making a living will should not generally lead to a court finding the maker incompetent. Rather the test of competence for a living will should be as it is in the law of probate. The test of competence used there is sufficient age, the ability to understand the nature of one's acts, the ability to recollect and understand the nature and location of one's property, and the ability to remember and understand one's relations to the persons who have claims upon the testator's bounty and whose interests are

87. Management of one's estate is probably so unique that model wills would be of little use, since it is far more complicated to continue one's affairs than to distribute the wealth they represent. Indeed, the use of a model form is fundamentally inconsistent with the idea of persons taking responsibility for themselves and would likely lead to the types of abuses in the present system.

affected by the will.⁸⁸ Challenges to the probate of wills on the ground of incompetency of the maker are rarely successful.⁸⁹ The passage of time since making the document generally suffices to indicate that the maker was competent at the time when the instrument was executed. "[I]solated acts, foibles, idiosyncrasies, moral and mental irregularities or departures from the normal" by themselves are insufficient to show incompetency.⁹⁰ Similarly generous treatment should be given to living wills, so that the property owner's wishes will be followed.

Third parties might also contend that the maker of the instrument, although otherwise functioning adequately, has fallen under undue influence, and that the living will therefore should be disregarded. The availability of living wills would motivate those concerned about undue influence to challenge the instruments when made, much as they may presently institute proceedings for guardianship or challenge improvidently made gifts. Their failure to challenge the living will soon after its execution should also be probative of the competence of its maker.

Courts should apply the doctrine of substituted judgment⁹¹—an attempt to determine what the ward would wish if competent—when third parties question the competency of the maker of a living will, just as courts apply the doctrine to similar cases involving decedents' wills. In my opinion the use of the doctrine of substituted judgment is preferable to disregarding a person's wishes altogether, although it shares with the current unsatisfactory law of incompetency the uncertain benevolence of deciding what is in the best interest of someone else. Nonetheless, substituted judgment is better than total disregard of the ward's intent. The terms of a living will could direct decisions about substituted judgment even though that document would be denied direct effect.

88. *E.g.*, *Estate of Smith*, 200 Cal. 152, 158, 252 P. 325, 328 (1926); T. ATKINSON, HANDBOOK ON THE LAW OF WILLS § 51 (2d ed. 1953); Note, *Psychiatric Assistance in the Determination of Testamentary Capacity*, 66 HARV. L. REV. 1116, 1116-17 (1953).

89. "[A]n examination of the [California] cases discloses comparatively few in which the attack on the ground of incompetency was successful." 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Wills and Probate*, § 99, at 5616 (8th ed. 1974).

90. *Estate of Wright*, 7 Cal. 2d 348, 356, 60 P.2d 434, 438 (1936).

91. The doctrine and its philosophical rationale are discussed in Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 57-68 (1976).

II. THE LIVING WILL AND SURROGATE MANAGEMENT OF HEALTH NEEDS

This article has concerned itself principally with the disposition of an elderly person's wealth. Guardianships are available for the surrogate management of an elderly person's health needs as well. As a form of involuntary intervention, such "protective" services of all sorts have frightening potential. While comparative data is not available, one would suppose that wards perceive guardianships of their persons, especially those resulting in hospitalization, as greater invasions of personal autonomy than guardianships of their estates. Whether or not this conjecture is true, empirical evidence suggests that involuntary hospitalization may be lethal.⁹² The Benjamin Rose Institute, in a study of the effectiveness of protective services, compared an involuntarily hospitalized group with a control group to determine, among other things, how much longer involuntarily hospitalized patients lived. Its findings indicated that the involuntarily hospitalized group died sooner than the control group.⁹³ The study noted the generally recognized belief that people, especially the elderly, resent forced relocation, and that involuntary hospitalization creates very high levels of anxiety.⁹⁴

In this part I examine the legitimacy of the grounds used to involuntarily commit elderly persons for health reasons, and I discuss how a living will might allow individuals to determine the nature of their health care after they have become incompetent.

A. *Grounds for Involuntary Commitment*

The decision whether involuntary intervention is necessary to provide medical care is generally made under standards quite similar to, or identical with, those used for property management.⁹⁵ Consequently, the vagaries that attend guardianship determinations for property management plague determinations for health care as well.⁹⁶ The distortion caused by expert testimony is increased, since the testimony of physicians about the ward's need for care appears far more clearly to fall within their expertise, and is therefore proba-

92. See Blenker, *Environmental Change and the Aging Individual*, 7 GERONTOLOGIST 101 (1967); Gottesman, *The Response of Long-Hospitalized Aged Psychiatric Patients to Milieu Treatment*, 7 GERONTOLOGIST 47 (1967).

93. BENJAMIN ROSE INSTITUTE, PROTECTIVE SERVICES FOR OLDER PEOPLE: FINDINGS FROM THE BENJAMIN ROSE INSTITUTE STUDY (1974).

94. *Id.*

95. G. ALEXANDER & T. LEWIN, *supra* note 4, at 81-96.

96. See notes 19-20 *supra* and accompanying text.

bly given greater weight by the court than is a medical prediction of fiscal improvidence. Although testimony as to the health care which can be provided a ward does lie within medical expertise, the question of whether involuntary intervention is needed to provide treatment raises the same problems of prediction that exist in property management cases.⁹⁷ Since courts have difficulty distinguishing between the issues, they give excessive weight to medical testimony.⁹⁸

If a guardian is appointed, the health care the guardian provides the ward may vary from simply furnishing nutritional needs and occasional medicine, to having the ward involuntarily committed to an institution. The interests protected by the guardian's intervention are a bit more complex than those protected in the property cases. In addition to protecting wards from their own improvidential inability to provide for their needs—the best interest standard—there may be a specific concern that the wards not commit suicide or harm others. While guardianship laws do not expressly impose these concerns on the guardian, civil commitment law reflects the societal interest in all three by recognizing them as grounds for commitment.⁹⁹ In this section I consider the legitimacy of involuntarily committing elderly persons because they are dangerous to others or to themselves—grounds that complicate this article's consideration of a ward's self-determination because they introduce significant claims by others.

1. *Dangerousness to others.*

The most clearly legitimate claim by third parties is that the ward may be dangerous to others.¹⁰⁰ Persons committed because they are considered dangerous owe their commitment at least in part to public safety considerations. This type of commitment, however, has been under strong attack recently.¹⁰¹ Commentators have pointed out that psychiatrists forced to confront the prospect of possible violence from an unrestrained patient have a strong motivation to predict dangerousness, thus obtaining the safety of the patient's incarceration in a neutral hospital.¹⁰² While doubts about the relia-

97. See notes 52-57 *supra* and accompanying text.

98. See Schulman, *To Be or Not To Be an Expert*, 1973 WASH. U.L.Q. 57, 63; Wexler & Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 60-61 (1971).

99. See *Civil Commitment*, *supra* note 40, at 1201-07; Note, *supra* note 52, at 1289-97.

100. See *Civil Commitment*, *supra* note 40, at 1201-07; Note, *supra* note 52, at 1289-93.

101. See Ennis & Litwak, *supra* note 54.

102. See, e.g., Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways*, PSYCH. TODAY, Feb. 1969, at 43, 47.

bility of psychiatric testimony do not alter the state's concern for public safety, the doubts certainly suggest that involuntary commitment may be an overreaction.

Moreover, hospitalization because of feared future dangerousness is similar to criminal preventive detention (incarceration because of feared future criminality). But a belief that a person may be dangerous in the future is not an acceptable ground for criminal punishment.¹⁰³ A therapeutic approach does not help legitimate the state's claim in the civil area, since dangerousness is not an illness and a dangerous person may not be "treatable." By incarcerating persons thought to be dangerous, the state fills mental hospitals with persons detained for the public welfare without regard to whether they can benefit from treatment.¹⁰⁴

Further, the confusion of interests on this issue has led to the anomaly of laws such as California's Lanterman-Petris-Short Act,¹⁰⁵ in which "legal" officials select persons for the mental health establishment and physicians must "diagnose" their dangerousness.¹⁰⁶ The initial decision to treat rather than prosecute is made by a legally trained person who initiates the mental health review, and physicians are then asked to determine whether a person is dangerous. In other words, the treatment decision is made by people trained in the law; the question of criminality is left to physicians.

Because of these problems and others, commitment for dangerousness to others is falling into disrepute. Recent interdisciplinary studies, such as that made by the California Bar's Commission on Law and Mental Health Problems, have concluded that danger to others is not a legitimate ground for civil commitment.¹⁰⁷ The state's interest in the protection of the public can be satisfied by the more traditional process of the criminal law.

2. *Dangerousness to self.*

The societal concern about suicide¹⁰⁸ raises slightly different issues. The evidence which demonstrates that psychiatrists cannot reliably predict when individuals are dangerous to others does not

103. See note 52 *supra*.

104. Cal. Bar Comm'n, Report on Law and Mental Health Problems (1979) (on file with author) [hereinafter cited as Cal. Bar Comm'n Report].

105. CAL. WELF. & INST. CODE §§ 5000-5404.1 (West 1972 & Supp. 1979).

106. *Id.* § 5150 (West Supp. 1979).

107. See Cal. Bar Comm'n Report, *supra* note 104. Candor requires the author to disclose that he was a member of the Commission.

108. *Civil Commitment*, *supra* note 40, at 1201-07; Note, *supra* note 52, at 1293-95.

expressly address the ability of psychiatrists to predict danger to self, though one would suppose that the two are closely linked. In any event, there is a dearth of studies demonstrating the reliability of psychiatric predictions of suicide. Some insight into this form of psychiatric prediction is provided by the change in California law after the adoption of the Lanterman-Petris-Short Act.¹⁰⁹ Prior to this Act, patients thought to be suicidal could be involuntarily incarcerated until rehabilitated. Under the Act, after an emergency 72-hour period,¹¹⁰ initial involuntary commitment is limited to 30 days; thereafter legal process is required for further incarceration.¹¹¹ A followup study of the Lanterman-Petris-Short Act demonstrated that recertification was very infrequently sought¹¹² and patients were routinely released. Nonetheless, the study found no suicides among the released group.¹¹³ This limited data suggests that involuntary hospitalization—certainly *long term* involuntary commitment—was unnecessary to achieve the societal goal of preventing suicide.

Moreover, society's concern about suicide is inconsistent with its ambivalence to other acts proven to be dangerous, though not immediately lethal, to individuals. For example, smoking, publicly condemned as lethal,¹¹⁴ is not illegal. Similarly, saccharin is generally available despite some concern that it might be a carcinogen.¹¹⁵ It is true that persons are generally free to choose to receive medical care or to reject it.¹¹⁶ Such choices are routinely afforded in the interest of individual freedom.

Further, while the state may have an interest in preventing death, individuals have a strong philosophical claim to determine their longevity. Some have asserted a categorical right to die.¹¹⁷ Many have asserted such a right under limited circumstances, as is seen in a number of statutes permitting persons to direct termination of life

109. CAL. WELF. & INST. CODE §§ 5000-5404.1 (West 1972 & Supp. 1979).

110. *Id.* § 5151 (West Supp. 1979).

111. *Id.* § 5254 (West 1972).

112. See ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW 152 (1972).

113. *See id.*

114. *See The Smoking Report*, SCIENTIFIC AM., Feb. 1964, at 66.

115. *See generally* Batzinger, Ou & Bueding, *Saccharin and Other Sweeteners: Mutagenic Properties*, 198 SCI. 944 (1977); Bryan, Ertürk & Yoshida, *Production of Urinary Bladder Carcinomas in Mice by Sodium Saccharin*, 168 SCI. 1238 (1970).

116. *See* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1 (1975); Note, *Suicide and the Compulsion of Lifesaving Medical Procedures: An Analysis of the Refusal of Treatment Cases*, 44 BROOKLYN L. REV. 285 (1978); Comment, *Informed Consent to Immunization: The Risks and Benefits of Individual Autonomy*, 65 CALIF. L. REV. 1286 (1977).

117. Brecher, *Opting for Suicide*, N.Y. Times, Mar. 18, 1979, § 6 (Magazine), at 72.

support systems after hope of recovery passes.¹¹⁸ The California Bar's Commission on Law and Mental Health Problems rejected the danger of suicide as a legitimate reason for involuntary incarceration.¹¹⁹

Yet the state may argue that in committing an individual to prevent suicide, it acts on the "true" wishes of that individual: In response to committed patients' claims of autonomy, the state might counter that the patients would have wished intervention but-for their illnesses. If the only rationale for intervention in such cases is the "true" intent of the patient, and if only this justification is consistent with society's belief in personal autonomy, then greater effort should be made to discover this intent. A document executed prior to the onset of mental illness, specifying whether the patient actually wanted intervention, should determine whether the patient is committed. In the next section I explore how the living will might serve as such a document.

B. *Using the Living Will*

A living will competently executed should determine whether a ward can be given treatment involuntarily. Through a living will, wards can, while competent, decide whether treatment is in their best interest. Under the standard approved by the California Bar's Commission on Law and Mental Health Problems as the only legitimate standard for involuntary intervention,¹²⁰ physicians are asked to address the treatability of emotional conditions affecting patients, rather than to predict or treat future dangerousness to self or others. Since a knowledge of a patient's competently made treatment decision is necessary to treat that patient,¹²¹ the living will could, by furnishing this knowledge, determine whether treatment would be supplied. Living wills might also provide advance consent to treat-

118. Horan, *The "Right to Die": Legislative and Judicial Developments*, 13 FORUM 488 (1978); Note, *The Legal Aspects of the Right to Die: Before and After the Quinlan Decision*, 65 KY. L.J. 823 (1977); Comment, *The Living Will: Already a Practical Alternative*, 55 TEX. L. REV. 665 (1977); Comment, *North Carolina's Natural Death Act: Confronting Death with Dignity*, 14 WAKE FOREST L. REV. 771 (1978). The highly respected California Poll recently reported that Californians approve of passive euthanasia by an eight to one margin, and that active euthanasia was approved by better than a two to one margin. Field, *Californians More Liberal than the New Law About Right to Die*, San Jose Mercury, Apr. 25, 1979, § C, at 25, col. 1.

119. See Cal. Bar Comm'n Report, *supra* note 104.

120. *Id.*

121. The patient's informed consent to treatment, where it can be obtained, is a necessary prerequisite to medical action. See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

ment by those who would fear jeopardizing their status or employment through irrational acts more than they would fear the hospitalization designed to cure them. These individuals would file documents to short-cut admission procedures and to facilitate early treatment.¹²²

The practical considerations making living wills difficult as instruments of *property* management are dwarfed by the difficulties of attempting to delimit future *medical* intervention. Forms of treatment change radically from time to time. The quality of institutions and forms of therapy change as well. It is likely that only *categorical* consent or refusal of *any* sort of treatment in the living will could withstand the changes brought by time. Nonetheless, some benefits can be obtained through a less-than-comprehensive instrument. For example, some people may particularly fear electroconvulsive therapy,¹²³ and wish specifically to provide against its administration. Similarly, psychotropic drugs may be anathema to some. Psychosurgery may be particularly unattractive to some but attractive to others. Some may wish to limit the length of involuntary treatment, providing, for example, that involuntary hospitalization should be limited to 3 months whatever its form, or to express a preference for a certain facility if available or a predilection against another.

The importance of the ability to file a binding document controlling future medical intervention is that it transfers control back to the individual and thus relieves possible anxiety about being overpowered when growing old. That the instrument would likely be incomplete, failing to consider all possible alternatives or to reflect advances in medical treatment, should not be as significant as the capacity the instrument gives to people to be responsible for themselves.

III. CONCLUSION

Adoption of the legislation necessary for living wills would, of course, be experimental. A large number of people would not execute the required documents. Those who did not execute living wills would not be affected by the change in the law; the small number of people initially taking advantage of the statute would allow legisla-

122. The living will would, of course, only govern the ward's treatment and would not prevent the state from applying criminal process to interdict dangerous acts performed by the maker.

123. See J. FRIEDBERG, *SHOCK TREATMENT IS NOT GOOD FOR YOUR BRAIN* (1976); A. SCHEFLIN & E. OPTON, *THE MIND MANIPULATORS* 354-402 (1978).

tive monitoring of the results. Possibly the management schemes provided in some living wills may prove to be unfair to children, parents, spouses, or others. Yet this is equally true of wills. The potential unfairness of wills is outweighed by the importance of providing for individual choice; the same seems true for the living will.

The principal advantage of the living will proposal is that it places the question of what to do with the property and health of a living human being whose judgment can no longer be trusted in the hands of the one person who will surely deal with the problem with the best interests of the incompetent in mind: the individual's prior self. It will at least remove from the judicial process the spectacle of cases in which avarice controls and wards are deprived of their property in the name of benevolence. It will remove doubt as to the most appropriate disposition of property and thus relieve courts and relatives of the burden which they now face in trying to determine the best interests of the ward. It will certainly provide a perceived benefit to those who fear that they will be overwhelmed when they grow old by others who will take control of their lives. The right to determine the future course of health care and the use of possessions would add an important element to the right of individuals to be responsible for themselves.

