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Michael P. Kane

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THE APPLICATION OF THE SUBSTITUTION OF JUDGMENT
DOCTRINE IN PLANNING AN INCOMPETENT’S ESTATE

I. Introduction

Recent advances in psychiatric diagnosis have resulted in an increase in both the number of persons who are declared incompetent before death and the duration of their incompetency. Unfortunately, this development has created problems since few people provide for the possibility that they may become incompetent in their old age. Estate planners are faced with the challenge of providing for the incompetent’s needs and conserving his estate in a manner which is responsive to both the present interests of the incompetent and the longer range requirements of his estate plan. This area of estate planning necessarily involves the personal interests of both the incompetent and his heirs.

It is the purpose of this Comment to examine the powers of guardians and the courts under the doctrine of substitution of judgment to administer the estates of incompetents. This doctrine has traditionally permitted courts to award payments from the estate of an incompetent to persons the incompetent was under no legal duty to provide for. In theory, the court stands in the shoes of the incompetent and inquires whether it would have given assistance under the circumstances. This doctrine does not apply, however, to those cases most frequently before the courts — applications by persons to whom the incompetent owes a legal duty of support.

Consequently, courts have permitted an allowance to be made to a spouse

1. For a general discussion of the practical and academic problems arising from a failure to provide for incompetency, see Zillig, Planning for Incompetency and Possibilities and Practices Under the Conservatorship Law, 37 S. Cal. L. Rev. 181 (1964); Note, Guardianship in the Planned Estate, 45 Iowa L. Rev. 360 (1960).

2. Most of the payments under the substitution of judgment doctrine have come from the income of the incompetent’s assets rather than from the principal. The courts are reluctant to disburse corpus, undoubtedly because any such disposition seems a more permanent reduction of his property. See In re Bond, 198 Misc. 256, 98 N.Y.S.2d 81 (Sup. Ct. 1950); In re Fleming, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940). But see In re du Pont, 41 Del. Ch. 300, 194 A.2d 309 (1963), where the court in discussing this problem stated:

   If the quoted language was intended to suggest that the principle of substitution of judgment . . . can have no application to a disbursement from principal, it is not an acceptable statement of the Delaware law. I conclude that the substitution of judgment doctrine is not so restricted. Rather, the fact that a disbursement of principal is involved in the request only requires the court to move with greater caution in exercising its discretion.

   Id. at 314, 194 A.2d at 317.

3. In In re Berlstein, 145 Ohio St. 397, 62 N.E.2d 205 (1945), the concurring judge succinctly stated:

   The allowance to provide support for dependents of the incompetent person does not involve the so-called doctrine of substitution of judgment. That doctrine is called into being, in those jurisdictions wherein it is recognized, when the court is asked to make an allowance out of the incompetent’s estate to persons for whom he is not bound to provide.

   Id. at 404, 62 N.E.2d at 208.

4. See, e.g., In re Griffith, 33 Del. Ch. 387, 93 A.2d 920 (1953); Stoltze v. Stoltze, 393 Ill. 433, 66 N.E.2d 424 (1946); In re de Nisson, 197 Wash. 265, 84 P.2d 1024 (1938).
II. History of the Doctrine

As previously mentioned, the substitution of judgment doctrine is grounded on the theory that, an incompetent is a ward of the court and that the court should exercise its discretion and assert its judgment to make distributions out of his estate which it has reason to believe the incompetent himself would make if he had the capacity to act.

A. Traditional Application

The principle which has become known as the substitution of judgment doctrine was originally announced in the English case of *Ex parte Whitbread*. In this case a niece of the incompetent petitioned for an allowance from the surplus income of the incompetent's estate. In authorizing an allowance for needy brothers and sisters and their children, Lord Eldon stated:

[T]he Court, in making the allowance, has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for these persons.


6. In *In re Henderson*, 45 Pa. D. & C. 359 (C.P. Bedford 1942), the incompetent father's entire estate consisted of a railroad relief pension, all of which was required for the father's needs. The court exercised its discretion to deny an allowance for the support and education of the father's minor child.


8. See p. 132 supra.


10. Id. at 879 (emphasis added).
The basis of this decision, therefore, was not that the brothers and sisters had any right to an allowance, but that the court was merely authorizing what the incompetent himself would probably have done.11

As enunciated in Whitbread, the substitution of judgment doctrine permitted payment out of the "surplus"12 beyond the incompetent's needs to "immediate relations"13 who are "otherwise unprovided for."14 This principle has been extended by subsequent decisions15 to permit distributions out of principal16 and for purposes other than support.17 In addition, while the most frequent beneficiaries continue to be relatives of the incompetent,18 payments have been permitted to persons outside the family. For example, allowances have been made for friends,19 a retired servant20 and for charitable gifts.21

11. Id. at 879. See p. 135 infra, for an analysis of the factors which the courts will consider in determining an incompetent's probable course of conduct.


13. 35 Eng. Rep. at 878. It should be noted, however, that the Lord Chancellor was not convinced that distributions should be restricted to the immediate family. In regard to this issue he stated:

The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children — to brothers and other collateral kindred; and if we get to the principle, we find that it 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.

Id. at 879.

14. Id. at 879.

15. For an illuminating discussion of the early development of the doctrine, see Thompson & Hale, The Surplus Income of a Lunatic, 8 Harv. L. Rev. 472 (1895).

16. See note 2 supra.

17. Recently, courts have held that need on the part of the recipient is not a necessary condition and have permitted distributions from incompetents' estates for the purpose of avoiding estate taxes. See Estate of Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (1967); In re du Pont, 41 Del. Ch. 300, 194 A.2d 309 (1963); In re Myles, 57 Misc. 2d 101, 291 N.Y.S.2d 71 (Sup. Ct. 1968); In re Carson, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962); In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964). Generally, the courts have concluded that a reasonable man in planning his estate would make gifts in order to avoid unnecessary estate or inheritance taxes. For a detailed discussion on the applicability of the substitution of judgment doctrine in tax avoidance situations, see pp. 139-41 infra.


19. In In re Heeney, 2 Barb. Ch. 326 (N.Y. 1847), the court permitted as a fixed allowance to three elderly friends of the incompetent "the same allowance which Mr. Heeney was in the habit of making to them." Id. at 330. In In re Earl of Carysfort, 41 Eng. Rep. 418 (Cr. & Ph. 1840), an annual allowance was granted out of the income of the incompetent's estate to an old personal servant.

20. See, e.g., Harris v. Harris, 57 Cal. 2d 367, 369 P.2d 481, 19 Cal. Rptr. 793 (1962) (allowances from the surplus income of the estate of incompetent as donations for charitable and religious purposes were approved); In re Brice, 233 Iowa 183, 8 N.W.2d 576 (1943) (allowance granted to a nephew but court recognized its power to authorize donations for charities); Citizens' State Bank v. Shanklin, 174 Mo. App. 639, 161 S.W. 341 (1913) (allowed guardian of incompetent to make contribution to a church).
In summary, it may be stated that two conditions must be satisfied before the courts will authorize an allowance. It must be shown that: (1) the amount remaining in the incompetent’s estate will produce sufficient income to meet his estimated maximum expenses, and (2) the incompetent, if he were normal, would have pursued similar conduct. In determining the incompetent’s “probable conduct” the courts, in order to authorize a distribution, have considered the following factors: (1) the incurability of his condition; (2) his present and future needs; (3) past conduct; (4) existing wills or estate plans; (5) his relationship with the prospective donees; and (6) the needs of the person seeking the allowance. The purpose of an appraisal of these factual circumstances is to enable the court to act as the incompetent would have, had his capacity to act not been impaired.

22. For a general discussion of this point, see Comment, Planning Incompetents’ Estates Via Inter-Vivos Distributions, 11 Vill. L. Rev. 150, 151 (1965).
25. Comment, supra note 22, at 151.
27. In In re du Pont, 41 Del. Ch. 300, 194 A.2d 309 (1963), the court, while authorizing a distribution from the estate, concluded that: [T]he property remaining in the guardians’ hands after the proposed distribution was shown to be more than sufficient to administer the balance of his estate and to maintain him in the manner in which he was accustomed to live. Id. at 315, 194 A.2d at 317.
28. In In re Fleming, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940), the court granted an allowance to a niece of the incompetent on evidence that prior to his incompetency he had generously contributed to her support.
29. 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. In In re Carson, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962), the court set aside the gift to a daughter because, under the terms of the will, she was not to receive her share of the incompetent’s estate until she attained a certain age.
30. See Estate of Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (1967), where the court succinctly stated:
Even in the absence of a showing of former practice or conduct, 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. It is not likely that an incompetent would provide for a divorced daughter-in-law whom he never knew, and the fact that his total net estate on his death would be enhanced by a gift to her is of no consequence. On the other hand, it may be inferred that he would, if sane, have reasonable concern in her son as his grandson. A gift to him would be proper. Id. at 427, 56 Cal. Rptr. at 524–25.
31. The impact of a showing of need by the recipient was recognized in Ex parte Whitbread, 35 Eng. Rep. 878 (Mer. 1816).
32. For an example of a court’s determination of the factors to be considered in authorizing a distribution out of an incompetent’s estate, see In re Fleming, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940). In ordering the allowance the court stated: In determining whether the incompetent, if sane, would contribute to the support of such persons (relatives to whom no duty of support is owed), the Court must be governed by the proof presented as to the needs and necessities of the person seeking the allowance; as to the relationship and intimacy which he and the incompetent bore to each other prior to adjudication; and as to the present and probable future requirements of the incompetent himself and those for whose support he may be legally liable, considered in relation to the size and condition of his estate — giving to each of these and any other pertinent factors such weight as from all the circumstances it finds the incompetent would give. Id. at 853, 19 N.Y.S.2d at 236.
Notwithstanding the traditional case law application of the substitution of judgment doctrine which enables courts to act for the benefit of incompetents, to a large extent statutes now regulate the control that courts may exercise over the estate of an incompetent and define the purposes for which expenditures may be authorized. With respect to the statutory regulation of this control, the courts in the United States may be divided into two groups: (1) those which view their power over the estates of incompetents as strictly limited by statutes and which tend to construe such statutes narrowly against an allowance; and (2) those courts giving a broad interpretation to their authority and what they consider the best interests of the estate.

An example of a court strictly construing a state statute in determining whether a guardian should have the power to make a gift from the ward’s estate is the 1966 Texas decision of In re Neal. In Neal, the guardian of the estate of an incompetent sought authorization to make a present gift, for the purpose of minimizing the estate taxes that would be levied upon the incompetent’s heirs at his death. The guardian contended that under the provisions of the Texas Probate Code a guardian has the common-law power to make a gift from the ward’s estate where the ward, if competent, would do so. However, the court, while recognizing the substitution of judgment doctrine, denied its application concluding “that any order authorizing the gift ... would be in excess of the power delegated by the [s]tatutes of this state and would be invalid.”

The court found that other statutory provisions which expressly provided for dis-

34. 406 S.W.2d at 499.
35. TEX. Prob. CODE ANN. § 32 (1956), states:
   The rights, powers, and duties of executors, administrators, and guardians shall be governed by the principles of the common law, when the same do not conflict with the provisions of the statutes of this State.
   The court found this section inapplicable and rejected the guardian’s contention, concluding that:
   [E]ven if the words, “principles of the common law,” are construed to include equitable powers, this section of the code does not grant to the court common law powers, but merely provides that the rights, powers and duties of executors, administrators, and guardians shall be governed by the principles of the common law, when the same do not conflict with the provisions of the statutes of this State.
   406 S.W.2d at 500.
36. 406 S.W.2d at 500. See TEX. Prob. CODE ANN. § 230(b) (1956), for a summary of the duties imposed on guardians in exercising their judgment. This provision states in pertinent part:
   The guardian of the estate of a ward is entitled to the possession and management of all properties belonging to the ward, ... It is the duty of the guardian of the estates to take care of and manage such estate as a prudent man would manage his own property. He shall account for all rents, profits, and revenues that the estate would have produced by such prudent management.
   However, the court felt that this section “must be construed in conjunction with other statutory provisions which set out more specifically what a guardian may do and by implication what a guardian may not do. ...” 406 S.W.2d at 501.
37. 406 S.W.2d at 503.
tributions out of income under certain conditions, and which provided for the support of his family limited the powers of the court, and precluded application of the substitution of judgment doctrine where the primary purpose for making the gift was to avoid estate taxes.

Illustrative of a state court decision in which the doctrine has been applied through a broad interpretation of the statutory law pertaining to the management of an incompetent's estate is the California case of Estate of Christiansen. In Christiansen the guardian sought permission to distribute part of the principal of an incompetent's estate to prospective heirs for the purpose of avoiding estate taxes. After an examination of existing precedents, the court stated that any authority for the distribution of an incompetent's property "must be found in the application of what is sometimes referred to as the doctrine of substituted judgment." The court then rejected the argument that the application of the substitution of judgment doctrine is specifically limited by the express provisions of the California Probate Code which states in pertinent part that:

On the application of the guardian or the next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward, or any part of such surplus income, to the next of kin whom the ward would, in the judgment of the court, have aided, if said ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court, but the court shall give consideration to the amount of surplus income available after due provision has been made for the proper support and maintenance of the ward, to the circumstances and condition of life to which the ward and said next of kin have been accustomed and to the amount which the ward would, in the judgment

38. Tex. Prob. Code Ann. § 398(c) (1956), states in pertinent part:
   [if the court is satisfied and finds from the evidence that the amount of the proposed contribution stated in the application would probably not exceed twenty per cent of the net income of the ward's estate for the current calendar year, and that the net income of the ward's estate for such year exceeds, or probably will exceed, Twenty-five Thousand Dollars, and that the full amount of such contribution, if made, will probably be deductible from the ward's gross income, in determining the net income of the ward under the applicable income tax laws, rules, and regulations of the United States of America, and that the condition of the ward's estate is such as to justify a contribution in said amount, and that the proposed contribution is reasonable in amount and is for a worthy cause, the court in its discretion may enter an order authorizing the guardian to make such contribution from income of the ward's estate to the particular donee designated in said application and order. . . .

   The court by which any incompetent is committed to guardianship may make orders for the support of his family and the education of his children, when necessary (emphasis added).


41. Id. at 403, 56 Cal. Rptr. at 509. Although the guardian additionally contended that the gifts would permit enjoyment of the incompetent's property by her family during her lifetime, it was not asserted that any payments were necessary for the support of any of the proposed distributees.


43. 248 Cal. App. 2d at 407, 56 Cal. Rptr. at 511.
of the court, have allowed said next of kin, had said ward been of
sound mind.44

In interpreting the authority to be derived from this section of the Probate
Code the court concluded that "the provisions of section 1558 do not
preclude the courts of this state from exercising the substituted judgment
doctrine in situations not covered by that section."45

In comparison with the Neal rationale, the Christiansen decision illus-
trates how a liberal interpretation of state statutes will facilitate the logical
management of an incompetent's estate. By utilizing broad discretionary
powers the Christiansen court, in permitting the distribution out of the
incompetent's estate for the purpose of avoiding estate taxes, has allowed
the guardian to take advantage of the existing tax structure for the benefit
of the incompetent's estate.

Since 1941,46 California has recognized that the "endorsement of a
policy of flexible procedure, resting in the sound discretion of the court,
permits recourse to principles of equity which are responsive to the interests
of both the ward and next of kin."47

In the discussion of tax planning for incompetents that will follow,
it will be noted that other states, including Pennsylvania, have alluded to
the problem of evaluating a particular state statute in order to determine
its effect on the common law substitution of judgment doctrine. However,
the only case law in this area is derived from a few isolated decisions in
Texas and California, which have dealt with the problem in depth and,
while closely analyzing their own pertinent statutes, have reached different
conclusions in the interpretation of these similar statutes.48 These dif-

44. CAL. PROB. CODE § 1558 (West 1956).
45. 248 Cal. App. 2d at 411, 56 Cal. Rptr. at 514.
46. Guardianship of Hudelson, 18 Cal. 2d 401, 115 P.2d 805 (1941).
47. Id. at 407, 115 P.2d at 809.
48. Compare TEX. PROB. CODE ANN. § 230(b) (1956), which states in perti-
nent part:
The guardian of the estate of a ward is entitled to the possession and man-
agement of all properties belonging to the ward. . . . It is the duty of the guardian
of the estate to take care of and manage such estate as a prudent man would
manage his own property. He shall account for all rents, profits, and revenues
that the estate would have produced by such prudent management.

with CAL. PROB. CODE § 1502 (West 1956), which provides:

Every guardian of an estate must manage it frugally and without waste,
and apply the income, as far as may be necessary, to the comfortable and suitable
support, maintenance and education of the ward and his family, if any; and if the
income is insufficient for that purpose, he may sell or mortgage or give a
deed of trust upon any of the property . . . .

These sections merely list the general duties imposed upon guardians in the
exercise of their judgment. However, the application of these provisions by the Texas
and California courts has varied.

In interpreting section 230 the Texas court felt that the general language
"must be construed in conjunction with other statutory provisions which set out more
specifically what a guardian may do and by implication what a guardian may not do
in the management of the ward's estate." 406 S.W.2d at 501. However, the California
court rejected a similar argument that the general duties imposed on the guardian
prevent him from making "any disposition of the income or principal of the ward's
estate other than as expressly . . . provided to the contrary." 248 Cal. App. 2d at 411,
ferent interpretations indicate that the effect of state statutes on the common law substitution of judgment doctrine will depend upon whether the particular court considers itself strictly bound by the statutory language as the Texas court did, or whether the court will follow the reasoning of the California court and liberally construe the statute in order to effectuate the most equitable estate plan. It is submitted that unless uniform guidelines are adopted similar to those proposed by Article V of the Proposed Uniform Probate Code\(^5\) an increasing number of courts will be confronted with similar problems of interpretation. The courts will most probably continue to differ on how the substitution of judgment doctrine is to be applied even though they are interpreting statutes of similar construction.

C. Application of Doctrine for Tax Purposes

The application of the substitution of judgment doctrine to avoid unnecessary estate or inheritance taxes has been of great significance to estate planners.\(^6\) Several courts have granted a guardian authority to dispose of surplus income and portions of the corpus of an estate through a gift where the object of the gift is not to meet any needs of the applicant, but solely to effectuate a sound estate plan.

*In re du Pont*\(^7\) is an excellent example\(^8\) of a court applying the substitution of judgment doctrine for the sole purpose of saving estate taxes. In this case the court decided that it “is empowered to invoke the so-called substitution of judgment doctrine . . . ”\(^9\) to grant authorization to the guardian to make gifts of the incompetent’s assets\(^10\) to his children and grandchildren through an inter-vivos trust. This conclusion was reached through a liberal interpretation\(^11\) of a statute which provides that

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56 Cal. Rptr. at 514. The court concluded that specific authority for each act of the guardian is not necessary. It was stated that the specific provisions of the statute “do not preclude the courts of this state from exercising the substitution of judgment doctrine in situations not covered by [those provisions].” 248 Cal. App. 2d at 411, 56 Cal. Rptr. at 514.

49. See pp. 145–47 infra.

50. For a thorough analysis of tax planning for estates, see C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES §§ 38.1–47.12 (2d ed. 1962).


52. Apparently, *In re Carson*, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962), decided a year earlier than *du Pont*, is the first case to permit distribution of a portion of the corpus of the incompetent’s estate solely to realize the substantial savings in taxes and administration expenses. In upholding the gift the court stated that “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.” *Id.* at 547, 241 N.Y.S.2d at 290.

53. 41 Del. Ch. at 314, 194 A.2d at 317.

54. The gifts were valued at $36,000,000. Although the children, all adults, were not in financial need, evidence was introduced to show that the requested transfer would provide the heirs with a substantially greater benefit, through tax savings of approximately $16,100,000. *Id.* at 302–04, 194 A.2d at 310–11.

55. Where, as in *In re Neal*, 406 S.W.2d 496 (Tex. Civ. App. 1966), the view has been adopted that courts which administer the estates of incompetents are severely limited by statute, the substitution of judgment doctrine has been rejected if authority for its application was not expressed in the existing statutes.

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"[a] trustee may, . . . do whatever is necessary for the care, preservation, and increase of his [ward's] estate."66

In In re Kenan,67 a court-appointed guardian sought authorization, pursuant to legislative enactments,68 to make certain gifts to charities for tax purposes.69 The purpose of these gifts was to effectuate a sound estate plan rather than to aid the individual beneficiaries. In its determination of the applicability of the substitution of judgment doctrine the supreme court concluded:

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, . . . that the lunatic, if then of sound mind, would make the gift.60

The court, however, denied the request of authority on the ground that the lower court's finding that the incompetent, if competent and heeding sound advice, would have made the gifts was not supported by the evidence. On the second appeal,61 a divided supreme court found the evidence adequate to support the lower court's findings of fact that the incompetent would have made the gifts to charities and affirmed the judgments granting the guardian authority to make them on her behalf.

The underlying rationale behind a liberal application of the substitution of judgment doctrine for tax purposes was succinctly summarized in Estate of Christiansen.62 There it was determined that:

To refuse to permit the management of the incompetent's estate in the manner that a reasonable and prudent man would manage his estate may, in many cases, lead to the improbable conclusion that it was the intent of the incompetent to enrich the taxing authorities rather than the natural or declared objects of his bounty.63

It is submitted that effective management of an incompetent's estate necessarily entails the extention of the doctrine to allow for beneficial tax planning. It would be unreasonable to assume that a ward, if competent would not recognize the different tax consequences between estate and gift taxes.64 Any concerned individual with a sizable estate should realize

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57. 261 N.C. 1, 134 S.E.2d 85 (1964).
59. The proposed donations consisted of $731,600 from the income of the ward, $100,000 from the principal of her estate, and a life estate of approximately $300,000 per year in a revocable trust.
60. 261 N.C. at 9, 134 S.E.2d at 91.
63. 248 Cal. App. 2d at 423, 56 Cal. Rptr. at 522.
64. See generally Oppenheim, The Donation Inter Vivos, 43 Tul. L. Rev. 731 (1969).
that savings will result if the gifts escape the estate tax and are taxed solely under the lower-rate gift tax.65 Even if gifts should be held to be in contemplation of death66 and therefore restored to the gross estate for estate tax purposes, some savings will result.67

In addition to the savings resulting from inter vivos gifts, certain tax deductions are available upon the establishment of a trust for charitable purposes.68 Prior law allowed a deduction for property transferred to a trust as corpus to generate income to the income beneficiary for life with the remainder passing to charity. Generally, an income tax deduction was allowed for the present value of the charitable remainder,69 and, for the purposes of estate and gift taxes, a deduction was allowed for the value of the remainder if the corpus of the trust was included in the gross estate.70 However, in order to assure that the charity received the value permitted as deductions, the Tax Reform Act of 196971 will only allow these deductions72 where the trust is a charitable remainder annuity trust73 or a charitable remainder unitrust.74 Nevertheless, it seems reasonable to assume that the incompetent, if able, would avail himself of the tax advantages by conforming with the more stringent requirements of the Tax Reform Act. The rationale which is used to extend the substitution of judgment doctrine to permit distributions solely for tax purposes75 should also apply to permit the courts to authorize the establishment of the appropriate charitable trusts.

67. In such a situation the gift tax is available as a credit against the estate tax. Int. Rev. Code of 1954, § 2012.
72. Tax Reform Act of 1969, § 201, 83 Stat. 549 (1969). There is one exception where a charitable deduction for income tax will be allowed. See note 73 infra. Also, where the remainder is real property which passes to a charity, a deduction for estate tax purposes will be allowed. Tax Reform Act of 1969, § 201, 83 Stat. 549 (1969).
73. A charitable remainder annuity trust is one where a fixed sum (not less than 5% of initial principal) is to be payable at least annually to income beneficiaries for life or for a term not exceeding twenty years. For example, $10,000 yearly regardless of whether income is more or less than $10,000. See Tax Reform Act of 1969, § 664(d)(1), 83 Stat. 563 (1969).
74. A charitable remainder unitrust is one where a fixed percentage (not less than 5%) of the net fair market value of the total fund, valued annually, is to be paid at least annually to the income beneficiaries for life or for a term not exceeding twenty years. For example, the fund at the beginning of the year is $100,000, income to valuation date is $10,000 and unrealized appreciation to that date is $10,000. Total value of the fund on the valuation date is $120,000. If 5% is to be paid to the income beneficiary, the amount payable is $6,000. See Tax Reform Act of 1969, § 664(d) (2), 83 Stat. 563 (1969).

However, a unitrust (but not an annuity trust) may provide that if the trust income is less than the required amount, only the trust income for the year must be paid over. Thus, no invasions of principal will be required to make good an income deficiency, but the deficit must be made good in later years where income exceeds the required amount. See Tax Reform Act of 1969, § 201, 83 Stat. 549 (1969).
75. See p. 140 supra.
III. Substitution of Judgment in Pennsylvania

A. History

The substitution of judgment doctrine has been approved and applied by the Supreme Court of Pennsylvania since 1883.76 In *Hambleton's Appeal*77 the court established definite guidelines in permitting the distribution of an incompetent's estate to needy relatives, which have led to an intelligent application of this doctrine by the judiciary. First, the court recognized that in administering the incompetent's estate "his personal comfort and welfare are the prime objects which are to be kept in view. . . ."78 It was further noted that the court should endeavor to continue the affairs of the incompetent as they were prior to his affliction and "to do that which it might reasonably [be] suppose[d] he would have continued to do, had he retained his sanity."79

Following the *Hambleton* guidelines, Pennsylvania courts have extended the doctrine of substituted judgment to permit allowances for purposes other than the support of the immediate family, which the incompetent has a legal duty to provide.80 For example, the courts have authorized distributions to the older child81 and mother of an incompetent.82

Notwithstanding the guidelines established in *Hambleton*, the application of the substitution of judgment doctrine in Pennsylvania is now regulated by statute — Section 644 of the Incompetents' Estates Act of 1955.83 This provision, which controls the distribution of an incompetent's property, states:

All income received by a guardian of the estate of an incompetent, in the exercise of a reasonable discretion, may be expended in the care and maintenance of the incompetent without the necessity of court approval. The court, for cause shown, may authorize or direct the payment or application of any or all of the income or principal of the estate of an incompetent for the care, maintenance or education of the incompetent, his spouse, children or those for whom he was making such provision before his incompetency, or for the reasonable funeral expenses of the incompetent’s spouse, child or indigent parent. In proper cases, the court may order payment of amounts directly to the incompetent for his maintenance or for incidental expenses and may ratify payments for these purposes.84

On its face this statutory provision seems to leave very little discretionary power in the court and could be strictly construed to altogether

76. Hambleton's Appeal, 102 Pa. 50 (1883).
77. Id.
78. Id. at 54.
79. Id. at 53.
80. Generally, the traditional application of the doctrine in Pennsylvania is similar to its application throughout the country. See pp. 133–35 supra.
84. Id.
exclude the application of the doctrine. However, the courts have interpreted this statutory language very liberally and have found implied authority for the continued application of the substitution of judgment doctrine to permit distributions out of incompetents' estates. The discussion which follows, concerning the application of this doctrine for tax purposes, will examine the courts' analysis and interpretation in arriving at this implied authority.

B. The Application of the Doctrine For Tax Purposes in Pennsylvania

One of the more controversial areas in Pennsylvania law has been the limits of the power of the courts to grant or authorize gifts or allowances out of the estate of an incompetent solely to obtain a reduction of his taxable estate. The Pennsylvania case which initially decided this issue was Bullock's Estate.\(^85\) This case has been cited repeatedly as authority for the proposition that the substitution of judgment doctrine cannot be extended to permit distributions solely to obtain tax advantages. In Bullock the guardian requested permission to distribute to the wife and two daughters of the incompetent the amount of income in excess of expenses which had accumulated in the estate, for the purpose of reducing inheritance and estate taxes. After analyzing the applicable statutory provision,\(^87\) the court refused to grant an allowance on the basis that the Pennsylvania statute did not expressly authorize such distributions. The court went on to say that "[t]ax 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."\(^88\)

Notwithstanding this strict statutory interpretation, the court in Groff Estate\(^89\) distinguished Bullock and employed the substitution of judgment doctrine in authorizing gifts out of the incompetent's estate for the purpose of reducing taxes.\(^90\) In reaching its decision the court recognized the origin of this doctrine in Ex parte Whitbread\(^91\) and its application in Pennsylvania since 1883.\(^92\) While justifying the applicability of the doctrine in the instant case the court found it necessary to rationalize the exclusion of the substitution of judgment doctrine in the Bullock opinion. The court mentioned two reasons why the inapplicability of the


\(^88\) 10 Pa. D. & C.2d at 685.


\(^90\) It was determined that if the inter vivos gifts were authorized, the savings in taxes would be $244,740, or, if found to be in contemplation of death, a little more than $88,000. Id. at 563-64.


\(^92\) Hambleton's Appeal, 102 Pa. 50 (1883).
doctrine in Bullock was not controlling in Groff: (1) because no reference was made to the doctrine "it is evident that this was not called to the attention of the court at all";\(^9\) and (2) "Even had this doctrine been . . . recognized as supplying a legal foundation in a proper case, the court might well have reached the same conclusion, declining to apply the doctrine because of the weakness of the facts and surrounding circumstances."\(^9\) The Groff court then interpreted section 644 of the Incompetents' Estates Act of 1955\(^8\) and determined that while this section may limit the distributive powers of a guardian, "nothing is expressly stated there or elsewhere in the act to circumscribe the power of the court."\(^9\) From this statutory interpretation the court concluded that the Orphans' Court Act of 1951\(^7\) gave the orphans' court exclusive jurisdiction over the estates of incompetents,\(^8\) and it also "conferred on [this] court all legal and equitable powers required for or incidental to the exercise of its jurisdiction."\(^9\)

In summary, Groff agreed with the Bullock decision that absent any statutory authorization for the guardian to distribute on incompetent's estate, in those instances where he undertakes to do so on his own discretion his actions will be struck down as not "within the orbit of the powers expressly conferred. . . ."\(^10\) However, the Groff court, finding its authority in the appropriate provisions of the Orphans' Court Act, ultimately concluded that the substitution of judgment doctrine should be applied by the court to permit the proposed gifts in order to effectuate a sound tax plan.

It is submitted that the orphans' courts of Pennsylvania will continue to permit inter vivos gifts out of an incompetent's property for the sole purpose of avoiding unnecessary taxes. These courts, finding their authority in a broad interpretation of the pertinent statutes,\(^10\) should apply the substitution of judgment doctrine so they may act for the incompetent in a manner which it is reasonable to assume he would have acted\(^10\) had he been sane.

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94. Id.
96. 38 Pa. D. & C.2d at 569.
98. Pa. Stat. tit. 20, § 2080.301 (4.1) (1964), provides that the orphans' courts shall have exclusive jurisdiction of:
   - The administration and distribution of the real and personal property of the estates of incompetents, except where jurisdiction thereof already has been acquired by another Pennsylvania court. Another court which has acquired jurisdiction of the estate may transfer it to the orphans' court.
100. Bullock Estate, 10 Pa. D. & C.2d 682, 685 (Orphans' Ct. Del. Co. 1957). It has been consistently held that this is a question for the judgment of the court, and without seeking and obtaining court approval, the guardian's independent action is a nullity. See, e.g., Peden Estate, 409 Pa. 194, 198, 185 A.2d 794, 796 (1962).
102. For a discussion of the analysis involved in a court's determination of what the probable conduct of the incompetent would have been, see p. 135 supra.
IV. Proposed Uniform Probate Code

A. Analysis of Article V — Protection of Persons
Under Disability and Their Property

This discussion is necessarily limited to Parts 3 and 4 of Article V of the Proposed Uniform Probate Code\textsuperscript{103} which concentrate on incapacitated persons\textsuperscript{104} and the protection of their property. The special guardianship principles related to the guardians of minors are beyond the scope of this Comment.

1. Part 3 — Guardians of Incapacitated Persons

Generally, any competent person or suitable institution may be appointed guardian of an incapacitated person.\textsuperscript{105} It is the duty of this guardian to provide for the comfort and maintenance of the person of his ward. Also, if no conservator\textsuperscript{106} — a person appointed by the court to manage the estate of a protected person — for the estate of the ward has been appointed, the guardian has limited authority over the property of the ward.\textsuperscript{107} However, where the ward has substantial property it is usually desirable to have “protective proceedings”\textsuperscript{108} to handle the management of his estate. Where a conservator has been appointed the guardian must account to him for the funds expended, but if there is no appointed conservator, the guardian must include an accounting for the ward’s property in the regular report submitted to the court concerning the ward’s personal condition.\textsuperscript{109}

2. Part 4 — Protection of the Property of Minors
and Persons Under Disability

The court may appoint a conservator of the estate if it is determined that the person is unable to manage his own property and “the person has property which will be wasted or dissipated unless proper management is provided. . . .”\textsuperscript{110} If the determination is made that sufficient grounds do exist for the appointment of a conservator, the court which

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\textsuperscript{103} For a concise summary of the background of the Probate Code, see 4 REAL PROP., PROB. & TR. J. 206, 207 (1969).

\textsuperscript{104} An incapacitated person is one 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 (emphasis added). PROBATE CODE § 5-101(1).

\textsuperscript{105} PROBATE CODE § 5-311(a).

\textsuperscript{106} PROBATE CODE § 1-201(f).

\textsuperscript{107} A guardian’s responsibility is the care of the ward himself. The management of the property of the estate is undertaken by the conservator under the supervision of the court. See discussion p. 146 infra.

\textsuperscript{108} These are proceedings to determine that a person who has an estate cannot effectively manage it. PROBATE CODE § 5-101(2). At such a proceeding the court may appoint a conservator or make other orders protecting the estate. PROBATE CODE § 5-401.

\textsuperscript{109} PROBATE CODE §§ 5-312(e), (f).

\textsuperscript{110} PROBATE CODE § 5-401(b)(ii).
is supervising the conservatorship is given all the powers which the individual would have if he were fully competent.\textsuperscript{111}

The basic duty of a conservator is to act as a fiduciary and observe the standard of care applicable to trustees.\textsuperscript{112} Included in the powers of the conservator is the authority to invest and reinvest funds of the estate.\textsuperscript{113} In addition, the conservator may distribute the income or principal of the estate for the support of the protected person and others who have been maintained and supported by the incompetent, and he may make such gifts to charity as the incompetent might reasonably have been expected to make.\textsuperscript{114} Although such powers may be executed without court authorization, gifts out of principal and those which exceed twenty percent of the yearly income from the estate are permissible only after a court hearing. However, as mentioned previously, the supervising court is given the authority to act in the manner most beneficial to the disabled person.\textsuperscript{115}

**B. Effect of Article V**

The statutory provisions discussed above set forth a broad listing of powers which may be exercised. In those states where the substitution of judgment doctrine is applied liberally with the best interests of the estate as the goal, Article V would not lead to significant change. However, in those jurisdictions where the doctrine is construed very strictly in light of existing state statutes, the adoption of Article V would have a profound effect. By specifically granting all the powers which the individual would have if he were of full capacity, which is in effect the incorporation of the substitution of judgment doctrine, the Proposed Uniform Probate Code eliminates the necessity for a "liberal" or "strict" interpretation of statutes in order to determine the degree of authority that is granted to guardians of incompetents' estates. The adoption of the Code would eliminate the possible determination, such as that made by the Texas court, that since the statute does not expressly include the substitution of judgment doctrine, or language similar thereto, such broad powers were not intended and therefore should not be applied. Such an interpretation restricts the distributive powers of guardians and thereby ignores the practicalities of sound tax planning. Under the Code, however, realistic estate planning, based on the utilization of tax advantages, would become possible. Guardians and the courts would no longer be severely

\begin{footnotes}
\item 111. **Probate Code** § 5-408, Comment at 110. Note that the court, in effect, is given the authority to substitute its judgment for that of the incapacitated person.
\item 112. **Probate Code** § 5-417. **Probate Code** § 7-302, in describing a trustee's standard of care, states in pertinent part:

[T]he trustee shall observe the standards . . . that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he shall be charged with using those skills.

\item 113. **Probate Code** § 5-424(b).
\item 114. **Probate Code** § 5-425.
\item 115. **Probate Code** § 5-408(d). It should be noted that anticipated tax savings may be the motivation for the exercise of several of these powers. **Probate Code** § 5-408(e).
\end{footnotes}
restricted in their distributive powers and would be free to manage the estate on the basis of what the person himself would have done if he were competent.

V. Conclusion

Ideally, an attorney who is planning an estate will not be confronted with the problem of determining whether a particular court will liberally interpret the applicable statutes to permit the utilization of the substitution of judgment doctrine. It would be most beneficial for all interested parties if the attorney could persuade his client of the need for the creation of an arrangement for the management of his estate which would become effective upon his becoming incompetent. This method of estate planning, which is analogous to a will taking effect at death, alleviates the uncertainty in determining what the incompetent would have done.

Unfortunately, few individuals provide for the possibility of incompetency and most estate planners must face the problem of determining what inter vivos distributions they are authorized to make without an express indication of the incompetent’s intent. Therefore, the manner in which a court applies the substitution of judgment doctrine becomes extremely important. It is submitted that the broad grant of judicial power obtained through a liberal application of this doctrine, or through the adoption of Article V of the Proposed Uniform Probate Code which incorporates it, is the most realistic solution to the problem of how to manage an incompetent’s estate. It enables guardians and the courts which supervise them to act in the best interests of their wards. By substituting its judgment for that of the incompetent, the court is more likely to arrive at a sound estate plan which will benefit each particular ward.

Michael P. Kane

116. See note 1 supra.