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Policy, Perspective, and the Proxy Will

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POLICY, PERSPECTIVE, AND THE PROXY WILL

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I. INTRODUCTION

Among the many legal documents an individual executes during his lifetime, the will is likely to be the most personal.[1] A testator's solemn declaration concerning the distribution of his estate inevitably reveals part of his uniqueness: who he is, whom he loves, and what he values. Whether florid and fussy or blunt and brief, the will tells an important part of his life story. Not surprisingly, for

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1. "It is, and for many centuries has been, a common thought in our economic system, that to execute a last will and testament is the most solemn and sacred act of a man's life." Brimmer v. Hartt (*In re* Estate of Hartt), 295 P.2d 985, 1002 (Wyo. 1956). Today, of course, a large variety of will substitutes compete with and often even replace the will. *See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 99 (2009) (observing that the will "is no longer the crown jewel of succession"). Even so, the will remains important for many estates. Moreover, the will is far more likely than most informal will substitutes to reveal unique aspects of the testator's personality.

hundreds of years statutes of wills have assumed that only the testator himself can design and execute his plan of testamentary distribution.[2]

A recent development in conservatorship laws, however, profoundly changes this historical assumption. Without hoopla, several states have enacted laws that permit a conservator to make, amend, or revoke the will of a protected person if the conservator obtains judicial approval.[3]

This Article examines the new world of proxy will making. It explains the incompleteness of current proxy will making statutes and questions the propriety of their default positions.[4] The Article also questions whether the proxy will, once unleashed, can or should be confined to conservatorship proceedings. Because the durable power of attorney is a document that many individuals execute in hope of avoiding a conservatorship, the Article explores whether states should permit an agent to make a proxy will if the principal explicitly grants the agent that authority.[5]

Ultimately, the primary goal of laws recognizing a proxy will should be to respect the testator and his known or probable wishes. The Article concludes that recognition of the proxy will under carefully defined rules is a logical step forward in probate law's continuing effort to fulfill testamentary intent.

II. CAPACITY AND CONSERVATORSHIPS

A. Will Execution and an Aging Society

Probate rules strive to respect a testator's individuality.[6] If a testator expresses his wishes in a reliable fashion, the law usually channels his property

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2. *See* Statute of Wills, 1540, 32 Hen. 8, c. 1, § 4 (Eng.) ("[E]very person . . . shall have full and free liberty, power and authority to give, dispose, will and devise . . . at his free will and pleasure . . . ."). Statutes of wills do, however, commonly allow a proxy signature when the testator possesses testamentary capacity and directs the proxy to sign in her presence. *See, e.g.*, UNIF. PROBATE CODE § 2-502(a)(2) (amended 2008), 8(I) U.L.A. 144 (Supp. 2009) (permitting proxy signature at the testator's direction and in her presence).

3. *See infra* note 23 (listing states that statutorily permit a conservator to make, amend, or revoke a protected person's will).

4. *See infra* Part III (discussing proxy will making by conservator).

5. *See infra* Part IV (discussing proxy will making by agent).

6. *See* Benge v. Sutton (*In re* Estate of Gorthy), 100 N.W.2d 857, 864 (Neb. 1960). In *Gorthy*, the Nebraska Supreme Court stated as follows:

> No right of a citizen is more valued than the power to dispose of his property by will. The right is in no manner based upon its judicious exercise. The very purpose of a will is ordinarily to produce inequality among heirs of the same class for reasons that appear sufficient only to the testator. He may desire to benefit the helpless, to reward the affectionate, and to punish the disobedient. He may be unjust to his children or other relatives. He is entitled to the control of his property during his lifetime and to direct its disposition after his death . . . .

Id.

at death in a way that fulfills those wishes.[7] Reliability exists if he properly executes the will while possessing testamentary capacity untainted by undue influence, fraud, or other wrongful conduct of third parties.[8]

While the rules governing testamentary capacity have remained static for generations,[9] rules concerning will execution have grown more forgiving in

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7. *See* Spiegelglass v. Spiegelglass (*In re* Estate of Spiegelglass), 137 A.2d 440, 441–42 (N.J. Super. Ct. App. Div. 1958) ("The law thus bends to the testator's wishes—and quite properly so, regardless of the difficulties that may be encountered in securing adequate proof of those wishes."). Various articles discuss the formalities associated with will execution. *See, e.g.*, Verner F. Chaffin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities*, 11 GA. L. REV. 297, 299–324 (1977) (describing in detail the signature and attestation requirements, using Georgia law as an exemplar); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 535–38 (1977) (providing sociological background to the historical development of formalities to support a policy argument in favor of relaxing strict adherence); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5–13 (1941) (discussing ritual, evidentiary, and protective functions of will formalities); Julian R. Kossow, *Probate Law and the Uniform Code: "One for the Money . . ."*, 61 GEO. L.J. 1357, 1369–81 (1973) (contrasting modern common law will formalities with those retained in the original UPC); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492–97 (1975) (outlining the traditionally asserted justifications for adherence to will formalities: evidentiary, channeling—standardization, cautionary, and protective functions); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1010–11, 1016–20 (1992) (describing the dispensing power of the 1990 UPC to relax the requirement of strict compliance with formalities in favor of effectuating testamentary intent and suggesting that UPC reforms do not go far enough); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035–46 (1994) (analyzing the dispensing power of the 1990 UPC as a means of avoiding illogical and unjust results from "judicial insistance on literal compliance" with formalities); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 199–204 (1991) (tracing historical development of will formalities from Statute of Frauds through the Statute of Wills leading up to the present day UPC); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPP. L. REV. 331, 332–54 (1979) (providing a detailed survey of the historical development of formalities and an in-depth analysis of their purported functions). *See generally* JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS 224–55 (3d ed. 2007) (discussing and comparing approaches to will execution).

8. Courts that invalidate wills for "other wrongful conduct" by third parties most commonly rely on duress. *See, e.g.*, *In re* Brunor's Will, 43 N.Y.S. 1141, 1142–43 (Sur. Ct. 1896) (concluding that husband's abuse and maltreatment of deceased wife did not prove duress affecting her will, particularly when her portrait indicated that husband, who was a small man, "did not always come off first best in their [spousal] encounters"), *rev'd sub nom. In re* Brunor, 47 N.Y.S. 681, 683–84 (App. Div. 1897) (containing husband's detailed and highly unflattering description of decedent and concluding that her will may have indeed been the product of undue influence and coercion). As society increasingly acknowledges the frequency of elder abuse, *see* Bradley J.B. Toben & Matthew C. Cordon, *Legislative Stasis: The Failures of Legislation and Legislative Proposals Permitting the Use of Electronic Monitoring Devices in Nursing Homes*, 59 BAYLOR L. REV. 675, 680 (2007) (discussing the prevalence of elder abuse in nursing homes), duress may emerge as an important ground for attacking wills in which elders make bequests to caretakers they fear.

9. *See* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 93 (2006) ("Testamentary capacity law stagnated for the entirety of the twentieth century."); *see also* Lawrence A. Frolik & Mary F. Radford, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAT'L ACAD. ELDER L.

recent years.[10] Relaxing the execution requirements enhances the opportunity to accomplish a testator's wishes for the distribution of his estate. In contrast, no one asserts that relaxing the threshold for testamentary capacity would produce similar benefits,[11] and no court or legislature has adopted a rule under which an individual lacking testamentary capacity can make, amend, or revoke a valid will.[12] After all, the capacity required for will execution has always been among the lowest on the spectrum of capacities required to execute various legal documents.[13]

Nonetheless, incapacity in its many various forms is a growing problem for our aging society.[14] The law increasingly confronts the dilemma of

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ATT'YS J. 303, 307–08 (2006) (discussing common law test for testamentary capacity laid out in *Greenwood v. Greenwood*, (1790) 163 Eng. Rep. 930 (K.B.), and refined in *Harwood v. Baker*, (1840) 13 Eng. Rep. 117 (P.C.)).

10. *See, e.g.*, Mann, *supra* note 7, at 1035–43 (discussing the dispensing power granted to probate courts under Uniform Probate Code section 2-503 and describing it as "the most recent salvo in a long campaign against formalism in wills adjudication, the roots of which go back over fifty years"). The UPC's harmless error rule, along with the occasional explicit or implicit adoption of a substantial compliance approach by courts acting on their own initiative, allow probate of a testator's imperfectly executed yet trustworthy expression of intent. *See* UNIF. PROBATE CODE § 2-503 (amended 2008), 8(I) U.L.A. 146 (Supp. 2009). These approaches have begun to replace the unwavering adherence to ritualistic observances once demanded by courts and legislatures. *See* Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1, 13 (2003). The reader should note, however, that the replacement is far from complete. *See id.* at 13–17 (concluding that "rollback of will formalities has seen limited success").

11. *Cf.* Champine, *supra* note 9, at 79–85 (discussing development and use of a forensic assessment instrument for testamentary capacity and arguing against "[p]redicating determination of incapacity" in such a way that "would produce a radical decrease in the standard for testamentary capacity").

12. Odd though it may initially sound, the law may permit an *incapacitated* person herself to revoke legal documents in some instances. *See, e.g.*, TENN. CODE ANN. § 32-11-106 (2007) (stating that a living will "may be revoked at any time by the declarant[] without regard to her mental state or competency").

13. *See infra* notes 25–46 and accompanying text; *see also In re* Will of Goldberg, 582 N.Y.S.2d 617, 620 (Sur. Ct. 1992) ("It is hornbook law that less mental capacity is required to execute a will than any other legal instrument."). Courts have frequently concluded that a person may have testamentary capacity even though she lacks the capacity to engage in ordinary business transactions. *Compare In re* Estate of Hastings, 387 A.2d 865, 868 (Pa. 1978) ("Competence in the conduct of one's business affairs, however, is not a requirement of testamentary capacity. Less capacity is needed to make a valid will than is necessary to transact ordinary business."), *with In re* Leonard, 321 A.2d 486, 488 (Me. 1974) ("A 'disposing mind' involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds." (internal quotation marks omitted)). *See generally* Frolik & Radford, *supra* note 9, at 305 ("If legal capacity lies along a spectrum, testamentary capacity is at the lower end.").

14. *See* Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147, 151 & n.22 (1994) (noting that the project staff from the National Probate Court Standards extrapolated from data provided to the National Center for State Courts that more than 300,000 guardianship cases are filed in the United States each year); COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2007: A NATIONAL PERSPECTIVE FROM THE COURT

accomplishing the probable wishes of an elder who can no longer make a will for himself.[15] A person who is unable to manage his financial affairs and who has no duly-appointed agent may find himself under a court-appointed conservatorship.[16] He may also lack testamentary capacity.[17] His conservatorship may last for years, during which time his estate and the objects of his bounty may change considerably. Changes in tax and other laws may also have a substantial impact upon the ultimate distribution of his estate. Even so, statutes of wills have continued to assume that the power to devise is personal; neither the testator nor the state can delegate this power to others.[18] Because the testator is unique and a will should reflect his singularity, no one else can make, amend, or revoke his will.[19]

STATISTICS PROJECT 17 (2008), http://www.courtstatistics.org (follow "2007 Full Report" hyperlink).

15. *See infra* notes 74–94 and accompanying text (discussing *inter vivos* distributions from estates of protected persons).

16. The terms used for designating the court-appointed manager of a person's property and of the person herself vary among the states. In this Article, *conservator* refers to the court-appointed designee to manage a person's property; *guardian* refers to the court-appointed designee to protect the person herself.

17. *See infra* notes 25–46 and accompanying text (discussing various capacity standards).

18. *See, e.g.*, *In re* Estate of Runals, 328 N.Y.S.2d 966, 976 (Sur. Ct. 1972) ("[T]he right to make a will is personal to a decedent. It is not alienable or descendable. It dies with the decedent."); *In re* Estate of Nagle, 317 N.E.2d 242, 245 (Ohio Ct. App. 1974) ("It is an inalienable right of a testator to make a will and, as long as it is not unlawful and the testator is competent, it is an abuse of discretion to alter his will.").

19. *See, e.g.*, Toler v. Murray, 886 So. 2d 76, 78 (Ala. 2004) (citing ALA. CODE §§ 26-2A-136(b)(3), -152(a), -154 (1975)) (noting that neither a court nor a conservator has the power to make a will on behalf of a protected person). For further discussion of the traditional approach, see *infra* notes 70–73 and accompanying text.

In a recent North Dakota case, a district court judge had previously ordered a limited conservatorship for a testator. Bartusch v. Hager (*In re* Estate of Dion), 623 N.W.2d 720, 724 (N.D. 2001). The district court judge's formal order stated that the testator "'shall redraft any recently executed last will and testament.'" *Id.* Responding to this language, the North Dakota Supreme Court observed the following:

> The wording of [the judge's] order . . . is unfortunate. The direction that "Dion shall redraft any recently executed last will and testament" was, as the trial court concluded in this case, unenforceable as a matter of law. Obviously, a court has no power to order anyone to execute a will, and the trial court properly instructed the jury in this case that "[a] Court or judge cannot order a person to make out a Will or how to make out a Will nor can a Court order additional formal requirements before a Will can be found valid." The power to make a will belongs to the testator and is not subject to veto power of the courts.

Id. at 727–28 (second alteration in original) (citing Smith v. Osborn (*In re* Estate of Anderson), 671 P.2d 165, 169 (Utah 1983)). That case also cites a North Dakota statute that draws similar conclusions. *Id.* at 727 (citing N.D. CENT. CODE § 30.1-29-08(2)(c) (1996) (providing in the conservatorship statute that a court has "all the powers over the person's estate and affairs which the person could exercise if present and not under disability, except the power to make a will")). For a discussion of how the 1969 UPC statute denied conservatorship courts the power to make a will for protected people, see *infra* note 72 and accompanying text.

To respect this probate rule and yet ameliorate the harsh effects of its application, states have developed rules that permit conservators to make certain nonprobate transfers from the estate of a person under a conservatorship (a protected person).[20] These lifetime transfers can eliminate or substantially minimize the need to make, amend, or revoke the protected person's will. States justify such transfers by concluding that the transfers reflect a substituted judgment of what the protected person would want had he retained capacity or that the transfers are in his best interest.[21]

South Dakota and California were the first states to conclude implicitly that these nonprobate options are not a completely satisfactory solution for protected persons and their estates.[22] These states and a few others now statutorily

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Not all states adhered slavishly to the common law rule. *See, e.g.*, Goeke v. Goeke, 613 So. 2d 1345, 1347–48 (Fla. Dist. Ct. App. 1993) (citing FLA. STAT. § 744.441(18) (1991)) (noting that the Florida statute "permits a guardian to execute a codicil amending the ward's will, but only to gain a specific estate tax benefit"). But for the possibility of this narrow exception, Florida follows the common law rule. *See, e.g.*, Sherry v. Klevansky (*In re* Guardianship of Sherry), 668 So. 2d 659, 661 (Fla. Dist. Ct. App. 1996) ("Section 744.441 does not include a provision permitting guardians, even with court approval, to amend their wards' wills, other than in the limited circumstances authorized in subsection 744.441(18)."); *cf.* John E. Slaughter, Jr., *Tax Aspects of Guardianships*, *in* FLORIDA GUARDIANSHIP PRACTICE § 16.32 (2008) (4th ed. 2002) ("Because there is no authority, in either the statutes or case law, for a guardian to execute a will for the ward, it is questionable whether F.S. 744.441(2) [authorizing guardian to exercise any power of appointment of the ward if in the ward's best interest], however ambiguous, would be construed to authorize a guardian to execute a will or codicil on behalf of the ward . . . .").

20. In this Article, a protected person is a person under a conservatorship. *See* UNIF. PROBATE CODE § 5-102(8) (amended 2008), 8(II) U.L.A. 118 (Supp. 2009) ("'Protected person' means a minor or other individual for whom a conservator has been appointed or other protective order has been made."). Older terms in use across the country for a person under a conservatorship include *conservatee*, *disabled person*, and *ward*. *See, e.g.*, MINN. STAT. ANN. § 252A.101(5)(a)(1) (West 2007) (using the terms *disabled person*, *conservatee*, and *ward*). Under the Uniform Probate Code, a conservator "manage[s] the estate of a protected person." UNIF. PROBATE CODE § 5-102(1), 8(II) U.L.A. at 118. This Article generally employs the UPC term *protected person* except when quoting from statutes or cases. Nonetheless, the reader should keep in mind the wide discrepancies in terminology among the states.

The UPC currently provides that "[t]he appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person." *Id.* § 5-409(d), 8(II) U.L.A. at 173. The comment to this section emphasizes that such orders are not a determination of incapacity under Part 3, which concerns guardianships of incapacitated persons. *Id.* § 5-409 cmt., 8(II) U.L.A. at 174. For the sake of convenience, however, this Article—which is not concerned with guardianships of the person—uses the term *incapacitated* to refer to a person for whom a court has imposed a conservatorship and who is thus legally incapable of managing an estate to some extent. The reader should keep in mind that this usage departs from that of the current UPC.

21. *See, e.g.*, *In re* Guardianship of Larson, 738 N.Y.S.2d 827, 829 (Sur. Ct. 2002) (justifying the transfer of a disabled adult's inheritance on the grounds that a reasonable person would do the same); *see also infra* notes 78–93 and accompanying text (discussing *inter vivos* estate distributions under "best interest" or "substituted judgment" standards).

22. *See* CAL. PROB. CODE § 2580(b)(13) (West 2002); S.D. CODIFIED LAWS § 29A-5-420(8) (2004). Colorado, Hawaii, Nevada, Massachusetts, and Minnesota are among the more recent converts. *See* COLO. REV. STAT. § 15-14-411(1)(g) (2008); HAW. REV. STAT. ANN. § 560:5-411(a)(7) (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 190B, § 5-407(d)(7) (West Supp. 2009);

empower courts to authorize a conservator to execute a will for the protected person.[23] Remarkably, the Uniform Probate Code (UPC) also endorses this development.[24] Before criticizing or commending the development, however, we must first examine several important conservatorship principles more fully to place the need for the proxy will in greater perspective.

B. Protected Persons and Their Estates

1. Capacity in Context

Courts have often noted that the evaluation of capacity in a conservatorship proceeding differs substantially from the evaluation of capacity in a will contest.[25] In conservatorship proceedings, courts examine the individual's ability

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MINN. STAT. ANN. § 524.5-411(a)(9) (West Supp. 2008); NEV. REV. STAT. ANN. § 159.078(1)(a) (LexisNexis 2003). Few observers have commented upon the enormity of the change except in passing. *See, e.g.*, Constance Tromble Eyster, *Estate Planning Considerations When Distributing Assets from a Conservatorship Estate*, COLO. LAW., Aug. 2003, at 55, 56 (discussing Colorado's version of the Uniform Guardianship and Protective Proceedings Act and providing an example in which a conservator might propose to make a new will for the protected person); Gregory R. Solum, *Guardianship and Conservatorship Proceedings: A New Approach*, BENCH & B. OF MINN., Aug. 2003, at 23, 23 (discussing Minnesota's adoption of the UGPPA and stating that "[o]ne very profound difference is the new provision authorizing conservators of the estate (after notice and hearing) to engage in estate planning including the power to 'make, amend, or revoke the protected person's will'"). Other commentary has simply noted the effect of the provisions. *See, e.g.*, Colin K.K. Goo et al., *Protecting Minors and Incapacitated Adults: Hawaii's "New" Conservatorship & Guardianship Law*, HAW. B.J., Apr. 2006, at 4, 10 (noting conservator's power to "make, amend, or revoke the protected person's will" under new law).

23. *See* CAL. PROB. CODE § 2580(b)(13) (West 2002); COLO. REV. STAT. § 15-14-411(g) (2008); HAW. REV. STAT. ANN. § 560:5-411(a)(7) (LexisNexis 2005); MASS. GEN. LAWS ANN. ch. 190B, § 5-407(d)(7) (West Supp. 2009); MINN. STAT. ANN. § 524.5-411(a)(9) (West Supp. 2008); NEV. REV. STAT. ANN. § 159.078(1)(a) (LexisNexis 2003); N.H. REV. STAT. ANN. § 464-A:26-a (LexisNexis 2007); S.D. CODIFIED LAWS § 29A-5-420(8) (2004). California's provision concerning the conservator's will making power dates from 1995. *See* CAL. PROB. CODE § 2580(b)(13) hist. nn. (West 2002). The South Dakota statute dates from 1993. *See* S.D. CODIFIED LAWS § 29A-5-420 note (2004) (Statutory Source Citations). For a discussion of New Hampshire's uniquely-worded statute and the more limited statutes from Florida and Illinois, see *infra* note 72.

24. *See* UNIF. PROBATE CODE § 5-411(a)(7), (b) (amended 2008), 8(II) U.L.A. 175 (Supp. 2009). The approach is also found in the freestanding Uniform Guardianship and Protective Proceedings Act (UGPPA). *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 411(a)(7)(b), 8A U.L.A. 392 (2003). States can enact the Uniform Guardianship and Protective Proceedings Act separately, or they can integrate the Act into Article V of the Uniform Probate Code. *See* UNIF. PROBATE CODE art. V, 8(II) U.L.A. at 114 (observing that Parts 1 through 4 of Article V of the Uniform Probate Code reproduce the 1997 Uniform Guardianship and Protective Proceedings Act but eliminate duplicative material); UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT hist. nn., 8A U.L.A. at 301; *see also In re* Guardianship of Wells, 733 N.W.2d 506, 509 & n.2 (Minn. Ct. App. 2007) (observing that the UGPPA has been adopted by Colorado, Hawaii, and Minnesota).

25. *See, e.g.*, Miller v. Fischer (*In re* Estate of Oliver), 934 P.2d 144, 148–49 (Kan. Ct. App. 1997) (noting that determination of incapacity for imposition of a conservatorship does not mean respondent lacks testamentary capacity; in fact, appointment of fiduciary does not destroy

to manage her property.[26] In will contests, courts examine whether at execution the testator knew her assets, knew the objects of her bounty, and made an orderly plan of disposition that she understood.[27] A person who possesses testamentary capacity does not need a third party to make, amend, or revoke a will for her even if she is under a conservatorship because of her inability to manage her property.[28]

In *In re Estate of Oliver*,[29] Alta Oliver executed her last will when she was approximately ninety.[30] At that time, she was also under a conservatorship imposed against her wishes.[31] At her death, disappointed beneficiaries named in Alta's prior wills asserted that, because of her preexisting conservatorship, she necessarily lacked testamentary capacity to execute the will in contest.[32] The Kansas court reviewing the case disagreed.[33] It noted the universal rule that the

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presumption in favor of testamentary capacity); Tank v. Lange (*In re* Estate of Wagner), 522 N.W.2d 159, 165 (Neb. 1994) (finding that capacity to defeat a conservatorship petition did not necessarily indicate testamentary capacity because the two capacity standards differ); *In re* Will of Maynard, 307 S.E.2d 416, 426–27 (N.C. Ct. App. 1983) (concluding that prior adjudication of incapacity and appointment of a guardian did not conclusively establish lack of testamentary capacity concerning a ward's later-executed will); A.G. Barnett, Annotation, *Effect of Guardianship of Adult on Testamentary Capacity*, 89 A.L.R.2d 1120, 1122 (1963) (noting that the mere fact that one is under guardianship does not deprive that person of the power to make a will).

26. *In re Estate of Wagner*, 522 N.W.2d at 165 (stating that one requirement for appointing a conservator is that "'the person is unable to manage his or her property and property affairs'" (quoting NEB. REV. STAT. § 30-2630(2)(i) (1989))).

27. *See* PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 40 (2d ed. 1994) ("The testator must have the mental capacity to (a) know the nature of his property, (b) know the natural objects of his bounty, (c) form an orderly plan of disposition, and (d) understand the disposition made by his will."); Frolik & Radford, *supra* note 9, at 307–08.

28. *See, e.g.*, Toler v. Murray, 886 So. 2d 76, 78–79 (Ala. 2004) (observing that a protected person may have testamentary capacity although he is unable to manage his property and business affairs effectively); Bookasta v. Swanson (*In re* Conservatorship of Bookasta), 265 Cal. Rptr. 1, 3 (Ct. App. 1989) (observing that a person under a conservatorship may have testamentary capacity); Citizens State Bank & Trust Co. of Hiawatha v. Nolte, 601 P.2d 1110, 1115 (Kan. 1979) (noting that a protected person with testamentary capacity can make a testamentary disposition even though he may not contract or deed away his property); Tucker v. Jollay, 311 S.W.2d 324, 325 (Tenn. Ct. App. 1957) (observing that persons under conservatorship "are not, per se, incapable of making a valid will"); Gilmer v. Brown, 44 S.E.2d 16, 19 (Va. 1947) ("[T]he general rule that, in the absence of a controlling statute, the mere fact that one is under a guardianship does not deprive him of the power to make a will.").

29. Miller v. Fischer (*In re* Estate of Oliver), 934 P.2d 144 (Kan. Ct. App. 1997).

30. *Id.* at 146–47.

31. *Id.*

32. *Id.* at 147. One of the dangers for a person who petitions for the appointment of a guardian or conservator for an alleged incapacitated person (AIP) is retribution in the form of a disinheriting act by the AIP. *See, e.g.*, Tank v. Lange (*In re* Estate of Wagner), 522 N.W.2d 159, 162–63 (Neb. 1994) (discussing a will contest by four children whom the testator-mother disinherited after the children brought an unsuccessful petition to establish a conservatorship over her). When the petitioner seeks the appointment out of self-interest, the subsequent disinheriting act seems to be a just reward. When the petitioner is truly concerned for the best interest of the AIP, however, disinheritance seems an unfair price to have to pay.

33. *In re Estate of Oliver*, 934 P.2d at 148.

existence of a conservatorship does not itself prevent the protected person from making testamentary dispositions.[34] Moreover, the court rejected the contestants' assertion that it should at least presume testamentary incapacity when a decedent executes her will while under a conservatorship.[35]

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34. *Id.* Several other Kansas decisions distinguish the conservator's role from the protected person's right to execute a will. *See, e.g.*, *In re* Estate of Raney, 799 P.2d 986, 992 (Kan. 1990) ("'It is practically a universal rule that the mere fact that one is under guardianship does not deprive him of the power to make a will.'" (quoting Bd. of Trs. of Park Coll. v. Hall (*In re* Hall's Estate), 195 P.2d 612, 615 (Kan. 1948))); Citizens State Bank & Trust Co. of Hiawatha v. Nolte, 601 P.2d 1110, 1114 (Kan. 1979) ("The conservator's duty, however, is to manage the estate during the conservatee's lifetime. It is not his function, nor that of the probate court supervising the conservatorship, to control disposition of the conservatee's property after death."); Campbell v. Black, 844 P.2d 759, 762 (Kan. Ct. App. 1993) (observing that a protected person in a voluntary conservatorship retains authority to make testamentary dispositions); *cf.* Caldwell v. LeRoy (*In re* Estate of Congdon), 309 N.W.2d 261, 267 (Minn. 1981) ("[B]ecause testamentary capacity is a less stringent standard than the capacity to contract, it is not inconsistent for the subject of a conservatorship to have sufficient capacity to execute a will." (citing Carter v. First Trust Co. of St. Paul (*In re* Estate of Jenks), 189 N.W.2d 695, 697 (Minn. 1971))). Modern cases agree that the existence of a guardianship or conservatorship does not of itself necessitate a determination of testamentary incapacity. *See* EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 6:13, at 6-65 to -66 (2d ed. 1999) ("[W]hen the courts are faced with the fact that the testator was placed under conservatorship or guardianship at or near the time of will execution, the courts state that the fact that the testator has been judicially determined to be incompetent and a guardian or conservator has been appointed to manage his affairs does not mean that the testator necessarily lacked testamentary capacity."); Barnett, *supra* note 25, at 1122 ("All of the cases found (with the exception of a few older decisions which have been effectively overruled) follow the general rule that one otherwise of testamentary capacity may make a valid will, regardless of the fact that he is under guardianship . . . .").

Of course, an unsuccessful petition for the appointment of a guardian or conservatorship does not of itself indicate that the respondent—the former AIP—necessarily possesses testamentary capacity. *See, e.g.*, *In re Estate of Wagner*, 522 N.W.2d at 165 (noting that the determination of mental capacity in a conservatorship proceeding is not the same as the determination of mental capacity required to execute a will).

35. *See In re Estate of Oliver*, 934 P.2d at 148. Substantial disagreement exists concerning the presumption of testamentary capacity following the establishment of a guardianship or conservatorship. Several courts have taken the *Oliver* approach. *See, e.g.*, Silva v. Miramon (*In re* Estate of Silva), 462 P.2d 792, 796 (Ariz. 1969) (observing that presumption of capacity exists even though decedent had "been adjudicated incompetent to handle his affairs"); Adams v. Idleman (*In re* Estate of Adams), 101 P.3d 344, 346 (Okla. Civ. App. 2004) (noting Oklahoma's "long standing rule of law . . . 'that a presumption of want of testamentary capacity does not arise from the fact that the maker of a will may have been under guardianship at the time of the making of the will'" (quoting *In re* Nitey's Estate, 53 P.2d 215, 217 (Okla. 1935))); Parham v. Walker, 568 S.W.2d 622, 624 (Tenn. Ct. App. 1978) ("Even the existence of a guardianship or conservatorship is not per se an adjudication of an unsound mind, that is, an adjudication of mental incapacity to execute a will." (citing Tucker v. Jollay, 311 S.W.2d 324, 325 (Tenn. Ct. App. 1957))); Whipple v. N. Wyo. Cmty. Coll. Found. of Sheridan (*In re* Estate of Roosa), 753 P.2d 1028, 1037 (Wyo. 1988) (concluding that guardianship created under the Uniform Veterans' Guardianship Act "does not result in any presumption of insanity or lack of testamentary capacity, a conclusion that is supported by authority elsewhere" (citing Morse v. Caldwell, 191 S.E. 479, 484 (Ga. Ct. App. 1937); M.L. Cross, Annotation, *Constitutionality, Construction, and Effect of the Uniform Veterans' Guardianship Act*, 173 A.L.R. 1061, 1077–78 (1948))). Some courts have noted that, at most, an inference of incapacity arises when the testator is under a conservatorship at the time he executes his will. *See,*

Modern courts recognize and evaluate different kinds and levels of capacity in determining whether an individual can manage, barter, donate, or devise her assets. Indeed, an examination of the judicial treatment of contracts, gifts, and wills in conservatorship cases confirms that the meaning of capacity is highly contextual. In *Lee v. Lee*,[36] Herbert Lee executed both a deed and a will while under a conservatorship.[37] Challengers contested the validity of the documents in two separate lawsuits that reached the Mississippi Supreme Court.[38] The court

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e.g., Van Gorp v. Smith (Estate of Mann), 229 Cal. Rptr. 225, 230–31 (Ct. App. 1986) ("A conservatorship raises an even weaker inference of testamentary incapacity.").

Some courts, however, do not retain the presumption of testamentary capacity when the testator is under a conservatorship or guardianship at the time of will execution. *See, e.g.*, Fowler v. Fowler, 294 So. 2d 156, 158 (Ala. 1974) (citing Houston v. Grigsby, 116 So. 686, 688 (Ala. 1928)) (stating that the proponent had the burden of establishing testamentary capacity); Boyd v. Cooper (*In re* Estate of Supplee), 247 So. 2d 488, 490 (Fla. Dist. Ct. App. 1971) ("[A]n incompetency adjudication creates a presumption of lack of testamentary capacity as to any will thereafter executed during the continuance of such adjudication."); *In re* Am. Bd. of Comm'rs for Foreign Missions, 66 A. 215, 226–27 (Me. 1906) (discussing presumption of testamentary incapacity); Nelson v. Nelson (*In re* Nelson), 891 S.W.2d 181, 188 (Mo. Ct. App. 1995) (noting statutory presumption of testamentary incapacity); *In re* Will of Maynard, 307 S.E.2d 416, 426–27 (N.C. Ct. App. 1983) (noting presumption of lack of testamentary capacity following imposition of guardianship); Taylor v. Garinger, 507 N.E.2d 406, 408 (Ohio Ct. App. 1986) (citing Kennedy v. Walcutt, 161 N.E. 336, 336–37 (Ohio 1928), *overruled by* Krischbaum v. Dillon, 567 N.E.2d 1291, 1297 & n.9 (Ohio 1991)) (discussing rebuttable presumption of testamentary incapacity); *In re* Estate of Lanning, 200 A.2d 392, 396 (Pa. 1964) (noting that burden of proving capacity shifts to proponent when testator had been adjudicated incompetent prior to will execution); Montes Family v. Carter (*In re* Estate of Ioupe), 878 P.2d 1168, 1172–73 (Utah Ct. App. 1994) (concluding that incompetency rating by Veterans Administration and resulting guardianship and conservatorships at least initially neutralized presumption of testamentary capacity; thus, proponent had burden to show by preponderance of the evidence that protected person had testamentary capacity).

Some courts have indicated that the presumption depends upon whether the basis for the guardianship is physical or mental. *Compare* Whitteberry v. Whitteberry (*In re* Estate of Whitteberry), 496 P.2d 240, 241 (Or. Ct. App. 1972) (refusing to apply presumption of testamentary incapacity when record did not indicate basis for imposition of guardianship), *with* Wood v. Bettis (*In re* Estate of Cooper), 880 P.2d 961, 962 (Or. Ct. App. 1994) (citing Ames v. Ames, 67 P. 737, 740 (Or. 1902); Gentry v. Briggs (*In re* Estate of Gentry), 573 P.2d 322, 325 (Or. Ct. App. 1978)) (noting rebuttable presumption of lack of testamentary capacity when guardianship was based on mental incompetence).

Some courts have noted that the presumption of testamentary capacity continues if the testator was under a voluntary guardianship. *Compare In re* Estate of Springer, 110 N.W.2d 380, 388 (Iowa 1961) (citing Olsson v. Pierson, 25 N.W.2d 357, 360 (Iowa 1946)) (finding no presumption of testamentary incapacity where the testatrix was under a voluntary guardianship), *with* Bierstedt v. Berninghaus (*In re* Estate of Bierstedt), 119 N.W.2d 234, 235 (Iowa 1963) (citing Ward v. Sears, 78 N.W.2d 545, 550 (Iowa 1956); Olson v. Olson, 46 N.W.2d 1, 12 (Iowa 1951); Willer v. Dohse (*In re* Willer's Estate), 281 N.W. 155, 157 (Iowa 1938)) (noting presumption of lack of testamentary capacity when guardianship resulted from petition filed by testator's three children).

Some states resolve the question statutorily. *See, e.g.*, LA. CIV. CODE ANN. art. 1482(C) (Supp. 2009) ("A limited interdict, with respect to property under the authority of the curator . . . is presumed to lack capacity to make or revoke a disposition *mortis causa*.").

36. 337 So. 2d 713 (Miss. 1976).

37. *Id.* at 714.

38. *See id.* (citing Lee v. Lee, 275 So. 2d 851 (Miss. 1973)).

upheld the validity of the will, but not the deed, although Lee had executed both documents on the same day.[39] The court found that the deed, unlike the will, required a capacity to contract that Lee lacked.[40]

When one challenges the validity of a contract entered into by an individual with alleged mental infirmities, courts often look for a baseline of reasonableness on the part of that individual: did he have a reasonable understanding of the transaction and did he act in a reasonable manner?[41] If he did not and the other party knew or should have known of the mental infirmity, courts typically conclude that the agreement is voidable.[42] In contrast, a will is unilateral and freely revocable; the testator may be the only one who knows of its existence until his death. Like Herbert Lee, many protected people have the capacity to execute a valid will while lacking the capacity to contract.[43]

The distinction between the capacity thresholds for wills and *inter vivos* gifts is less clear than that for wills and contracts. Enlightening case discussion is sparse. For an *inter vivos* gift that is irrevocable, some courts insist that the donor meet a moderately high threshold of capacity.[44] Although an irrevocable *inter*

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39. *Id.* at 714–15 (citing *Lee*, 275 So. 2d at 851).

40. *Id.* (citing *Lee*, 275 So. 2d at 851). Not all courts agree that a deed requires a capacity to contract. *See infra* notes 44, 51 (discussing disagreement over capacity standard concerning *inter vivos* transfers).

41. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1981) (treating contract as voidable if person "by reason of mental illness or defect (a) . . . is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) . . . is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition"); *see also* Farnum v. Silvano, 540 N.E.2d 202, 203–05 (Mass. App. Ct. 1989) (discussing contract in which purchaser knew of unfairness of the transaction and knew or had reason to know of seller's mental disability).

42. *See, e.g.*, Smith v. Osborn (*In re* Estate of Anderson), 671 P.2d 165, 169 (Utah 1983) (noting that statute made "sales, encumbrances, and transactions" by the protected person voidable but was silent on question of testamentary capacity).

43. *Cf.* Jones v. Kuhn, 650 P.2d 999, 1000–01 (Or. Ct. App. 1982) (holding that option contract entered into by protected person was void). The court noted that although the Oregon statutes specifically recognize that a protected person may have testamentary capacity, the statutes also specifically provide that "'a protected person for whom a conservator has been appointed cannot convey or encumber his estate or make any contract or election affecting his [sic] estate.'" *Id.* at 1000 (quoting OR. REV. STAT. § 126.223 (repealed 1995)).

44. *See In re* Null's Estate, 153 A. 137, 139 (Pa. 1930) ("[G]enerally speaking, it requires more business judgment to make a gift than to make a will, as the former is immediately active while the latter is prospective."). In a more recent opinion, a Pennsylvania superior court refused to apply the higher standard to an elderly donor who retained a life estate in the realty he conveyed to a relative. *See* Horner v. Horner, 719 A.2d 1101, 1104–05 (Pa. Super. Ct. 1998). Instead, the court viewed the conveyance as having *prospective* effect and thus concluded that testamentary capacity was the proper standard. *Id.* at 1105. The court's analysis is incorrect—at least concerning the effect of the transfer—because the donor did immediately deprive himself of important rights to the land by currently conveying the fully vested remainder to a relative.

Other cases favor a high or at least intermediate threshold of capacity. *See* Harrison v. City Nat'l Bank of Clinton, Iowa, 210 F. Supp. 362, 370–71 (S.D. Iowa 1962) ("A higher degree of mental capacity is required to execute an inter vivos conveyance or contract or to transact business generally, than is required in executing a will." (citing *In re* Estate of Ruedy, 66 N.W.2d 387, 392

vivos gift does not involve arm's length negotiations by putative antagonists, it does immediately and permanently deprive the donor of rights to assets she once owned.[45] Unlike a contract, the irrevocable *inter vivos* gift leaves the donor without consideration. To prevent an individual from improvidently giving away property that she might later need, applying a somewhat high capacity standard for irrevocable *inter vivos* gifts seems appropriate.[46]

In sum, courts evaluate capacity in context. State law clearly distinguishes the capacity test applicable to a respondent in a conservatorship proceeding from that applicable to a testator in a proceeding to challenge the testator's will. A protected person's lack of capacity to enter into contracts or to make irrevocable *inter vivos* gifts does not necessarily indicate her lack of testamentary capacity. Moreover, if the protected person has testamentary capacity, then she needs no one else to make, amend, or revoke her will even though a conservator is managing some or all of her assets.

(Iowa 1954); Van Dyke v. Benton County Bank & Trust (*In re* Van Dyke's Estate), 65 N.W.2d 63, 66 (Iowa 1954))); Whittemore v. Neff, No. 064348, 2001 WL 753802, at *6 (Conn. Super. Ct. June 11, 2001) (discussing creation of an *inter vivos* trust and concluding execution requires a higher contractual capacity standard); Hilbert v. Benson, 917 P.2d 1152, 1156 (Wyo. 1996) (citing *Harrison*, 210 F. Supp. at 370).

A concise view of the disparate views courts have espoused concerning capacity to make a gift is as follows:

> Some authorities hold that the test of mental capacity to be applied to a completed gift is the same as that to be applied to any other contract and not that of testamentary capacity. Others hold that capacity to contract is not required, but that it is sufficient if the donor is mentally competent to execute a will. Others have stated that the test is the donor's capacity to understand the nature and consequences of his act. Improvidence may be a factor in the determination of the mental capacity of the donor to make a gift.

38A C.J.S. *Gifts* § 13 (1996) (internal citations omitted).

Some opinions indicate that a donor needs only testamentary capacity for any *inter vivos* gift. *See, e.g.*, Hilco Prop. Servs., Inc. v. United States, 929 F. Supp. 526, 534 (D.N.H. 1996) ("[A] donor must possess sufficient mental capacity to make a valid gift and this capacity is measured by the standards governing testamentary capacity in will contests."); *In re* Estate of Clements, 505 N.E.2d 7, 9 (Ill. App. Ct. 1987) ("The test of a donor's mental capacity to make a gift is whether at the time of the transaction the donor had the ability to comprehend the nature and effect of his act."); *cf.* Saliba v. James, 196 So. 832, 835 (Fla. 1940) (citing 28 C.J. *Gifts* § 17 (1922)) (noting split of authority concerning capacity requirement for completed gifts).

45. *See* Everly's Adm'r v. Everly's Adm'r, 175 S.W.2d 376, 378 (Ky. Ct. App. 1943) (noting that a gift involves "no combativeness to obtain an advantage" and therefore requires a lesser threshold of capacity).

46. Some cases hold that even a voluntary conservatee cannot make *inter vivos* transfers of property without court approval. *See In re* Conservatorship of Marcotte, 756 P.2d 1091, 1094–95 (Kan. 1988); Citizens State Bank & Trust Co. of Hiawatha v. Nolte, 601 P.2d 1110, 1112–13 (Kan. 1979).

2. *Will Substitutes*

Many will substitutes do not deprive an individual of any assets.[47] Thus, like devises,[48] they may have no adverse financial impact upon the creator. For example, the individual who creates a Totten trust or a payable-on-death account maintains complete control over the trust or account assets.[49]

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47. Courts have also held that the capacity to execute a will is also the capacity required for a *gift causa mortis*, a will substitute. *See* Bagrowe v. Giannoulios (*In re* Estate of Vardalos), 320 N.E.2d 568, 571 (Ill. App. Ct. 1974). On capacity distinctions in the context of a voluntary guardianship, see *Nolte*, 601 P.2d at 1115. The *Nolte* court stated as follows:

> [W]e have concluded that a conservatee under a voluntary conservatorship cannot contract or deed away his property *inter vivos* without the prior approval of the conservator or, where required by statute, the approval of the district court. However, . . . he may make a testamentary disposition if the conservatee has testamentary capacity. In arriving at this conclusion, we are convinced that a contract rule would defeat the primary purpose of the voluntary conservatorship statute to dignify old age by eliminating, in many instances, the stigma of having the elderly person declared incapacitated or incompetent. Incapacity is a matter of degree. As all of us grow older, we gradually lose our faculties, both physical and mental. The longer we live and the older we become, the more we lose. If a voluntary conservatee, not mentally incapacitated, were to be given an unbridled power to contract or deed away his property *inter vivos,* the voluntary conservatorship would seldom be used, because the relatives of the elderly person, seeking to protect the loved one from his or her own actions, would of necessity, utilize the compulsory conservatorship procedure. Hence, the old folks would in most instances be required to spend their golden years branded as "incapacitated" or "incompetent."
>
> It also appears to us that, if a voluntary conservatee were given the power in his discretion to dispose of his property *inter vivos,* it is doubtful that any person would want to accept the position of conservator, since such a conservator, although given responsibilities and duties, would really have no control over the estate of his conservatee. This would be an extremely difficult, if not an impossible situation. We also note that such a holding would create a judicial exception, diminishing the broad powers of a conservator to control and manage the conservatorship assets provided for under the Kansas statutes. The Kansas legislature has not specifically granted a voluntary conservatee the power to contract or to incur debts while the conservatorship is in existence as is provided by the California statutes. If the legislature desires to make such an exception, it may do so.

Id.

48. Unless otherwise noted, the term *devise* in this Article broadly includes testamentary dispositions of realty and personalty.

49. *See* 9 C.J.S. *Banks & Banking* § 292 (2008) ("The owner retains sole ownership of a bank account having a payable-on-death designation." (citing Tipp v. Reinbrecht (*In re* Trust of Rosenberg), 727 N.W.2d 430, 443 (Neb. 2007))); 90 C.J.S. *Trusts* § 58 (2002) (citing Friedman v. Knable (*In re* Estate of Friedman), 97 Cal. Rptr. 653, 656 (Ct. App. 1971)) (noting that a Totten trust is a tentative trust, revocable at will of the depositor).

The same is true with changes made to payable-on-death accounts and Totten trusts. *See id.* Although these will substitutes spring from a contract with a bank, the ultimate beneficiary has merely an expectation until the death of the depositor. *See id.* At any moment prior to death, the depositor can revoke the accounts formally by closing them or informally by withdrawing the funds within them. *See* 9 C.J.S. *Banks & Banking* § 292 (2008) (citing *In re Trust of Rosenberg*, 727 N.W.2d at 443; *In re* Estate of Platt, 772 N.E.2d 198, 201 (Ohio Ct. App. 2002)); 90 C.J.S. *Trusts*

Just as the protected person may still possess the capacity to make, amend, or revoke a will, she may also possess the capacity to create certain will substitutes.[50] As previously suggested, courts have not always been consistent in addressing the capacity threshold for a person to make an irrevocable *inter vivos*

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§ 109 (2002). Thus, even when a court has concluded that a protected person has no power to contract, it may still recognize the individual's continued capacity to change beneficiary designations in such accounts because the changes do not deprive the individual of any assets currently. *See, e.g.*, Union Nat'l Bank of Wichita v. Mayberry, 533 P.2d 1303, 1307–08 (Kan. 1975) (distinguishing protected person's *inter vivos* dispositions from testamentary dispositions and upholding protected person's change in POD savings bond beneficiary designations); Miller v. Fischer (*In re* Estate of Oliver), 934 P.2d 144, 149–50 (Kan. Ct. App. 1997) (upholding a protected person's beneficiary changes on POD certificates of deposit, applying a standard of testamentary capacity).

In matters concerning will substitutes, such courts are likely to apply a lower threshold of capacity akin to that for testamentary dispositions generally. Some courts, however, have imposed a contractual standard. *See, e.g.*, SunTrust Bank, Middle Ga. v. Harper, 551 S.E.2d 419, 424–25 (Ga. Ct. App. 2001) (concluding that a ward could not change the beneficiary designation on his IRA account after a probate court established a guardianship that expressly removed the ward's power to make contracts and to enter into business or commercial transactions). In *Harper*, the ward attempted to change the beneficiary on his IRA and to name his son as the new beneficiary. *Id.* at 423. When the ward died, the son, who was also the ward's guardian, argued that the ward's act was testamentary in nature and should be recognized because the probate court had not removed the ward's power to make a will or examined his testamentary capacity during the guardianship proceeding. *Id.* The court of appeals disagreed, concluding that the change required capacity to contract and the probate court had determined that the ward lacked the capacity to contract in the guardianship proceeding. *Id.* at 424–25. For another example of a court imposing a contractual standard, see *Cason v. Owens*, 28 S.E. 75, 77 (Ga. 1897), where the court stated that an attempted change of beneficiary on a life insurance contract at a time when the insured lacks capacity to contract is null and void. Although the *Cason* court emphasized the insured's lack of capacity to contract at the time he attempted to change the beneficiary designation on his life insurance policy, *see id.* at 76–77, the facts suggest that the insured also lacked testamentary capacity. Most of the reported opinions concerning attempted changes of beneficiary designations discuss the mental competency of the insured generally and do not analogize the capacity threshold to that required for contracts or wills. *See, e.g.*, A.M.S., Annotation, *Avoidance on Ground of Fraud, Mistake, Duress, or Mental Incompetency of Otherwise Validly Effected Change of Beneficiaries of Insurance Policies*, 105 A.L.R. 950, 951 (1936) (discussing various cases and stating that "[i]t is clearly the general, if not universal, rule that if at the time he attempted to change the beneficiaries under an insurance policy, the insured was mentally incompetent, such attempted change is ineffective"). Yet the language of most of the opinions suggests that the lower threshold of testamentary capacity is appropriate, and at least some courts explicitly so state. *See, e.g.*, Goodale v. Wilson, 186 A. 876, 877 (Me. 1936) ("It is unquestioned that 'it requires no more mental capacity to change beneficiaries in a life insurance policy . . . than it does to make a will.'" (quoting McAllister v. Sec. Ben. Ass'n, 261 S.W. 343, 345 (Kan. City Ct. App. 1924); citing Grand Lodge, A.O.U.W. v. Brown, 125 N.W. 400, 403 (Mich. 1910))); *cf.* Kigar v. Mich. Conference Ass'n of Seventh-Day Adventists (*In re* Estate of Erickson), 508 N.W.2d 181, 183 (Mich. Ct. App. 1993) (discussing capacity requirement for changing the beneficiary designation on a life insurance policy and noting that the insured must "understand the business in which the insured was engaged[] to know and understand the extent of the insured's property, how the insured wanted to dispose of it, and who are dependent upon the insured" (citing Harris v. Copeland, 59 N.W.2d 70, 72 (Mich. 1953); *Grand Lodge*, 125 N.W. at 403)).

50. *See supra* notes 29–43 and accompanying text (discussing cases in which a protected person made will substitutes or changed beneficiary designations in such substitutes).

gift.[51] In contrast, increasingly it appears that the donor of a revocable *inter vivos* gift needs no greater capacity than that required to execute a will.[52]

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51. A number of cases indicate that contractual capacity is not required for an *inter vivos* gift. *See* Dixon v. Bradsher, 779 S.W.2d 727, 731 (Mo. Ct. App. 1989) (citing Flynn v. Union Nat'l Bank, 378 S.W.2d 1, 9 (Springfield Ct. App. 1964)) ("[T]he order of mental capacity required to make an inter vivos gift is the same as that required to make a will."); Cox v. Edwards (*In re* Conservatorship of Spindle), 733 P.2d 388, 390 (Okla. 1986) (citing Amado v. Aguirre, 161 P.2d 117, 119 (Ariz. 1945)) (indicating that a ward "of adequate mentality has the right to give away his property to whomsoever he wishes," even though by statute the ward was powerless to enter into a contract). However, a number of cases have indicated that contractual capacity is required for an *inter vivos* gift. *See* Lucas v. Frazee, 471 N.E.2d 1163, 1168 (Ind. Ct. App. 1984) (listing the donor's competence to contract among the elements for an *inter vivos* gift); *In re* Will of Goldberg, 582 N.Y.S.2d 617, 621 (Sur. Ct. 1992) (applying the contract standard to a husband's release of his wife from their antenuptial agreement); *In re* Null's Estate, 153 A. 137, 139 (Pa. 1930) ("[G]enerally speaking, it requires more business judgment to make a gift than to make a will, as the former is immediately active while the latter is prospective . . . ."); Landmark Trust (USA), Inc. v. Goodhue, 782 A.2d 1219, 1224 (Vt. 2001) (citing Burt v. Blair (*In re* Estate of Burt), 169 A.2d 32, 34 (Vt. 1961); Holton v. Ellis, 49 A.2d 210, 222 (Vt. 1946)) (distinguishing the capacity test for wills from that for *inter vivos* gifts, with the latter requiring that "the donor understands and comprehends in a *reasonable* manner the nature and effect of the gift" (emphasis added)). The *Goldberg* court observed the following:

> The authorities, which are replete with applications of the established rule with respect to testamentary capacity, are sparse as to the degree of mental capacity required for inter vivos activities that fall under the rubric of donative transfers, such as gifts, trusts and the type of transaction [release from an antenuptial agreement] presently before the court.

In re Will of Goldberg, 582 N.Y.S.2d at 618 (internal citations omitted).

For a general discussion of the capacity requirements to execute particular documents, see Frolik & Radford, *supra* note 9. Professors Frolik and Radford separate gifts in the form of will substitutes—in particular, the revocable trust—from irrevocable *inter vivos* gifts. *See id.* at 311–13. With regard to revocable trusts, they note that the position of the Uniform Trust Code, which requires only testamentary capacity, appears to depart from the standards suggested by some earlier case law. *See id.* at 311. With regard to irrevocable *inter vivos* gifts, however, they believe that "[i]t is clear from case law that the capacity to make a gift is the same as the capacity to enter into a contract." *Id.* at 312 (citing Bettin v. Comm'r, 543 F.2d 1269, 1271 (9th Cir. 1976); Wyman v. Dunne, 359 P.2d 1010, 1014–15 (Idaho 1961); Hill v. Brooks, 482 S.E.2d 816, 821 (Va. 1997)). At least one commentator has noted the differing capacity requirements among the courts for *inter vivos* gifts. *See* A. KIMBERLEY DAYTON ET AL., 3 ADVISING THE ELDERLY CLIENT § 32.11 (2009) ("Some courts have characterized donative capacity as a 'lower' degree of capacity than testamentary capacity, others have equated them, and at least one court has suggested that donative capacity is akin to contractual capacity.").

52. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (2003). The *Restatement (Third) of Property* provides the following rules concerning mental capacity:

> (a) A person must have mental capacity in order to make or revoke a donative transfer.
> (b) If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.
> (c) If the donative transfer is in the form of an irrevocable gift, the donor must have the mental capacity necessary to make or revoke a will and must also be capable of

The Uniform Trust Code (UTC) provides what is perhaps the best example of this trend. Section 602 of the UTC provides that *inter vivos* trusts are revocable unless the trust terms expressly provide otherwise,[53] and section 601 requires only that the settlor possess testamentary capacity to make, amend, or revoke the trust.[54] Applying the low threshold of testamentary capacity implicitly

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> understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor.

Id.

53. UNIF. TRUST CODE § 602(a) (amended 2005), 7C U.L.A. 546 (2006). The Uniform Trust Code (UTC) reverses the common law rule. *Id.* § 602 cmt. The UTC provides that "[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before [the effective date of this [Code]." *Id.* § 602.

54. *Id.* § 601, 7C U.L.A. at 545 ("The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."). The comment to the section states that the capacity standard for will making should apply because the "primary use of the revocable trust" is to "dispos[e] of property at death." *Id.* § 601 cmt. On the question of capacity in other trust settings, the comment further provides as follows:

> The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust.

Id. For a pre-UTC discussion of the capacity threshold for trust creation, see *In re Estate of Aronoff*, 653 N.Y.S.2d 844, 847 n.6 (Sur. Ct. 1996), and *In re Estate of ACN*, 509 N.Y.S.2d 966, 969 (Sur. Ct. 1986). In *Aronoff*, the court noted as follows:

> The level of capacity required to avoid set aside of a will is lower than that required to avoid set aside of an irrevocable trust on the same grounds. There appears to be no controlling authority as to which standard should apply to a revocable trust, although persuasive authority suggests that the will standard ought to apply to revocable trusts.

In re Estate of Aronoff, 653 N.Y.S.2d at 847 n.6 (citing RESTATEMENT (THIRD) OF TRUSTS § 11(2) (Tentative Draft No. 1, 1996)). Furthermore, in *ACN*, the court stated the following:

> Although there is no case which discusses the mental capacity necessary to execute a charitable remainder unitrust, it is well-settled that courts will apply the governing standards for analogous transactions. Petitioners argue that the standard to be applied is one of contract. Respondent claims that the analogous standard is that of making a will—a standard which requires less capacity than the execution of any other legal instrument. A will, by nature, is a unilateral disposition of property whose effect depends upon the happening of an event in futuro. A contract is a bilateral transaction in which an exchange of benefits, either present or deferred, is exchanged. A charitable remainder unitrust is a bilateral transaction between the settlor and trustee in which the settlor transfers a present interest in property in return for an annual fixed percentage of income based on the fair market value of the corpus (and a tax deduction). As such, it is more analogous to contract than to a will.

In re Estate of ACN, 509 N.Y.S.2d at 969 (internal citations omitted).

acknowledges that *inter vivos* revocable trusts and other tentative property transfers[55] most often function as direct alternatives to wills.[56]

3. *Limits on Judicial Power*

In conservatorship proceedings, modern courts attempt to maximize the autonomy of the protected person consistent with her best interests.[57] Before appointing a fiduciary, the court may—or must, in some states—explore whether options short of a court-appointed fiduciary can protect the individual needing management assistance.[58] To ensure that courts make individually-tailored conservatorship determinations that protect the individual but promote her autonomy, statutes increasingly require that the court specify both the factors

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55. Application of the testamentary capacity standard to will substitutes is not completely without danger. One should not forget that with many will substitutes, the donor does indeed deprive herself of rights or assets prior to death. For example, one can imagine settings in which the settlor with no more than testamentary capacity establishes a revocable *inter vivos* trust that makes substantial irrevocable distributions to third parties that permanently deprive her of assets she will almost certainly need for her own maintenance. Presumably the drafters of the UTC believed that the likelihood of such problems would be small. *See supra* note 54 (discussing section 601 of the UTC and its accompanying comment).

56. Changes in nontestamentary documents that bestow benefits at the protected person's death may require the conservator to obtain court approval. In *Southwick v. Leone (In re Estate of Leone)*, 860 P.2d 973 (Utah Ct. App. 1993), Catherine named her husband Tracy, her mother, and her daughter as beneficiaries on a life insurance policy. *Id.* at 974. Subsequently, she suffered a cerebral hemorrhage that left her comatose. *Id.* A settlement agreement appointed Tracy as her conservator. *Id.* When Tracy subsequently divorced Catherine, he requested that Catherine's brothers be appointed co-conservators. *Id.* at 974–75. Eleven months before Catherine's death, one of the brothers, acting as co-conservator, filed a change of beneficiary designation to eliminate Tracy from the life insurance policy. *Id.* at 975. When she died, however, the insurance company informed her family that the attempted change was ineffective without a court order. *Id.* A state statute specifically permitted a court to change beneficiaries of the protected person's life insurance policy as necessary to promote the best interests of the protected person. *Id.* at 977 (citing UTAH CODE ANN. § 75-5-408 (1992)). When Tracy claimed his share of the proceeds, the Utah Court of Appeals concluded that he remained a beneficiary at Catherine's death because the co-conservators had not asked a court to change the beneficiary designation during her life. *Id.* at 978.

57. *See, e.g.*, Nelson v. Nelson (*In re* Nelson), 891 S.W.2d 181, 187–88 (Mo. Ct. App. 1995) (discussing "least restrictive environment" principles incorporated into Missouri's conservatorship statutes); UNIF. PROBATE CODE § 5-409(b) (amended 2008), 8(II) U.L.A. 173 (Supp. 2009) ("[U]pon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person."). In *Nelson*, the court noted that the laws, combined with a clear and convincing standard of proof for demonstrating disability, "show[] a desire to defer in close cases to the dignity and personhood of the alleged incapacitated or disabled person rather than to take a strict paternalistic approach of utmost security." *In re Nelson*, 891 S.W.2d at 187.

58. *See, e.g.*, *In re* Guardianship of Braaten, 502 N.W.2d 512, 522–23 (N.D. 1993) (interpreting North Dakota conservatorship provision to preclude imposition of conservatorship on a woman who could not manage her estate by herself, but who was receiving adequate assistance from local workshop program).

necessitating a conservatorship and the powers that the court is transferring from the protected person to the conservator.[59] This "least restrictive alternative" approach clearly rejects the long and sad history of conservatorship cases in which judges summarily stripped individuals of virtually all rights without explanation or adequate investigation.[60]

On a fundamental level, the individual's ability to manage her assets is the most important determination in a conservatorship proceeding.[61] The judicial assessment of that ability requires the court to examine her capacity to contract and to make gifts.[62] A conservatorship is generally not an appropriate remedy for

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59. *See, e.g.*, *In re* Conservatorship of Lundgaard, 453 N.W.2d 58, 61–63 (Minn. Ct. App. 1990) (citing MINN. STAT. § 525.551(5) (1988)). In *Lundgaard*, the probate court concluded that the elderly respondent required a conservator. *Id.* at 60. On appeal, the court noted that a state statute mandated that the court imposing a conservatorship make specific written findings of fact supporting its conclusion. *Id.* at 63. The probate court, however, had merely used preprinted findings that tracked the definition of incapacity under state law. *Id.* at 61. The appellate court observed that "[f]indings which do not specifically address the necessary statutory factors, such as incapacitation, . . . do not comply with the statutory requisites for creation of conservatorships and appointment of conservators," and that "[f]uture use of such 'general,' conclusory findings will force this court to remand for findings consistent with the legislative mandate of specificity." *Id.* at 63.

60. Despite the widespread enactment of statutory reforms, old practices in guardianship and conservatorship proceedings die hard. In some places, they appear not to have died at all: courts simply ignore the procedural protections statutorily afforded to the alleged incapacitated person. *See, e.g.*, *In re* Conservatorship of Lundgaard, 453 N.W.2d at 63 (noting that the lower court did "not comply with the statutory requisites for creation of conservatorships and appointment of conservators"). Failure to provide procedural protection to the alleged incapacitated person may occur even in states that are generally well-known for respecting the rights of individuals. *See, e.g.*, Jeff Kelly et al., *Courts Strip Elders of Their Independence: Within Minutes, Judges Send Seniors to Supervised Care*, BOSTON GLOBE, Jan. 13, 2008, at A1 (noting that Massachusetts "judges routinely fast-track infirm elders into the care of guardians, often with little evidence to justify such wrenching decisions").

61. *See* Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 276 (1988) (noting that a conservatorship is appointed for one "'substantially unable to manage his own financial resources'"); *see also* UNIF. PROBATE CODE § 5-401 (amended 2008), 8(II) U.L.A. 164 (Supp. 2009) (requiring "clear and convincing evidence [that] the individual is unable to manage property and business affairs" for the appointment of a conservator). There is much room to debate what constitutes "ability to manage." Whatever the criteria adopted by a jurisdiction, however, management ability does play a driving role in determining whether an alleged incapacitated person needs a conservator.

62. *See* UNIF. PROBATE CODE § 5-401, 8(II) U.L.A. at 164. Section 5-401 provides as follows:

> [U]pon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this [part] in relation to the estate and affairs of:
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> . . . .
>
> (2) any individual, including a minor, if the court determines that, for reasons other than age:
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> (A) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate

the capable individual who makes management decisions that others may find objectively unreasonable.[63] A capable person may manage her assets as she sees fit.[64]

Yet even when bound by statute to impose the least restrictive alternative, courts in particular circumstances properly conclude that the respondent not only needs a conservator but also lacks capacity to contract or make irrevocable gifts.[65] A straightforward example is the individual who has no family or friends to act for her, who has no financial advance directive appointing an agent, and who is unable to act for herself because of severe cognitive impairment.

In contrast, in many circumstances conservatorship orders that merely place partial limits on contracting or donative powers serve the best interests of a protected person. In such cases, a court may grant the conservator general management powers over the protected person's assets and then direct the conservator to provide the protected person with a substantial allowance to spend or use completely as she wishes.[66] Alternatively, a court may remove only very

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> technological assistance, or because the individual is missing, detained, or unable to return to the United States; *and*
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> (B) by a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

Id. (emphasis added).

63. *Cf.* Smith v. Smith, 529 A.2d 466, 469–70 (Pa. Super. Ct. 1987) (citing *In re* Bryden's Estate, 61 A. 250, 251 (Pa. 1905)) (observing in dicta that people can use their estates as they wish, so long as they do so knowingly and voluntarily).

64. *See* UNIF. PROBATE CODE § 5-401, 8(II) U.L.A. at 164 (imposing a two-part test for entry of a protective order that does not allow an issuance or order merely because an individual makes objectively irresponsible management decisions); *cf.* Smith v. Smith, 397 S.W.2d 186, 196 (Tenn. Ct. App. 1965) (observing that illiterate, physically incapacitated, elderly woman perhaps suffering some mental deterioration did not need a conservator when she was still able to select an agent to act on her behalf).

65. *See, e.g.*, Stewart v. Bush (*In re* Conservatorship of Stallings), 523 So. 2d 49, 53 (Miss. 1988) ("Some persons are so incapable of handling their affairs that a conservator must be charged to do everything."); *see also* UNIF. PROBATE CODE § 5-410(a)(2), 8(II) U.L.A. at 174 (stating that court may exercise "all the powers over the estate and business affairs of the protected person which the person could exercise if the person were an adult, present, and not under conservatorship or other protective order"); UNIF. PROBATE CODE § 5-407(b)(3) (amended 2008), 8(II) U.L.A. 386 (1998) (providing a partial list of powers a court may appropriate in conservatorship proceeding, including the powers "to make gifts" and "to enter into contracts").

66. *See, e.g.*, *In re Conservatorship of Stallings*, 523 So. 2d at 52–53 (approving lower court order for conservator to establish a checking account for protected person for her sole use as she wished, with a balance of up to $2,000, to be replenished by conservator when it fell below $500); Nelson v. Nelson (*In re* Nelson), 891 S.W.2d 181, 187–88 (Mo. Ct. App. 1995) (increasing ward's allowance from $250 to $2,500 per month but affirming lower court's conclusion of disability as to financial matters). In *Nelson*, the appellate court acknowledged the lower court's concern about the protected person's ability to enter into contracts, particularly those involving "significant" amounts of money. *In re Nelson*, 891 S.W.2d at 187. The court also acknowledged, however, Missouri's

specific contracting or donative powers from the protected person, leaving her with other powers that help preserve her sense of self-worth and reduce the stigma associated with protected status.[67]

The modern statutory imposition of the least restrictive alternative approach, when respected by courts, reduces overbroad grants of power to conservators.[68] In theory, courts should be much more reluctant to deprive the protected person of all power to contract and make gifts.[69] Yet even in the bad old days when judges routinely gave the conservator full management powers over the assets of the protected person, one very important donative power lay beyond the realm of transfer: the power to will. Following traditional probate rules, judges, legislators, and legal scholars agreed that the protected person's right to devise is too personal to permit another to exercise.[70]

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statutory "least restrictive environment" principle and concluded that the larger allowance would contribute to the protected person's sense of dignity. *Id.* at 187–88.

67. *See, e.g.*, *In re* Conservatorship of Nelsen, 587 N.W.2d 649, 650–52 (Minn. Ct. App. 1999). In *Nelsen,* the court order required that the conservator "'[a]pprove or withhold approval of any contract, except for necessities, which the conservatee [protected person] may make or wish to make.'" *Id.* at 651 (alteration in original). Later the protected person attempted to retain an attorney to oppose the conservator's proposed sale of her property. *Id.* at 650. The attorney also sought removal of the conservator. *Id.* After the district court denied the conservator's proposal of sale, the attorney sought attorney fees. *Id.* Subsequently, the attorney withdrew from representation, and a second attorney filled in for the first. *Id.* The second attorney also later sought fees. *Id.* The court upheld the conservator's motion to deny the attorney fees because the conservator had not approved the purported attorney–client contract between the attorneys and the protected person. *Id.* at 651–52. Because of the conservatorship order, no attorney–client relationship existed between the attorneys and the protected person. *Id.* at 652. The court found that other safeguards for the protected person existed in the conservatorship statutes even if she could not unilaterally establish an attorney–client relationship to protect herself against the conservator. *Id.* at 651.

Under modern principles, the conservatorship order will often transfer only certain properties to the conservator, leaving the ward in full control of other properties. *See* Bryan v. Century Nat'l Bank, 498 So. 2d 868, 871–72 (Fla. 1986) (noting that it is essential to distinguish "which property has been placed under the guardian's control" and that capacity determination under Florida law differs in voluntary and involuntary guardianship proceedings); *see also supra* note 66 (discussing allowances for protected person).

68. *But see* Barnes, *supra* note 10, at 2, 4–13 (observing that the impact of guardianship proceedings upon the elderly has largely remained unchanged, despite statutory reforms). Professor Barnes cites numerous studies and statistics to show that the reformers' recommendations at the Wingspread conference in 1988 and the Wingspan conference in 2001 have largely gone ignored in actual guardianship proceedings involving the elderly, even though many of the procedural recommendations are now included in statutory directives to judges. *Id.* at 4–13.

69. *But see id.* (providing disheartening statistics about effects of attempted reforms).

70. *See* UNIF. PROBATE CODE § 5-407(b)(3) (amended 2008), 8(II) U.L.A. 386 (1998) (withholding from the supervising court the power to make a will for a protected person); *cf.* Hart v. Garrett (*In re* Estate of Garrett), 100 S.W.3d 72, 76 (Ark. Ct. App. 2003) (observing that a principal cannot transfer the power to make a will through a power of attorney, durable or otherwise, because the power is too personal); *In re* Estate of Runals, 328 N.Y.S.2d 966, 976 (Sur. Ct. 1972) ("[T]he right to make a will is personal to a decedent. It is not alienable or descendable.").

Not surprisingly, one still commonly finds state conservatorship statutes that employ the language of the pre-1998 version of the UPC.[71] This language permits a court to invest the conservator with "all the powers over the estate and business affairs which the person could exercise if present and not under disability, *except the power to make a will*."[72] Moreover, because the threshold

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71. *See* Bartusch v. Hager (*In re* Estate of Dion), 623 N.W.2d 720, 727 (N.D. 2001) (citing N.D. CENT. CODE § 30.1-29-08(2)(c) (1996)).

72. UNIF. PROBATE CODE § 5-407(b)(3), 8(II) U.L.A. at 386 (emphasis added). The subsection in its entirety reads as follows:

> After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the Court, for the benefit of the person and members of the person's immediate family, has all the powers over the estate and business affairs which the person could exercise if present and not under disability, *except the power to make a will*. Those powers include, but are not limited to, power to make gifts; to convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety; to exercise or release powers held by the protected person as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment; to enter into contracts; to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life of the protected person; to exercise options of the protected person to purchase securities or other property; to exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value; to exercise any right to an elective share in the estate of the person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer.

Id. (emphasis added). For examples of decisions incorporating language based on this provision, see *Bartusch v. Hager (In re Estate of Dion)*, 623 N.W.2d 720, 727 (N.D. 2001) (citing N.D. CENT. CODE § 30.1-29-08(2)(c) (1996)); *In re Bo*, 365 N.W.2d 847, 853 (N.D. 1985).

Statutes modeled on the 1969 UPC language or otherwise expressly denying the court—or conservator—the power to make a will include the following: ALA. CODE §§ 26-2A-136(b)(3), -152(a), -154 (LexisNexis 1992); ALASKA STAT. § 13.26.200(3) (2008); ARIZ. REV. STAT. ANN. § 14-5408(A)(3) (2005); DEL. CODE ANN. tit. 12 § 3901(e) (2007); D.C. CODE ANN. § 21-2055(b)(2) (LexisNexis 2008); IDAHO CODE ANN. § 15-5-408(b)(3) (2009); ME. REV. STAT. ANN. tit. 18-A § 5-408(3) (1964); MICH. COMP. LAWS ANN. § 700.5407(2)(c) (West 2002); MONT. CODE ANN. § 72-5-421(3) (2007); NEB. REV. STAT. § 30-2637(3) (2008); N.J. STAT. ANN. § 3B:12-49 (West 2007); N.M. STAT. ANN. § 45-5-402.1(B)(3) (LexisNexis 2004); N.D. CENT. CODE § 30.1-29-08(2)(c) (1996); OR. REV. STAT. § 125.025(7) (2007); S.C. CODE ANN. § 62-5-408(3)(a) (2009); UTAH CODE ANN. § 75-5-408(1)(c) (1993).

A Wisconsin statute provides that a guardian appointed for a married person may not "make, amend or revoke a will" for that person. WIS. STAT. ANN. § 54.20(2)(h) (West 2008). The statute does not specifically address the power of a guardian to make a will for an unmarried ward; however, the statute does require court approval for the guardian to make gifts from a ward's estate. § 54.20(2)(a). One infers that, because a guardian's power to make a will does not appear among those powers requiring court approval, the guardian has no such power in Wisconsin. *See* § 54.20(2). Surely the Wisconsin legislature did not intend to permit a guardian to make a will for a ward without court approval. If so, it would stand alone in its approach. *Cf.* Michael S.B. v. Berns (*In re* Guardianship of Stanley B.), 540 N.W.2d 11, 16 (Wis. Ct. App. 1995) (noting that under Wisconsin statute, guardians of married wards have additional rights).

In light of the historically pervasive prohibition against proxy will making, it is not surprising that some state statutes take the prohibition for granted. From their silence on the topic of proxy will making, one infers that the historical prohibition remains in place. *See, e.g.*, ARK. CODE ANN. § 28-65-308(b) (2004) (empowering courts to authorize gifts by guardians without discussing

courts' power to authorize proxy will making); CONN. GEN. STAT. ANN. § 45a-655(e) (West 1958) (discussing court-authorized transfers from the conserved person's gifts and other *inter vivos* transfers, yet remaining silent on the matter of proxy will making); GA. CODE ANN. § 29-5-23(a)(9) (2007) (empowering conservator to examine the will, but stating nothing about conservator's power to amend or revoke); *id.* § 29-5-23(c)(10) (allowing conservator to engage in "estate planning," which is defined elsewhere in the code as *inter vivos* transfers and actions); IND. CODE ANN. § 29-3-8-2(b) (LexisNexis 2000) (discussing a guardian's power to make gifts and disclaimers but not mentioning proxy will making power); IOWA CODE ANN. § 633.576 (West 2003) (stating broadly that a court may authorize a conservator to do "any . . . thing that the court determines is in the ward's best interests"); KAN. STAT. ANN. § 59-3078(f)(9) (2005) (limiting the power of a conservator to make gifts); KY. REV. STAT. ANN. §§ 387.680–.700 (LexisNexis 1999) (describing powers and duties of the conservator); LA. CODE CIV. PROC. ANN. art. 4566 (Supp. 2009) (discussing curator's management of interdict's affairs); MD. CODE ANN., EST. & TRUSTS § 13-203(c) (LexisNexis 2001) (giving courts the power to make distributions or authorize guardian to make distributions); MISS. CODE ANN. § 93-13-38(4)(a) (2004) (providing courts with the power to authorize *inter vivos* distributions from the estate of the ward); MO. ANN. STAT. § 475.094 (West 1992) (permitting court authorization of gifts for federal estate tax purposes from disabled protected person's estate).

Although Florida generally adheres to the common law prohibition on proxy will making, its statutes do contain a limited but important exception. *See* FLA. STAT. ANN. § 744.441(18) (West Supp. 2009). The exception permits the guardian to execute a codicil in very limited circumstances for tax purposes. *Id.* The codicil provision, added to the statute in 1980, provides as follows:

> When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in s. 736.1201), but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending said will to obtain the maximum charitable deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under such will.

Id. Illinois also has a statutory exception that permits amendment for tax purposes. *See* 755 ILL. COMP. STAT. ANN. 5/11a-18(a-5)(11) (West 2007). The statute provides that the court may authorize the guardian to "modify[] by means of codicil or trust amendment the terms of the ward's will or any revocable trust created by the ward, as the court may consider advisable in light of changes in applicable tax laws." *Id.* Although this language is broader than that of the Florida statute quoted above, it is substantially tempered by additional language that states, "The ward's wishes as best they can be ascertained shall be carried out, *whether or not tax savings are involved.*" *Id.* 5/11a-18(a-5) (emphasis added).

New Hampshire's broad statute reads as follows:

> (I) The probate court may authorize the guardian of the estate to make lifetime gifts and/or to plan for the testamentary distribution of the ward's estate consistent with the ward's wishes. If the ward's wishes cannot be ascertained, the probate court may authorize the guardian of the estate to plan for the testamentary distribution of the ward's estate in order to minimize taxation or to facilitate distribution of the ward's estate to family, friends, or charities who would be likely recipients of gifts from the ward.
>
> . . . .
>
> (II) The guardian of the estate shall petition the probate court for authorization to make lifetime gifts and/or to plan for the testamentary distribution of the ward's estate. . . .
>
> . . . .
>
> (III) Before authorizing the guardian to make lifetime gifts or to plan for the testamentary distribution of the ward's estate, the probate court must find, by a preponderance of the evidence, that the proposed gifts and/or testamentary

of testamentary capacity is so low and a protected person's abilities may fluctuate widely during her conservatorship, appellate courts have noted that trial courts cannot enter a conservatorship order stating that the protected person *henceforth* lacks capacity to execute a will.[73]

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plan are consistent with the ward's wishes or, based on the circumstances as they then exist, that:

(a) The testamentary distribution of the ward's estate will minimize taxation and/or facilitate distribution of the ward's estate to family, friends, or charities who would be likely recipients of gifts from the ward.

N.H. REV. STAT. ANN. § 464-A:26-a (LexisNexis 2007). For an interpretation of this statute, see *In re Guardianship of Phuong Phi Thi Luong*, 951 A.2d 136, 145–46 (N.H. 2008) (citing § 464-A:26-a), where the court indicates implicitly that the statute gives probate courts the power to approve a guardian's proposed will for a ward's estate but affirms the lower's court conclusion that the distribution in the guardian's proposed wills was not supported by a preponderance of the evidence.

Note that while the language of the pre-1998 UPC appears to limit the court's power only with regard to will making, a review of judicial decisions indicates that the powers a court may exercise through a conservator are perhaps not truly that broad. In *In re Bo*, 365 N.W.2d 847 (N.D. 1985), a county court used extremely broad language in the conservatorship order that appeared to give the conservator complete powers over the estate except for the power to make a will. *Id.* at 853. Nonetheless, when the conservator attempted to terminate a revocable trust at the protected person's request, the county court concluded that the order did not give the conservator such power. *Id.* at 853–54. Moreover, the supreme court upheld the county court's finding that the protected person himself lacked the capacity to revoke the trust. *Id.* at 852. The trust thereby remained effective with its local beneficiaries intact, even though the protected person had moved to another state. *Id.* at 848–49; *cf.* Gonzales v. Garcia (*In re* Guardianship and Conservatorship of Garcia), 631 N.W.2d 464, 469 (Neb. 2001) ("Where there is no statute outlining a court's powers related to modification or revocation of a trust agreement, authorities have generally noted that only the settlor may amend, modify, or revoke a trust.").

73. *See, e.g.*, Nelson v. Nelson (*In re* Nelson), 891 S.W.2d 181, 188 (Mo. Ct. App. 1995) (reversing parts of a lower court's judgment imposing restrictions on a ward's attempts to execute a will); Smith v. Osborn (*In re* Estate of Anderson), 671 P.2d 165, 169 (Utah 1983) (citing Cerny v. First Nat'l Bank (*In re* Estate of Kidd), 479 P.2d 697, 699 (Ariz. 1971)) (stating that "the power to make a will belongs to the testator and is not subject to veto power of the courts"). The *Anderson* court concluded that the lower court had exceeded its statutory power by issuing an order during the protected person's lifetime that attempted to void her testamentary dispositions. *In re Estate of Anderson*, 671 P.2d at 169; *cf. In re Estate of Kidd*, 479 P.2d at 699 (noting in a case not involving a conservatorship that a testator's power to make a will is not subject to judicial veto power). Oklahoma does not deny the potential testamentary capacity of a protected person, but it does impose an unusual and significant limitation upon its exercise. *See* OKLA. STAT. ANN. tit. 84, § 41(B) (West Supp. 2009). The Oklahoma statute provides as follows:

B. The appointment of a guardian or a conservator does not prohibit a person from disposing of his estate, real and personal, by will; provided, that when any person subject to a guardianship or conservatorship shall dispose of such estate by will, such will must be subscribed and acknowledged in the presence of a judge of the district court. The judge before whom the will is subscribed and acknowledged shall attest to the execution of the will but shall have neither the duty nor the authority to approve or disapprove the contents of the will. Subscribing and acknowledging such will before a judge shall not render such will valid if it would otherwise be invalid.

Id. The Oklahoma Supreme Court upheld this provision in *Urban v. Urban (In re Estate of Lahr)*, 744 P.2d 1267, 1270 (Okla. 1987).

4. Court-Authorized Gifts

Despite the traditional prohibition against the transfer of testamentary powers—and perhaps in large part because of that prohibition—courts have long authorized conservators to make *inter vivos* distributions from the estate of the protected person.[74] The principles governing judicial authorization of lifetime gifts from the estate of the protected person developed over the nineteenth and twentieth centuries.[75] By the last decades of the twentieth century, state conservatorship statutes often recognized and elaborated upon this judicial power.[76] Prior to the promulgation of such statutes, courts of equity often—but not always—found that they possessed the inherent power to authorize these lifetime distributions from the protected person's estate under the doctrine of substituted judgment.[77]

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74. *See* Strunk v. Strunk, 445 S.W.2d 145, 147–48 (Ky. Ct. App. 1969) (discussing the development of substituted judgment in England and the United States in the first half of the nineteenth century).

75. *See id.* The *Strunk* court noted as follows:

> The English courts have apparently taken a broad view of the inherent power of the equity courts with regard to incompetents. Ex parte Whitebread (1816), 2 Mer. 99; 35 E.R. 878 L.C. holds that courts of equity have the inherent power to make provisions for a needy brother out of the estate of an incompetent. This was first followed in this country in New York, In the Matter of Willoughby, a Lunatic, 11 Paige 257 (NY 1844). The inherent rule in these cases is that the chancellor has the power to deal with the estate of the incompetent in the same manner as the incompetent would if he had his faculties. . . .
>
> . . . .
>
> The right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward. The doctrine has been recognized in American courts since 1844.

Id. Before authorizing substantial gifts from the protected person's estate by the conservator, however, courts first consider the present and future needs of the protected person. *See, e.g.*, Kinney v. First Nat'l Bank N.D. (*In re* Conservatorship of Kinney), 495 N.W.2d 69, 72 (N.D. 1993) (holding that the lower court could authorize an institutional conservator to sell the home of a protected person even though the sale would require removal of her recently bankrupt son and his family and rejecting the son's request for charitable assistance from the estate because the first concern was for the protected person and her estate was insufficient to provide for her needs without the sale).

76. *See, e.g.*, TENN. CODE ANN. § 34-1-122 (2007) (allowing courts to authorize gift programs from disabled people's estates if they had established gift programs before their disabilities); *see also supra* note 72 (discussing various state statutes, including those that specifically empower a court to authorize *inter vivos* distributions without permitting proxy will making). Increasingly, the doctrine of substituted judgment has been applied to medical decisions for the incapacitated person. For one court's view of the propriety of this usage, see *Guardianship of Doe*, 583 N.E.2d 1263, 1267–68 (Mass. 1992), which discusses the use and expansion of the substituted judgment doctrine in the context of medical treatment.

77. *See, e.g.*, *Strunk*, 445 S.W.2d at 149 (concluding that despite the absence of statutory authorization, the court had inherent equitable power to apply the doctrine of substituted judgment to an incompetent individual in the context of medical treatment); *In re* Trusteeship of Kenan, 138 S.E.2d 547, 548, 554 (N.C. 1964) (citing *In re* Flagler, 224 N.Y.S. 30, 31 (Sup. Ct. 1927); *Ex parte*

Historically, courts developed the doctrine of substituted judgment to further the presumed intent of the incapacitated person.[78] Courts applying the doctrine in the traditional manner authorize distributions from the incapacitated individual's estate when they believe that the individual would make such distributions if capable.[79] Had the law of substituted decision-making evolved in a logical, uniform manner, substituted judgment decisions would have remained true to the presumed wishes of the now-incapacitated person.[80] In other words, decision-makers would act not from their own values or those of a third party but rather from the values held by the protected person when not incapacitated.

Whitbread, (1816) 35 Eng. Rep. 878, 879 (Ch.)) (noting that the court could authorize *inter vivos* distributions based on a showing that the incompetent person probably would have made such distributions if competent). Prior to the advent of modern statutes, courts often required that gifts be limited to the surplus income of the estate. *See, e.g.*, Sheedy v. Hatch (*In re* Hall's Guardianship), 187 P.2d 396, 402 (Cal. 1947) (citing *In re* Brice's Guardianship, 8 N.W.2d 576, 579 (Iowa 1943); 25 AM. JUR. *Guardian and Ward* § 79 (1940)) (recognizing the possibility of gifts from the surplus of the estate to further the presumed wishes of the incompetent person). Courts in some jurisdictions, however, found or suggested that they had no power at all to deviate from statutory provisions concerning the estates of incompetents. *See* Christiansen v. Christiansen (*In re* Guardianship of Christiansen), 56 Cal. Rptr. 505, 512 (Ct. App. 1967) (listing opinions from various jurisdictions where courts have found statutes to be controlling).

78. *See Strunk*, 445 S.W.2d at 147–48 (discussing the traditional view of substituted judgment). Substituted judgment in its traditional form now generally provides the starting point for healthcare decision-making for an incapacitated individual. *See, e.g.*, Guardianship of Doe, 583 N.E.2d at 1267 (applying the doctrine of substituted judgment to determine medical treatment decision). As Lawrence Frolik has noted in a cogent article on the role of guardians, conservators, agents, and surrogates, substituted judgment "has not yet completely triumphed in regards to property-management decisions." Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON. L. REV. 53, 66 (2007) (citing *Strunk*, 445 S.W.2d at 148). Professor Frolik notes that courts tend to use substituted judgment when the issue is whether to spend or give away the protected person's property; in contrast, courts tend to use a best interest test when the issue is investment decisions. *Id.* at 66. To this observation, one might also note that California has largely turned the traditional doctrine of substituted judgment on its head. The result, as discussed in the text above, is that California judges are authorized to employ a best interest or reasonable person test under the guise of substituted judgment. *See* Wells Fargo Bank v. Keresey (*In re* Conservatorship of Estate of Hart), 279 Cal. Rptr. 249, 252 (Ct. App. 1991) (citing *In re Guardianship of Christiansen*, 56 Cal. Rptr. at 521–22).

79. For a brief history of the early development of substituted judgment in England and the United States, see *Strunk*, 445 S.W.2d at 147–48 (citing *In re* Willoughby, 5 Paige Ch. 126, 127 (N.Y. Ch. 1844); *Ex parte* Whitbread, 35 Eng. Rep. at 879), which notes early opinions employing what came to be called substituted judgment and defines it as "the power to deal with the estate of the incompetent in the same manner as the incompetent would if he had his faculties." *Strunk* observes that the doctrine "is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward." 445 S.W.2d at 148. *But see* Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 34–35 (1990) (indicating that in all prior cases the substituted judgment doctrine had applied only to individuals who had been competent at one time and stating that the court "had no basis whatsoever for its claim that . . . [the] legal fiction was broad enough to 'cover all matters touching on the well-being of the ward'" (citing *Strunk*, 445 S.W.2d at 148)). In recent decades, the use of substituted judgment in matters of death and dying has become increasingly important. *See id.* at 35–55 (discussing doctrine and its use in various cases).

80. *See supra* note 79 (discussing traditional application of substituted judgment doctrine).

Although the historical meaning of substituted judgment is still the prevailing one, it is no longer the only one. Today, some courts and legislatures employ a so-called "substituted judgment" doctrine that authorizes gifts from the protected person's estate in the absence of evidence concerning what the person would have done.[81] In California, courts are empowered to use substituted judgment to authorize such gifts even when evidence may indicate that the individual would not have made those gifts.[82] These courts authorize a gift so

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81. For early cases taking the substituted judgment doctrine in this new direction, see *In re Guardianship of Christiansen*, 56 Cal. Rptr. at 522–23, where the court discusses limits of the traditional substituted judgment test, and *In re Myles' Estate*, 291 N.Y.S.2d 71, 72 (Sup. Ct. 1968) (quoting *In re Guardianship of Christiansen*, 56 Cal. Rptr. at 522), where the court approves of the reasonably prudent man standard. The *Christiansen* opinion contains an exhaustive overview of court-ordered distributions from an incompetent person's estate. *See In re Guardianship of Christiansen*, 56 Cal. Rptr. at 511–22. It observes that the traditional interpretation—"requiring evidence of past conduct or practice"—is "too narrow." *Id.* at 520. The opinion later states the following:

> Whether termed a liberal subjective rule or an objective rule tempered and supplemented by evidence of the incompetent's former practices and conduct, the commentators are practically all in agreement that, as suggested seventy years ago, the guardian should be authorized to act as a reasonable and prudent man would act under the same circumstances, unless there is evidence of any settled intention of the incompetent, formed while sane, to the contrary.

Id. at 521 (internal citation omitted). Later California opinions increasingly emphasize the reasonable prudent person standard. *See In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 252 (citing *In re Guardianship of Christiansen*, 56 Cal. Rptr. at 521); *infra* notes 123–24 and accompanying text (discussing cases).

In some cases of proposed *inter vivos* estate planning by the conservator, courts have developed tests that include various objective factors along with a subjective test that requires the conservator to show that there is no substantial evidence that the protected person, as a reasonably prudent person, would not have made the proposed gifts if competent. *See, e.g.*, *In re* Keri, 853 A.2d 909, 914 (N.J. 2004) (citing *In re* Trott, 288 A.2d 303, 307 (N.J. Super. Ct. Ch. Div. 1972)) (discussing such a test). In some jurisdictions, however, the reasonable person standard can now trump the express wishes of the protected person. *See, e.g.*, Cecil v. Netcharu (Conservatorship of Estate of McDowell), 23 Cal. Rptr. 3d 10, 14–15 (Ct. App. 2004) (noting that the California substituted judgment statute essentially "'permits the court to substitute its judgment for that of a conservatee'" (quoting *In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 251)), *overruled on other grounds by* Bernard v. Foley, 47 Cal. Rptr. 3d 248, 264 n.14 (2006); *see also infra* notes 122–23 and accompanying text (discussing modern California law).

82. *See, e.g.*, *In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 252 (concluding that California precedent did not require traditional application of substituted judgment but rather permitted "*substitution* of the court's judgment for that of the incompetent person"). In *Hart*, the conservator proposed to make *inter vivos* distributions to minimize estate taxes. *Id.* at 254–55. One of the protected person's children objected, alleging in part that his mother had never been motivated by tax considerations. *Id.* at 255. The court emphasized that the important concern was "what a reasonably prudent person in the [protected person's] position would do now." *Id.* at 264. Later, the court stated that it viewed the relevant statute as reaffirming "the principle that the question in substituted-judgment proceedings is not what the [protected person] would do but rather what a reasonably prudent person in the [protected person's] position would do." *Id.* For a case in which a court approved an estate plan even though the protected person's wishes were not clear, see *In re Jones*, 401 N.E.2d 351, 354–55 (Mass. 1980), where the court authorizes a conservator to establish two charitable trusts with a protected person's assets where the protected person was

long as a reasonably prudent person would make that gift under the circumstances.[83] In such cases, only the name of the doctrine remains; this newer approach largely or totally discards the traditional principles of substituted judgment in favor of an objective standard.[84] In essence, it appears that courts and legislatures taking this newer approach are relying heavily—if not completely—on a traditional best interest test but calling it substituted judgment.[85]

Used properly, an objective approach to decision-making by a conservator can undoubtedly benefit a protected person and her estate. For example, such an approach can maximize the estate by allowing the court to approve estate plans

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intestate and had no known expectant heirs. The *Jones* court noted that the protected person was unlikely to recover sufficient capacity to execute a will and that she had made charitable gifts, though small, in the past. *Id.* at 355.

83. *See, e.g.*, *In re* Guardianship of Larson, 738 N.Y.S.2d 827, 829 (Sur. Ct. 2002) (authorizing the transfer of a disabled adult's inheritance to a device similar to a supplemental needs trust under the doctrine of substituted judgment, which inquires "'as to what a reasonable and prudent person would do in the circumstances'" (quoting *In re* Petition of Daly, 536 N.Y.S.2d 393, 395 (Sur. Ct. 1988)), *superseded by statute*, N.Y. MENTAL HYG. LAW § 81.21 (McKinney 2006), *as recognized in In re* Pflueger, 693 N.Y.S.2d 419, 423 (Sur. Ct. 1999))). In cases such as *Larson*, courts properly use a reasonable prudent person standard when the individual neither expressed his wishes nor ever had the ability to express his wishes. *See id.* The question becomes what is in the best interest of such an individual since there is no basis for employing substituted judgment in its historical sense.

84. *See, e.g.*, Conservatorship of Jackson, 721 A.2d 177, 178–80 (Me. 1998) (upholding a conservator's transfer of a protected person's home to his adult, disabled son). In the *Jackson* conservatorship proceeding, the conservator had informed the court that it intended to convey a remainder interest in the protected person's home to the protected person's adult, disabled son. *Id.* at 178. The court appointed the conservator "without limitation." *Id.* The conservator later learned that its plan would make the protected person ineligible for Medicaid, so the conservator transferred the property outright to the son. *Id.* When other children of the protected person objected to the transfer, the court concluded that the conservator had acted within its powers, even if the transfer was considered to be a gift. *Id.* at 179–80.

85. The Supreme Judicial Court of Massachusetts explained the traditional meaning of substituted judgment and its expanded application to scenarios in which the court has no basis for inferring the incapacitated person's desires:

> The judge . . . must try to identify the choice "which would be made by the incompetent person, if that person were competent, taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person."
>
> Lack of a prior expressed intention . . . does not bar use of the doctrine of substituted judgment. We recognize that in situations in which there is an attempt to use substituted judgment for a never-competent person, it is a legal fiction. . . . "While it may . . . be necessary to rely to a greater degree on objective criteria [in the case of a never-competent person] . . . the effort to bring the substituted judgment into step with the values and desires of the affected individual must not, and need not, be abandoned."

Guardianship of Doe, 583 N.E.2d 1263, 1267–68 (Mass. 1992) (alteration in original) (internal citations omitted) (explaining substituted judgment in the context of medical decision-making for an incompetent person). For a court's explanation of how New Jersey statutes reconcile the best interest standard with the common law equitable doctrine of substituted judgment, see *In re Keri*, 853 A.2d 909, 913 (N.J. 2004).

that minimize taxes even though the incapacitated person failed to express any views about tax savings while capable.[86] The use of an objective approach in such a setting does not conflict with the protected person's known or probable wishes. In contrast, an approach that authorizes a judge's view of reasonableness[87] to trump the protected person's wishes is a dangerous one.[88] Such an approach permits the law to distinguish among similar estate plans based on whether the property owner is currently under a conservatorship: a court must respect and fulfill the objectively unreasonable wishes of the property owner who retains functional management capacity[89] but can impose what it believes is a "better" plan on the property owner who becomes a protected person.[90] True, the two asset owners are situated differently following the onset of the latter's incapacity when the latter may not be able to act for herself. Yet the assumption that a court knows what estate plan is best for the incapacitated person—and may impose a plan that is contrary to her expressed desires while capable—is enough to give each of us pause.

In sum, a best interest determination can, and indeed should, play an important role in some judicially-approved estate plans.[91] Conservatorship law

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86. *See* Strange v. Powers, 260 N.E.2d 704, 709 (Mass. 1970) ("There is no reason why an individual, simply because he happens to be a ward, should be deprived of the privilege of making an intelligent commonsense decision in the area of estate planning, and in that way forced into favoring the taxing authorities over the best interests of his estate."); *infra* notes 101–04 and accompanying text (discussing UPC proxy will making provision and commentary noting that its use will probably be to minimize estate taxation). *But cf.* Michael S.B. v. Berns (*In re* Guardianship of Stanley B.), 540 N.W.2d 11, 17 (Wis. Ct. App. 1995) (refusing to allow a guardian's proposed gifts from the estate of a wealthy, elderly widower to avoid taxes, concluding that it had no statutory authority and refusing to adopt principles of substituted judgment where not authorized by the legislature).

87. *See supra* notes 81–82 and accompanying text (discussing California case law interpreting its statute to make the reasonably prudent person standard the most important component of substituted judgment).

88. *See, e.g.*, Wells Fargo Bank v. Keresey (*In re* Conservatorship of Estate of Hart), 279 Cal. Rptr. 249, 252, 264 (Ct. App. 1991) (observing that what a reasonably prudent person in the protected person's position would do is more important than what this protected person would do).

89. *See, e.g.*, Bauer v. Bosser (*In re* Bauer's Estate), 59 N.W.2d 481, 483 (Wis. 1953) (observing that where testator is competent, "'[i]t is not the business of courts to undo what an old person may have done with his property, because of judicial notions of propriety or moral obligation . . . , or the wishes of relatives, however deserving'" (quoting Boardman v. Lorentzen, 145 N.W. 750, 756 (Wis. 1914))).

90. *Cf.* Cline v. Larson (*In re* Estate of Stack), 383 P.2d 74, 79 (Or. 1963) ("[T]he law of wills . . . does not create for testators a standard such as a reasonably prudent person, and demand that all testators and their wills conform to it. Each is left free to do with his property as he wishes provided his disposition of it does not run afoul of other legal principles.").

91. When an individual was born and remains severely incapacitated, no basis may exist for inferring what she would have done if competent. As courts have noted, however, it is unfair to deny the individual the benefit of objectively beneficial estate planning merely because she is incapacitated. *See, e.g.*, *In re* Keri, 853 A.2d 909, 920 (N.J. 2004) ("So long as the law allows competent persons to engage in Medicaid planning, incompetent persons, through their guardians, should have the same right, subject to the legal constraints laid out herein."). In these situations, the law may necessarily resort to a best interest test incorporating a reasonable person standard. The

should acknowledge that determination for what it is, however, and should not view it as a component—much less the controlling component—of substituted judgment.[92] The law would be far less muddy—and far more historically accurate—if substituted judgment decisions remained true to the wishes or probable wishes of the protected person, on the one hand, and if best interest decisions reflected the wishes of the hypothetical reasonable person, on the other. Best interest decisions would continue to be proper when little or no evidence exists concerning the protected person's probable wishes.[93]

As we shall see, the UPC proxy will making statute emphasizes the preeminence of the protected person's wishes but does not neglect the potential importance of objective factors in proper settings.[94]

III. PROXY WILL BY CONSERVATOR

A. Dangers and Opportunities

In light of estate planning alternatives available to judges, conservators, protected persons, and protected persons' families, one might argue that the old probate rule still makes sense: state legislatures do not need to repose potential will making powers in persons other than the testator.[95] A protected person who possesses testamentary capacity is free to execute a will and is often capable of creating various will substitutes.[96] A protected person who lacks testamentary

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alternative of relegating the protected person to default rules that harm her estate would seem to defeat the conservator's mandate to protect the estate.

92. In fact, the California Court of Appeals did not combine the traditional substituted judgment doctrine together with a reasonable prudent person test into a single doctrine called "substituted judgment." *See* Christiansen v. Christiansen (*In re* Guardianship of Christiansen), 56 Cal. Rptr. 505, 522–23 (Ct. App. 1967). The *Christiansen* court simply and appropriately noted that the traditional substituted judgment doctrine was too narrow to address adequately all of the potential needs of a protected person. *Id.* at 520–21. Moreover, it did not conclude that the decisions of a reasonably prudent person in the protected person's position are more important than the decisions this protected person herself would have made if she had retained capacity. *Id.* at 525. Unfortunately, cases like *Hart* expanded and twisted the *Christiansen* holding. *See In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 252–53.

93. *See supra* note 81 and accompanying text (discussing proper use of best interest and prudent person test).

94. *See infra* note 101 (providing pertinent language from UPC).

95. *See supra* notes 47–56, 74–85 and accompanying text (discussing the use of court-approved *inter vivos* transfers and will substitutes to accomplish the protected person's wishes). A Georgia statute recognizes that guardians may seek to engage in covert estate planning with alternatives to *inter vivos* transfers and will substitutes. *See* GA. CODE ANN. § 29-4-23(b)(3) (2007). By changing the protected person's domicile, the guardian may be able to change the estate distribution significantly—particularly if the protected person is intestate. *See e.g.*, *id.* (indicating that a court is to consider the inheritance and succession ramifications of a guardian's proposed change of the ward's domicile).

96. *See, e.g.*, Dixon v. Bradsher, 779 S.W.2d 727, 731 (Mo. Ct. App. 1989) ("[T]he order of mental capacity required to make an inter vivos gift is the same as that required to make a will." (citing Flynn v. Union Nat'l Bank of Springfield, 378 S.W.2d 1, 9 (Mo. Ct. App. 1964))).

capacity often will have her presumed wishes accomplished through *inter vivos* property arrangements—most likely in the form of will substitutes—that her conservator can make under existing statutes and case law.[97]

Nonetheless, settings do exist in which a will, not a will substitute, is what the protected person now lacking testamentary capacity needs or would have desired. A proxy will making power permits the conservator to amend the protected person's will to reflect the changes in beneficiary or estate status that would have caused the protected person to amend the will. A proxy will making power also permits the conservator to correct substantive mistakes in the protected person's will or mistakes in its execution. A proxy will itself can be a simpler and cheaper solution than an *inter vivos* trust or other estate planning alternative. A proxy will can also allow a protected person to exercise a testamentary power of appointment.

Importantly, a proxy will can be a simple, direct means of avoiding the default rules of inheritance law that might distribute the protected person's estate in ways that would defeat her wishes. For example, consider the mother whose will leaves her estate to an adult son. She later develops severe dementia and is placed under a conservatorship. She has no testamentary capacity. As her death approaches, her son becomes insolvent. Applicable state law will not permit him to disclaim the devise.[98] Unless her conservator takes action quickly, the devise to the son will ultimately go to the hands of his creditors. Evidence indicates that the mother, if capable, would have executed a new will in this setting to disinherit the son and substitute his children as beneficiaries. If execution of a simple will is the most expedient and least costly solution to this problem, why should a conservator not be able to accomplish directly by will precisely what the protected person would have accomplished had she retained testamentary capacity?[99]

Permitting conservators to make, amend, or revoke a will for the protected person is a logical step forward from the current practice that permits conservators to engage in *inter vivos* estate planning through will substitutes.[100]

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97. *See supra* Part II.B.2–4 (discussing will substitutes and court authorization of *inter vivos* distributions). If the jurisdiction follows the traditional view of substituted judgment, these *inter vivos* property arrangements should be consistent with the views of the protected person, if those views are known. *See supra* notes 78–79 and accompanying text.

98. For statutes barring an insolvent individual from disclaiming under state law, see FLA. STAT. ANN. § 739.402(2)(d) (West Supp. 2009) and MASS. GEN. LAWS ANN. ch. 191A, § 8(2) (West 2004).

99. *See In re* Keri, 853 A.2d 909, 920 (N.J. 2004) ("So long as the law allows competent persons to engage in Medicaid planning, incompetent persons, through their guardians, should have the same right, subject to the legal constraints laid out herein.").

100. One can argue that the next step in this progression is to permit a will to be executed postmortem. In fact, the idea may not be as unpalatable as it initially sounds. For those troubled by the thought of after-death wills, however, one can draw rational lines to distinguish and prevent the postmortem will. Most importantly, a protected person is necessarily a living person. Thus, the will executed by her conservator is in no sense a postmortem will and does not violate the historical rule that a will cannot be executed by or for a dead person. Moreover, the law has always recognized

Both practices assist in accomplishing the probable intent of the protected person. Yet expanding the conservator's role from *inter vivos* planning to will execution, amendment, or revocation is a step that state legislatures should take carefully. Because the will is the traditional instrument through which we provide for our loved ones at death, the will holds a unique and revered position in our collective psyche. We acknowledge the many circumstances in which we know with certainty what an incapacitated person would have wanted in her will, but still we fear the misuse of a proxy will making power.

To address that fear, proxy will making statutes must detail and circumscribe the proxy will making power. If proxy will making statutes maximize the probability of accomplishing the protected person's testamentary desires and minimize the danger of third party overreaching and abuse, the proxy will will gain public support and emerge as another effective estate planning tool.

B. Substituted Judgment

Section 5-411 of the UPC gives the conservator the power to "make, amend, or revoke the protected person's will," but only "[a]fter notice to interested persons and upon express authorization of the court."[101] The requirements of notice and express court authorization are the most significant procedural limitations upon the conservator seeking to use his proxy will making power.[102]

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that as long as the protected person is living, the possibility exists that the person may regain testamentary capacity, even if the person is currently comatose or in a persistent vegetative state. *See* UNIF. PROBATE CODE § 5-411(c)(6) (amended 2008), 8(II) U.L.A. 175 (Supp. 2009).

101. *Id.* § 5–411. The UPC provision states, in pertinent part, as follows:

> (a) After notice to interested persons and upon express authorization of the court, a conservator may:
>
> . . . .
>
> (7) make, amend, or revoke the protected person's will.
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> (b) A conservator, in making, amending, or revoking the protected person's will, shall comply with [the State's statute for executing wills].
>
> (c) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained. The court shall also consider:
>
> (1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;
>
> (2) possible reduction of income, estate, inheritance, or other tax liabilities;
>
> (3) eligibility for governmental assistance;
>
> (4) the protected person's previous pattern of giving or level of support;
>
> (5) the existing estate plan;
>
> (6) the protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and
>
> (7) any other factors the court considers relevant.

Id.

102. This language implicitly requires notice not only to all persons interested in the estate of the protected person, but also to the protected person herself. *See id.* Even in the absence of this

In response to a conservator's request to execute a will in the protected person's behalf, the court "shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained."[103] This consideration makes clear that the traditional form of substituted judgment should be the principal factor guiding the court. Thus, decisions are based "primarily" on the probable wishes of the individual in question and not upon those of a generic reasonable person.[104]

The statute provides a list of secondary considerations to guide courts.[105] Several of these considerations are implicit elaborations of the traditional substituted judgment doctrine. Like the substituted judgment doctrine, these factors substantially limit a conservator's ability to put forth a plan to which the protected person, if capable, might object. For example, in deciding whether to authorize a conservator's proposed will, the court must consider the protected person's "existing estate plan."[106] This consideration should raise serious judicial concern over the proxy will if the conservator proposes to deviate substantially from an earlier estate plan. If the protected person is likely to regain capacity, she is at least partly protected by the statutory directive that the court consider "the probability that the conservatorship will terminate before the protected person's death."[107] Seldom would a court properly authorize a conservator to execute a will for a person who is most likely only temporarily incapacitated. The court is also to consider "the protected person's previous pattern of giving or level of support."[108] Indeed, most courts currently consider all of the preceding factors when authorizing *inter vivos* distributions from the protected person's estate.[109] Not surprisingly, the UPC uses these factors for both *inter vivos* and proxy will plans.[110]

The statute implicitly acknowledges that a protected person's failure to execute a will when she possessed testamentary capacity rarely reflects her knowledge or approval of the state intestacy statute. The conservator's proxy will making power provides the protected person with the opportunity to avoid the default distribution of intestate succession when such a distribution would defeat her probable intent. Allowing her fiduciary to exercise her will making power under principles of substituted judgment acknowledges her continuing

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statutory directive, common law fiduciary principles would require that the conservator notify the protected person of any proposed change in her estate plan.

103. *Id.* § 5-411(c).

104. *Id.* § 5-411 cmt., 8(II) U.L.A. at 176.

105. *Id.* § 5-411(c), 8(II) U.L.A. at 175.

106. *Id.* § 5-411(c)(5).

107. *Id.* § 5-411(c)(6).

108. *Id.* § 5-411(c)(4).

109. *See id.* § 5-411 cmt., 8(II) U.L.A. at 176.

110. *Id.* § 5-411(a)–(c), 8(II) U.L.A. at 175 (providing one list of consideration factors not only for proposed will, but also for trust creation, certain *inter vivos* gifts, exercise of elective share, disclaimer of inheritance, and so forth).

worth as a human being.[111] Of course, a court should make a demanding inquiry before approving a conservator's proposed will that discriminates significantly against or among the natural objects of the protected person's bounty. In proper circumstances, however, principles of substituted judgment could justify disinheritance of family members from whom the protected person was and has remained emotionally and financially estranged.[112]

The UPC explicitly directs a court to consider "the financial needs of . . . individuals who are in fact dependent on the protected person for support."[113] Although this consideration is stated objectively (and not as part of the substituted judgment doctrine), this concern for dependents probably coincides with the concerns of the typical protected person.[114]

The statute also mandates that a court consider the "possible reduction of income, estate, inheritance, or other tax liabilities" resulting from the proposed will.[115] This is yet another objective factor that reflects a concern that the protected person probably would have had.[116] The comment to the statute observes that "the authority confirmed by [the statute] will most often be used to minimize tax liabilities."[117] It is a rare individual who does not desire to maximize her estate by tax avoidance. Even if the person has not expressly stated such a desire while having testamentary capacity, one assumes she would not oppose a will or estate plan that provides more for the objects of her bounty.

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111. Although most individuals first encountering the idea of a proxy will making power are immediately concerned about an overreaching conservator, in fact, the power creates substantial questions for the conservator in a state where such power exists. *See* 7A JOHN W. GRUND & J. KENT MILLER, COLORADO PRACTICE SERIES: PERSONAL INJURY PRACTICE § 39.27A (2d ed. Supp. 2008). For example, under what circumstances *must* a conservator petition for a proxy will? Can the conservator's failure to do so result in personal liability?

112. Thus, a court should be very reluctant to approve a proxy will if the estrangement between the protected person and the person to be disinherited was caused or aggravated substantially by the conservator or others who would take under the will. A court should be similarly reluctant to approve a proxy will if either the conservator or the will beneficiaries isolated the protected person or otherwise unreasonably prevented the disinherited person from establishing or reestablishing a relationship with the protected person.

113. UNIF. PROBATE CODE § 5-411(c)(1), 8(II) U.L.A. at 175.

114. Nonetheless, this objective concern could in fact conflict with the protected person's probable desires in some cases. If the protected person had a dependent child for whom he had no emotional ties—a not unusual scenario with noncustodial parents of nonmarital children or children of divorce—the protected person might well choose to disinherit the child. If substituted judgment is the most important factor in guiding the court, then the court could approve the proposed proxy will disinheriting the dependent child. While the result is socially unfortunate, it conforms to the statutory directive and accomplishes what the protected person would do had he retained testamentary capacity.

115. UNIF. PROBATE CODE § 5-411(c)(2), 8(II) U.L.A. at 175.

116. *But see* Wells Fargo Bank v. Keresey (*In re* Conservatorship of Estate of Hart), 279 Cal. Rptr. 249, 264 (Ct. App. 1991) (containing an allegation by a protected person's son that his wealthy mother "'was primarily concerned with non-tax types of issues'" and that tax considerations had not influenced her when she was competent).

117. UNIF. PROBATE CODE § 5-411 cmt., 8(II) U.L.A. at 176.

Finally, the statute directs the court to consider "any other factors the court considers relevant."[118] This catchall provision, like some of the other secondary factors expressly listed for judicial consideration, may include concerns that parallel those under the substituted judgment doctrine.

As previously discussed, the UPC statute is fashioned so that when an expressly listed objective factor is at odds with the decision the protected person would have made, the court's principal concern is for the latter.[119] Wording the statute in this manner substantially reduces the concern that courts might veer from the traditional use of substituted judgment towards a bastardized use that substitutes the judgment of a reasonable person for that of the individual whose assets are in question.[120]

In fact, this bastardized use has found acceptance in some places. California's legislature and courts have taken the lead in flipping traditional substituted judgment on its head.[121] Under the rubric of "substituted judgment," California has elevated the judge's view of reasonableness over the probable desires of the particular individual whose estate is in question.[122] Although

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118. *Id.* § 5-411(c)(7), 8(II) U.L.A. at 175.

119. *See id.* § 5-411(c).

120. *See id.*

121. *See* 4 THOMAS C. TAYLOR, JR., CALIFORNIA TRANSACTIONS FORMS: ESTATE PLANNING § 19:32 (1999) (citing *In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 264) ("[I]n the final analysis, the question in substituted judgment proceedings, including those concerned with making a will for the conservatee, is not what the conservatee would do, but rather what a reasonable person in the conservatee's position would do."). The California statutes themselves do not mandate this interpretation. *See* CAL. PROB. CODE §§ 2580, 2583 (West 2002). In fact, the statutes seem to contemplate that a traditional application of substituted judgment will be the governing factor in most cases. *See id.*

The California statute delegating a will making power to conservators under court supervision is section 2580, which provides, in pertinent part, as follows:

> (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:
>
> . . . .
>
> (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.
>
> (3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse or domestic partner), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.
>
> (b) The action proposed in the petition may include, but is not limited to, the following:
>
> (1) Making gifts of principal or income, or both, of the estate, outright or in trust.
>
> . . . .
>
> (13) *Making a will.*

Id. § 2580 (emphasis added). The criteria under which courts are to evaluate a proposed action are listed in section 2583 of the California Probate Code. *See id.* § 2583. Although the criteria may appear weighted in favor of traditional substituted judgment, the reported opinions from California courts interpret the statute otherwise. *See infra* notes 122–23 (discussing California case law on substituted judgment).

122. *See* Cecil v. Netcharu (Conservatorship of Estate of McDowell), 23 Cal. Rptr. 3d 10, 14–15 (Ct. App. 2004) (noting that the California substituted judgment statute essentially "'permits the

California's statutory language concerning substituted judgment does not completely ignore the wishes of the protected person, the reported case law bluntly states that the court's principal concern is that a proxy will reflect the goals of a "reasonably prudent person" in the protected person's position.[123] The result is that California's approach relies far more on an objective best interest determination than on a traditional, subjective substituted judgment determination.

The principal purpose of a proxy will making power should be to further the probable testamentary desires of the incapacitated person, not to thwart them. To gain widespread public approval, statutes recognizing proxy wills must rely first and foremost on traditional substituted judgment principles. A best interest or reasonableness inquiry should play a secondary role—for example, when the protected person's probable desires are unknowable and yet her existing estate plan (or lack thereof) will render clearly unfortunate results.[124] Under

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court to substitute its judgment for that of a conservatee'" (quoting Wells Fargo Bank v. Keresey (*In re* Conservatorship of Estate of Hart), 279 Cal. Rptr. 249, 251 (Ct. App. 1991))), *overruled on other grounds by* Bernard v. Foley, 47 Cal. Rptr. 3d 248, 264 n.14 (2006). The *McDowell* court also quoted *Hart*'s observation that "'[t]he question in substituted-judgment proceedings is not what the conservatee would do but rather what a reasonably prudent person in the conservatee's position would do.'" *Id.* at 15 (quoting *In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 264). Although the California Supreme Court subsequently disapproved of the *McDowell* court's interpretation of a statutory term ("care custodian"), the state high court did not discuss substituted judgment. *See* Bernard v. Foley, 47 Cal. Rptr. 3d 248, 264 & n.14 (2006) (citing *Conservatorship of Estate of McDowell*, 23 Cal. Rptr. 3d at 21). For another example of a California court's use of this type of substituted judgment, see *Conservatorship of Estate of Kane*, 40 Cal. Rptr. 3d 378, 379–80 (Ct. App. 2006), which notes that under the substituted judgment doctrine, lower courts have the authority to authorize special needs trusts for protected persons and to substitute their judgment for the protected person's under an "objective prudent-person standard."

123. Thus, the California courts have indicated that, if a reasonable person would be concerned about tax minimization, the protected person's will should reflect that concern even though the protected person showed no interest in tax matters when the person possessed testamentary capacity. *See In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 264 (noting that the overriding statutory concern is what a reasonably prudent person in the protected person's position would do, not what this particular protected person would do); *see also* Thomas A. Pasquesi, *Estate Planning for Disabled Adults: The Legal Framework*, 94 ILL. B.J. 242, 243 & n.8 (2006) (citing Christiansen v. Christiansen (*In re* Guardianship of Christiansen), 56 Cal. Rptr. 505 (Ct. App. 1967); *Ex parte* Whitbread, (1816) 35 Eng. Rep. 878 (Ch.)) (noting that *Christiansen* became the basis for using the reasonably prudent person standard in the substituted judgment analysis and that this "shift is based not upon on *Whitbread*"). Pasquesi states bluntly, "Regardless [of the California development] . . . , an individual's right of 'self-determination' . . . remains sacrosanct and therefore the societal reasonable person standard does not presently appear to apply in Illinois." *Id.* at 243 n.8.

124. For example, a person born with severe cognitive impairment may never be able to express her desires. In most states, she is relegated to die intestate. Even under the modern UPC approach, her conservator would have no real basis for exercising substituted judgment in its original form because it would be impossible to know what she would have wanted had she been competent. Under a best interest test, however, the conservator—with court approval—could draft a will reflecting what a reasonably prudent person would want under these circumstances. The best interest alternative is important, for it may be that the generic rules of intestate succession would provide unpalatable results in some cases. One might imagine a protected person who is cared for

California's perversion of substituted judgment, the court-approved proxy will may be a document that is hardly personal to the testator. Instead, the testator's unique desires are sacrificed to the judge's view of reasonableness.[125] Such an approach represents a seismic shift from the historical purpose of wills law in the United States.

C. Opting Out, Opting In

Current proxy will making statutes are silent on an individual's ability to opt out of the provision. In light of the UPC's implicit directive that the court shall primarily be guided by traditional principles of substituted judgment,[126] a court could not easily disregard a capable person's clear indication that she did not want a conservator to have her will making power. To quell any lingering concern of testators who oppose proxy wills, the drafters could amend the statute to indicate explicitly that a capable individual may, by a writing executed in compliance with the statute of wills, deprive a court of the power to authorize a proxy will.

An "opting out" provision, however, may not be the best way to fashion a statute that empowers a court to authorize a proxy will. No formal studies

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by a cousin for her entire life. The protected person also has a paternal half-sibling who never once visited or showed any interest in her. Yet the half-sibling, not the cousin, is the heir apparent of the protected person. Would not a reasonable person want the protected person's estate to pass to the only family member who cared for her? Would it not be in the protected person's best interest to provide for the cousin? Proxy will making statutes would permit such a will based on a best interest determination when there is little or no basis for a substituted judgment.

125. The extent to which California courts would intentionally ignore the clear but objectively unreasonable testamentary wishes of a protected person is not clear. Most cases emphasizing the objective nature of California's substituted judgment approach apparently are concerned with proposed *inter vivos* distributions from the protected person's estate to reduce estate taxes. *See, e.g.*, *In re Conservatorship of Estate of Hart*, 279 Cal. Rptr. at 252 (quoting *In re Guardianship of Christiansen*, 56 Cal. Rptr. at 522–23) (discussing proposed *inter vivos* transfers by conservators to minimize estate taxes). Most individuals wish to avoid estate taxes, even if they have never clearly expressed such an opinion to family members, lawyers, or estate planners. Courts authorizing such distributions based on a reasonable person standard will rarely, if ever, thwart the probable testamentary desires of the protected person, at least if the *inter vivos* distributions are to those named in her will or to those who are objects of her bounty.

If the California legislature truly views substituted judgment as first and foremost an inquiry into reasonableness under all circumstances, however, then courts should have no difficulty in approving a conservator's request to revoke or amend the protected person's existing will that disinherits her child or that greatly distinguishes among her children. Regardless of the protected person's wishes, existing will provisions may be removed if they would be unreasonable in the eyes of an objective, prudent person. The result is that the document may be someone's "will," but it is not truly the last "will and testament" of the protected person. Yet, its new provisions will apply to her estate. It seems likely that few of us would want a court to have a power to substitute its judgment for our own as to what is reasonable concerning our will distributions.

126. *See* UNIF. PROBATE CODE § 5-411(c) (amended 2008), 8(II) U.L.A. 175 (Supp. 2009); *see also supra* notes 78–79 and accompanying text (discussing historical application of substituted judgment).

indicate whether most individuals want a judge to be able to approve a proxy will in the event of their incapacity.[127] In fact, it seems very likely that most people do not want judges to have such power. If this is indeed the majority view, then the default position of a proxy will making statute should not place upon that majority the burden of opting out. Instead, a proper default rule would permit a court to authorize a proxy will for the individual who opts in.[128] A capable individual could opt in by a provision in her will or by other properly executed documents indicating her wish for the court to have such power. Moreover, an opt-in approach could allow the testator to indicate the circumstances under which a judge should have the power to authorize a proxy will for her.[129]

D. Revocation of the Proxy Will

If a court terminates the conservatorship of a protected person during her lifetime, is her proxy will revoked? If a protected person remains under a

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127. *See generally* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 (2009) (providing an excellent analysis of the testamentary problems created by "timeworn" legislation). Continuing his study of and contribution to the default rule literature, Professor Hirsch observes that data is needed to inform inheritance law:

> [I]n every situation where theory warrants intervention to effectuate probable intent, we need data to guide our course. Some data are available today, but we must have more. Without data to inform our law, we are flying blind and cannot tell how far off target our hunches and conjectures are carrying us.

Id. at 656.

128. The problem is summarized succinctly by Professor Hirsch. *See id.* at 617 & n.37 (noting the "structural contradiction" in *mandatory* rules that purport to carry out substantive intent while not permitting an individual to opt out and arguing that *default* rules should ordinarily be based on the "majoritarian" view).

129. Detractors of the opt-in approach might argue that it returns us almost precisely to the problems we faced when no one else could make, amend, or revoke an individual's will. In other words, their fear would be that an individual would not opt in because she fails to anticipate future circumstances in which she might want a conservator to have a will making power. But this fear assumes that lawmakers and drafters of model statutes know better than the individual what is good for her. In fact, many an individual will execute her estate plan long before death and fail to update it despite continued capacity and circumstances that would cause a reasonably prudent person to amend those plans. Reasonably prudent people may think her failure to act unfortunate, but we recognize that the choice is hers. Until empirical studies show that most individuals would want a conservator to have their will making power, the stronger argument seems to favor the opt-in approach. The principal cost of this approach would be that of informing individuals of their ability to grant a proxy will making power. The cost would be minimal for individuals whose estate plans are drafted by lawyers (who are presumed to know the applicable probate laws and inform their clients appropriately); the cost would be greater to educate those who form their estate plans (if they do so at all) without the assistance of lawyers.

A third alternative, lying between the extremes of opting out or opting in, is to adopt a rule that provides the conservator a limited proxy will making power (under court authorization) to maximize the value of the estate, but that permits a protected person to grant the conservator additional will making authority in a document properly executed while she possessed testamentary capacity.

conservatorship but possesses or regains testamentary capacity following the execution of her proxy will, is the proxy will affected? The UPC does not answer these questions.[130]

A valid proxy will executed by a conservator should remain effective following the termination of the conservatorship unless the former protected person subsequently amends or revokes that will. Fiduciary principles and modern respect for a protected person's autonomy indicate that, to the extent possible, a conservator should keep the protected person abreast of the conservator's will making plans during the conservatorship.[131] The conservator should also seek the protected person's input.[132] Thus, in many instances the protected person will be aware of the proxy will *during* the existence of the conservatorship. At the very latest, the former protected person should learn of the proxy will by the final accounting incident to the termination of her conservatorship.[133] In either case, the former protected person having testamentary capacity can make an informed decision to ratify or reject the proxy will. Her inaction, combined with knowledge of the proxy will, would be tantamount to ratification.[134]

As previously discussed, the law evaluates the capacity to manage one's assets and the capacity to make a will with different tests.[135] If the protected person has testamentary capacity while under the conservatorship, then of course she may make, amend, or revoke her will without the assistance of the conservator or a judge. Similarly, if while under a conservatorship she regains testamentary capacity and executes a will following a court-approved proxy will, her later executed will should be effective even if the conservatorship continues

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130. The UPC does, however, require the court to consider the probability of early termination of the conservatorship when ruling on the conservator's proposed proxy will. UNIF. PROBATE CODE § 5-411(c)(6) (amended 2008), 8(II) U.L.A. 175 (Supp. 2009).

131. *See supra* notes 101–02 and accompanying text (discussing requirement of UPC statute that an interested person be given notice of a conservator's proposal to make, amend, or revoke the protected person's will and observing that common law fiduciary duties would seem to require the conservator to seek the protected person's input to the extent practicable).

132. *See* UNIF. PROBATE CODE § 5-411 cmt., 8(II) U.L.A. at 176 ("The protected person's personal values and expressed desires . . . are to be considered when making decisions."); *supra* notes 101–10 and accompanying text (discussing the statutory requirements of the UPC).

133. Because the UPC statute requires notice to interested persons when the conservator proposes to make, amend, or revoke the protected person's will, *id.* § 5-411(a), 8(II) U.L.A. at 175, the protected person will in fact have received notice at that time. Depending upon the severity of incapacity, however, she may not be able to understand the consequences of the conservator's proposed actions when she receives that notice. When the conservatorship is terminated, however, she should understand the consequences of the conservator's actions. A copy of the will should be delivered to her at the time of the conservatorship's termination and final accounting.

134. If, however, the conservatorship is terminated and the former protected person died never knowing or never having reason to know of the proxy will, a court might reasonably refuse to probate the will. Alternatively, heirs or beneficiaries under an earlier will might have a reasonable basis for a will contest.

135. *See supra* notes 25–35 and accompanying text (discussing the distinction between the capacity standards for executing a will and for imposition of a conservatorship).

until her death.[136] If she regains testamentary capacity and does not execute a new will despite having knowledge of the proxy will, then the proxy will should be probated.

IV. PROXY WILL BY AGENT

In some instances, a protected person will have both a conservator and an agent acting under a durable power of attorney. When the conservator and agent are not the same person and their views conflict, the final subsection of UPC section 5-411 provides that "absent a court order to the contrary, a decision of the agent takes precedence over that of a conservator."[137] It seems unlikely that a court would issue an order favoring a conservator's decision to make, amend, or revoke a protected person's will without carefully considering the views of the protected person's agent who is acting in good faith. If the views of the conservator and the agent coincide, the court may have little difficulty in granting the conservator's request. If their views diverge, however, the court may have substantial difficulty in determining the proper course of action. The view of an agent acting in good faith may be particularly compelling because the agent was personally selected by the protected person and presumably is in the best position to know what the protected person would desire.

In fact, often a primary purpose for the appointment of an agent under a durable power of attorney is the principal's hope to avoid a conservatorship and the judicial interference in her affairs that must inevitably accompany that conservatorship. Thus, an important question in this new world of proxy wills is whether a capable principal can grant her will making power to her agent. A California statute expressly denies the principal the ability to grant such a

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136. This result, which seems to be mandated by traditional wills law, could lead to estate distributions that reasonably prudent persons would find objectionable. For example, a court might permit a conservator to execute a carefully drafted will that minimizes taxes for the estate of a protected person who lacks testamentary capacity. Subsequently, the protected person regains testamentary capacity but not the capacity required to terminate the conservatorship. The protected person then executes a simple holographic will "revoking all prior wills" and including distributive provisions that deviate substantially from the proxy will and that do nothing to minimize estate taxes. It appears that a court supervising the conservatorship would be powerless to prevent the protected person from executing such a will under these circumstances. A probate court is bound to uphold the subsequently executed will if it satisfies the applicable statute of wills and the testator had capacity at the time of execution. *See supra* note 73 and accompanying text (noting that a court supervising a conservatorship cannot declare that the protected person has no power to execute a will).

137. UNIF. PROBATE CODE § 5-411(d), 8(II) U.L.A. at 175. The final subsection of 5-411 provides in its entirety as follows:

> Without authorization of the court, a conservator may not revoke or amend a durable power of attorney of which the protected person is the principal. If a durable power of attorney is in effect, absent a court order to the contrary, a decision of the agent takes precedence over that of a conservator.

Id.

power,[138] and the Arkansas Court of Appeals has reached the same conclusion.[139] Most states, however, have not explicitly addressed the issue by statute or case law. Similarly, the UPC and the 2006 Uniform Power of Attorney Act (UPOAA) do not discuss the matter.[140]

Nonetheless, if states provide a legislatively delegated will making power to a conservator, logic may eventually dictate that states also recognize the principal's explicit delegation of will making power to her agent.[141] Perhaps most principals would not give their agents such power, but some would; no doubt, many individuals would prefer that they, and not a court, choose who, if anyone, will make their proxy wills. Who better than the capable principal to choose for herself the recipient of her will making power?[142] Such an express, *personal* delegation of the will making power by a capable principal to her agent may well lead to a proxy will far superior to that proposed by a conservator acting only through a state's default rules.[143]

At first blush, one may be tempted to argue that because a conservator must obtain a judge's permission for the will he proposes, the proxy will by conservator receives a judicial stamp of approval that a proxy will by agent would not receive. Therefore, as the argument would have it, a proxy will by agent is substantially more dangerous than a proxy will by conservator. That argument, however, is neither accurate nor convincing as a reason for refusing to recognize any proxy will by an agent. Like all wills, a proxy will by agent has no immediate effect at the time of execution and therefore does not change or deplete the testator's estate. Moreover, the will must be probated for it to be legally recognized as the testator's will. Through probate, the proxy will by

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138. CAL. PROB. CODE § 4265 (West 2009).

139. Hart v. Garrett (*In re* Estate of Garrett), 100 S.W.3d 72, 76 (Ark. Ct. App. 2003) ("[A] power of attorney . . . cannot bestow upon the attorney-in-fact the power to create a will on behalf of a principal.").

140. For example, Article 2 of the Uniform Power of Attorney Act includes a number of sections concerning agent authority over the principal's estate, real property, retirement plans, taxes, and gifts. UNIF. POWER OF ATTORNEY ACT §§ 201–217, 8B U.L.A. 61–78 (Supp. 2009). Article 2 does not, however discuss an agent's authority to make, amend, or revoke the will of his principal. *Id.*

141. *But see In re Estate of Garrett*, 100 S.W.3d at 76 (observing that an agent cannot receive the power to devise for a principal). As a trailblazer in providing a delegated will making power to conservators, California might be expected to take the lead in recognizing an agent's proxy will making power expressly granted by a principal. Such, however, is not the case. Section 4265 of the California Probate Code provides, "A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal's will." § 4265.

142. The typical principal delegating will making power to an agent would probably want that power to be a springing one that becomes effective only upon incapacity as that term is described in the power of attorney document.

143. Although a will executed by an agent would not be subject to court approval before execution or during the principal's lifetime, it would be subject to attack upon the principal's death. Heirs and beneficiaries under prior wills could allege any of the traditional grounds for will contest as well as breaches of fiduciary duty by the agent.

agent would thus receive a judicial stamp of approval before the testator's assets are distributed.

Granted, the proxy will by agent would receive judicial approval only at the testator's death, whereas the proxy will by conservator must receive approval prior to execution and perhaps again at the testator's death.[144] Unlike the conservator, however, the agent was personally chosen by the principal. In other surrogate decision-making settings—including those involving life and death—courts have placed more substantial burdens on conservators than upon agents because the principal did not choose the conservator personally.[145] If the principal explicitly delegates her will making power to his agent, one must assume that the principal would not want to impose upon the agent the additional burden of prior judicial approval.

In fact, the argument for legal recognition of the proxy will by agent does not depend upon legal recognition of the proxy will by conservator. Regardless of whether a state permits the proxy will by conservator, one can compellingly argue that current laws concerning powers of attorney support recognition of the proxy will by agent. Laws regarding durable powers of attorney currently permit an agent to make *inter vivos* gifts in many circumstances.[146] An agent may even make gifts to himself if the principal has explicitly given the agent that power.[147] The agent's power to make *inter vivos* gifts poses a far more imminent and devastating threat to the principal and her estate than would a power to devise on behalf of the principal.

Outright *inter vivos* gifts immediately reduce a principal's estate. If such gifts substantially deplete the principal's estate, they may endanger the

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144. Note, however, that an individual objecting to the conservator's proposed proxy will may be out of luck if he waits until the death of the protected person to voice his objections vociferously and thoroughly. In a case of first impression, the California Court of Appeals held in 2008 that a substituted judgment order for a revocable living trust and pour-over will had collateral estoppel effect over issues that were raised or could have been raised in the substituted judgment proceeding. Murphy v. Murphy, 78 Cal. Rptr. 3d 784, 809 (Ct. App. 2008). Thus, following the protected person-testator's death, a testator's son was precluded from alleging undue influence or fraud of a will beneficiary or from relying on a prior testamentary agreement that the testator had with his wife to provide for the son. *Id.* at 801–02, 809. The court stated that "the integrity of the judicial system would be served, judicial economy promoted and vexatious litigation avoided by giving collateral estoppel effect to the substituted judgment order." *Id.* at 808.

145. *See, e.g.*, Wendland v. Wendland (Conservatorship of Wendland), 110 Cal. Rptr. 2d 412, 433 (2001) (holding that a conservator must be held to a higher standard of proof than an agent in asserting a conscious conservatee's right to withhold medical care because a conservator cannot be presumed to have special knowledge of the conservatee's wishes and a principal presumably designates a person as an agent when the principal has the highest degree of confidence in the agent).

146. *See, e.g.*, IDAHO CODE ANN. § 15-12-201(1) (2009); N.M. STAT. ANN. § 46B-1-201(A) (LexisNexis Supp. 2008); UNIF. POWER OF ATTORNEY ACT § 201(a)(2), 8B U.L.A. 61 (Supp. 2009).

147. *See, e.g.*, IDAHO CODE ANN. § 15-12-201(1)–(2) (2009); N.M. STAT. ANN. § 46B-1-201(A)–(B) (LexisNexis Supp. 2008); UNIF. POWER OF ATTORNEY ACT § 201(a)–(b), 8B U.L.A. at 61.

principal's well-being, financial and otherwise. In theory, the estate can recover from the agent if the gifts are made improperly. In many instances, however, recovery will be slow or incomplete. If the agent or his donees have squandered the assets, recovery may be impossible. Thus, an agent with a power to make gifts can immediately wreak havoc upon the principal's estate.[148] In contrast to outright *inter vivos* gifts by agent, devises in a proxy will by agent would have no effect until the principal's death. The proxy will cannot deplete the estate of the principal during her life. Very importantly, those who believe they are the true objects of the principal's bounty can contest the will of an overreaching agent *before* the proxy will plan is given effect.[149]

Although the preceding points indicate why states might permit a principal to delegate her will making power to her agent, none of the points suggest that a state should provide such power by default within a durable power of attorney. Just as current law generally precludes an agent from making substantial gifts to himself in the absence of an explicit delegation of that power by the principal,[150] proxy will making rules should preclude an agent from executing, amending, or revoking the principal's will in the absence of an explicit delegation of her will making power. Commonly encountered blanket statements, such as "I give my agent all powers to do anything that I could do," should not suffice as a grant of the will making power because the typical principal would not contemplate that she is delegating her will making power with such a statement.[151]

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148. *See* UNIF. POWER OF ATTORNEY ACT § 201 cmt., 8B U.L.A. at 62 ("The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan.").

149. The principal could also incorporate procedural safeguards within the power of attorney that describe the circumstances under which the agent's exercise of the will making power is proper. For example, the power of attorney might require that an agent's proposed will be approved only with the consent of all the principal's children, only with the advice and consent of her surviving spouse, or only for the purpose of minimizing estate taxes as recommended by the her lawyers and accountants.

150. *See, e.g.*, IDAHO CODE ANN. § 15-12-201(2) (2009); N.M. STAT. ANN. § 46B-1-201(B) (LexisNexis Supp. 2008). Section 201 of the Uniform Power of Attorney Act further states that "unless the power of attorney otherwise provides," agents who have been given express grants to make gifts may not make gifts to themselves unless they are "ancestor[s], spouse[s], or descendant[s] of the principal." UNIF. POWER OF ATTORNEY ACT § 201(b), 8B U.L.A. at 61. Section 217(c) provides that gifts by an agent are to be "consistent with the principal's objectives if actually known by the agent." *Id.* § 217(c), 8B U.L.A. at 77. If the principal's objectives are unknown, gifts by an agent must be "consistent with the principal's best interest." *Id.* The commentary to section 201 notes the potential dangers of providing an agent with total power over the principal's estate. *Id.* § 201 cmt., 8B U.L.A. at 62. For this reason, section 201(a) requires that a variety of powers exist only if provided by specific grant. *Id.* § 201(a), 8B U.L.A. at 61.

151. A state that generally recognizes holographic wills could choose to deny that option to an agent exercising the principal's will making power. To help ensure that the proxy will reflects the probable wishes of the principal, the state might impose execution requirements in addition to those generally required for the execution of a formal, attested will. For example, the state could require that the proxy will be executed by two disinterested witnesses who have read the will, who know the principal, and who attest (or swear) that they believe the contents of the will are in conformity

V. CONCLUSION

In light of the many will substitutes through which conservators can redirect a protected person's estate, there is little reason not to recognize a proxy will by conservator when that will is created in accordance with carefully defined rules. Recognition of a proxy will would permit a conservator to accomplish overtly and simply what he can currently accomplish only covertly through means that are sometimes cumbersome and expensive. Proxy will statutes that require courts and conservators to base their decisions primarily upon traditional principles of substituted judgment can substantially eliminate the risk that a proxy will would thwart the probable wishes of the protected person.

Until empirical evidence demonstrates that a typical individual would want her conservator to have a proxy will making power, one can doubt the wisdom of a statute bestowing that power upon all conservators by default. Keeping in mind probate's ultimate goal of effectuating intent, it seems that an individual should at least be able to opt out of such a default rule. In fact, a statute that permits an individual to opt in may be the better default position. Moreover, considering the extreme breadth of powers that states currently permit a principal to bestow upon her agent under a durable power of attorney, states might well recognize the proxy will by agent if the principal explicitly opts to give her agent will making power.

Although recognition of a proxy will making power is a logical step in assisting the conservator or agent with his estate planning obligations, the power does represent a notably new development. By allowing someone other than the testator to make, amend, or revoke the testator's will, the proxy will breaks with centuries of tradition. Probate law has long considered the power to make, amend, or revoke a will to be personal and inalienable. Yet the growing use of the traditional substituted judgment doctrine demonstrates that delegated powers can help facilitate the goals of a person who can no longer speak for herself. In short, the law has increasingly recognized that a personal power—including the power to make a will—does not have to be inalienable to remain essentially personal.

Testators have little reason to fear a proxy will executed in compliance with a thoughtfully crafted statute that recognizes a delegated will making power. As one state high court observed long ago, "[t]he preservation of the privilege of making one's own will brings to the old and helpless a consideration which might not otherwise always be extended to them, and should not be whittled away."[152] A proxy will can help preserve this privilege, fulfilling the probable (and even unique) testamentary wishes of a protected person. With growing

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with the wishes of the principal. Or, if the principal's wishes are unknown, a state could require that the proxy will be executed in conformity with her best interest.

152. Tabb v. Willis, 156 S.E. 556, 565 (Va. 1931).

numbers of incapacitated individuals in our society, this is a particularly laudable goal.