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LOSING IT IN CALIFORNIA: CONSERVATORSHIP AND THE SOCIAL ORGANIZATION OF AGING

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I. INTRODUCTION

The American population is aging. At the turn of the century, less than one in ten Americans was fifty-five or over; and only one in twenty-five was sixty-five or over.¹ By 1987, 20% of the population was at least fifty-five, and 12.5% was at least sixty-five.² There is every indication that the "graying of America" will continue. The U.S. Census Bureau predicts that by 2030, 21% of U.S. citizens will be over sixty-five, and 2.8% will be over eighty-five (up from 1% in 1990).³

Age itself does not, of course, disqualify a person from taking care of herself, or managing what she owns—not old age at any rate. *Young* age in fact does disqualify: As every parent knows, *all* newborn babies are

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1. SENATE SPECIAL COMMITTEE ON AGING, 101ST CONG., 1ST SESS., *AGING AMERICA: TRENDS AND PROJECTIONS I* (Comm. Print 1989).

2. *Id.*

3. Erik Lindbloom, *America's Aging Population: Changing the Face of Health Care*, 269 *JAMA* 674 (1993).

“incontinent,” and absolutely none of them can balance a checkbook or handle a portfolio. Babies develop at more or less the same pace—teething, crawling, learning to walk and talk. Decline and fall, at the other end of life, is a much more individual project. Some men and women in their nineties are mentally sharp, lively, engaged, and in gear. Others are definitely not. Even the most eager advocate for the rights of the elderly would have to admit that there is a powerful correlation between getting old, getting very old, getting very, very old, and “losing it.” Consequently, a hefty number of people in their “golden years” find themselves unable to take proper care of their gold.

If, in fact, there is not very much gold, and if an old person is part of a warm, caring family, the problem never reaches the threshold of the legal system. If there is no supportive family, but rather a fragmented, conflicted family, or no family at all, and if there is quite a bit of money, some sort of legal arrangement is absolutely essential. There are a number of legal institutions aimed at filling the need for some kind of management. One of these devices is the conservatorship. Another is the so-called durable power of attorney (DPA), a modern variation on an old, familiar theme—the power of attorney.⁴ To some extent these two devices are rivals; there are those who champion the one over the other, and vice versa.⁵

Basically, a power of attorney is a document which somebody signs, authorizing another person (the “attorney”) to act on behalf of the person who signed the document. This is a useful device and very common. In the ordinary case, it has very little to do with mental competence. For example, a young man with a bit of money, going off to explore the Amazon jungle, might give his mother or sister or friend a power of attorney to write checks for him, collect dividends and interest, pay bills, and in general handle his affairs while he is gone. An ordinary power of attorney lapses on death or incompetence; if the young man is eaten by piranhas, or driven

4. Yet another method is to create a trust, either revocable or irrevocable. The income (and principal) from the trust can be used by the trustee for the care and support of the beneficiary. Obviously, this is for the rich only; and it requires advance planning, which makes it impractical in most cases. In *In re Waxman*, 466 N.Y.S.2d 85 (N.Y. App. Div. 1983), Herman Waxman had created an irrevocable trust “to provide for his medical and living expenses.” *Id.* at 87. His attorney was the trustee. “Under these circumstances,” said the court, “there is no need for the appointment of a conservator.” *Id.*

5. See Dale L. Moore, *The Durable Power of Attorney as an Alternative to the Improper Use of Conservatorship for Health-Care Decisionmaking*, 60 ST. JOHN'S L. REV. 631 (1986); Arnold J. Rosoff & Gary L. Gottlieb, *Preserving Personal Autonomy for the Elderly: Competency, Guardianship, and Alzheimer's Disease*, 8 J. LEGAL MED. 1 (1987).

mad by jungle drums, the authority of the "attorney" comes to an end.⁶

A *durable* power of attorney is quite a different document. It grants the same types of power as an ordinary power of attorney and then some. The main difference is the fact that it endures. Death, of course, ends it, but not incompetence or failure of mental or physical powers.⁷ Indeed, that is the point of the arrangement.⁸

If I give you a durable power of attorney, my signature is the empowering act. Once I sign, the instrument is up and running (although I can stipulate that only my incapacity will trigger it.) Nobody requires the "attorney" to go to court for permission to do his business, and there is, in fact, no supervision at all.⁹ This is in sharp contrast to a conservatorship. A conservator, like an "attorney," manages somebody else's affairs. The arrangement, however, is usually involuntary. The person who gets protected may or may not *choose* the conservator; the legal source of power is not a document signed by the ward, but a court order;¹⁰ the whole process is minutely governed by pages and pages of law; and every

6. For example, under § 5204(d) of the California Probate Code, a person may set up a power of attorney specifically to deal with a bank account or the like. If the grantor of the power dies, or a "guardian or conservator of the estate" is appointed for him, the power comes to an end. CAL. PROB. CODE § 5204(d) (West 1991 & Supp. 1995).

7. See CAL. PROB. CODE § 4125 (West Supp. 1995) ("All acts done by an attorney in fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal . . . as if the principle had capacity."). The principal can specify either that "incapacity" does not affect the DPA; or even that it becomes effective *only* upon incapacity. CAL. PROB. CODE § 4124.

8. There is also a special form of durable power of attorney designed specifically for health care decisions. Such a DPA, among other things, reflects the modern obsession with questions of whether, when, and how to "pull the plug." Many states have provided for a device of this kind. See, e.g., CAL. PROB. CODE §§ 4600-4806 (West Supp. 1995); GA. CODE ANN. §§ 31-36-1 to -13 (1991); MINN. STAT. ANN. §§ 145C.01-.15 (West Supp. 1995); MISS. CODE ANN. §§ 41-41-151 to -183 (1993); MO. ANN. STAT. §§ 404.800-.872 (Vernon Supp. 1995); NEV. REV. STAT. §§ 449.800-.860 (1991); N.H. REV. STAT. ANN. §§ 137-J:1 to :16 (Supp. 1994); N.D. CENT. CODE §§ 23-06.5-01 to -18 (1991 & Supp. 1993); OHIO REV. CODE ANN. §§ 1337.11-.17 (Anderson 1993 & Supp. 1994); TENN. CODE ANN. §§ 34-6-201 to -215 (1991); TEX. CIV. PRAC. & REM. CODE ANN. §§ 135.001-.018 (West Supp. 1995); VT STAT ANN. tit. 14, §§ 3451-3467 (1989 & Supp. 1994); WYO. STAT. §§ 3-5-201 to -213 (Supp. 1995). For a discussion of this type of DPA, see Marshall B. Kapp, *Ohio's New Durable Power of Attorney*, 14 U. DAYTON L. REV. 541 (1989).

9. California does have some formal legal requirements relating to the composition of the DPA document. See CAL. PROB. CODE §§ 4124, 4401 & 4402 (West Supp. 1995). The primary purpose of these sections, however, seems to be to ensure that the signer understands the powers she is giving to her attorney, rather than to regulate the content of this granting of power. And, of course, if the attorney abuses her power, she can be sued and the power can be terminated. CAL. PROB. CODE § 4941 (West Supp. 1995).

10. CAL. PROB. CODE § 1800.3 (West 1991).

important step must be funneled through a court and win the stamp of approval of a judge.¹¹

Whether this complexity is good or bad has been much discussed,¹² and more attention will be given to this issue later in this article. For researchers, the conservatorship device has one real advantage that the durable power of attorney lacks—it leaves a public paper trail (the court files).¹³ There is no way of knowing exactly how many DPA's exist in any county or state. But we can measure conservatorships with great precision. We can tell how many are opened, where, and how. We can tabulate quite a few of their gross characteristics.¹⁴ Powers of attorney are probably more common than conservatorships; but we have no way at all of knowing how many people have created *durable* powers.¹⁵

Moreover, though the two devices are rivals, there is no way the durable power of attorney can win the war. Short of some kind of legislative revolution, which has zero probability at the moment, there is no way to defeat or eliminate conservatorship. The DPA is a common device, but nonetheless, only a small minority of people have ever signed one, even elderly people. The rest either resist the idea, do not know about it, or simply do not think about it. A sudden deterioration in health, a life crisis, or any number of catastrophic events, might trigger a petition to set up a conservatorship. These usually come much too late for a durable power of

11. *Id.*

12. *See, e.g.,* Julia C. Spring & Nancy Neveloff Dubler, *Conservatorship In New York State: Does It Serve the Needs of the Elderly*, in EST. & FIN. PLAN. FOR THE AGING & INCAPACITATED CLIENT 1991, at 295 (PLI Est. Plan. & Admin. Course Hardbook Series No. 200, 1991); Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273 (1988).

13. Since 1990, however, several categories of documents have been made confidential in California, including the initial investigator's report, CAL. PROB. CODE § 1513 (West 1991 & Supp. 1995), the follow-up report, CAL. PROB. CODE § 1851 (West 1991), and supplemental petition information, CAL. PROB. CODE § 1821 (West 1991). For purposes of this study, the Santa Clara County Court, exercising its discretion allowed under CAL. PROB. CODE § 1826 (West 1991), granted the researchers permission to examine the files to view these confidential documents.

14. Unfortunately, very few states have compiled even minimal summary statistics on conservatorship cases. One exception is Michigan, where these statistics have been kept for the last 12 years. In Michigan, the number of conservatorship filings has increased from 5491 for the period between July 1982 and June 1983, to 7012 in 1992. *See* 1982-1992 MICH. ST. CTS. ANN. REP.

15. A survey of 111 nursing homes in Tennessee found that 2.3% of the residents had limited guardianships and 2.8% had conservatorships of property or person. Another 6.5% had executed powers of attorney, and 20.3% had "representative payee[s]." David Hightower et al., *Elderly Nursing Home Residents' Need for Public Guardianship Services in Tennessee*, 2 J. ELDER ABUSE & NEGLECT 105, 113-15 (1990). Unfortunately, the figures in this study do not distinguish between durable powers and ordinary powers of attorney.

attorney.

In any event, with or without rivals, the importance of conservatorship is surely increasing; and so, too, are the numbers of conservatorship estates, although there is an acute shortage of data. After all, the elderly population (as noted above) is growing more rapidly than the population at large. Many of these elderly people have money, another precipitating factor. Further, more and more elderly people have lost their grip (again, a minority of the elderly, but in the aggregate, they make up a substantial army of the unable). Conservatorship is obviously here to stay.

This is a small study of some aspects of conservatorship in operation, making use of the data in court files.¹⁶ The data set consists of all the conservatorship cases in the North District of Santa Clara County during the period from January 1988 through December 1990. Sixty-one of these case files were examined more intensely and analyzed statistically.¹⁷ In addition, a larger sample of 365 San Francisco cases was examined to help us understand how the peculiarities of the North District of Santa Clara County affected our results

Santa Clara County is part of the vast San Francisco metropolis. The county sprawls south along the San Francisco peninsula, just past the ganglion of suburbs that make up San Mateo County, which separates Santa Clara County from San Francisco itself. The county seat of Santa Clara County is San Jose, a far-flung city which has grown like a weed since the end of the second World War; more people live, in fact, within its scraggly borders than in San Francisco. The county government, and the main courthouse, are located in San Jose, but during the time of this study there was a branch (the "North District") located in downtown Palo Alto,

16. To ensure privacy, no names or specific file numbers will be cited in this article. We will instead refer to these cases by reference to our numbered notes on these documents.

17. The total number of case files in this time period was 98. The statistics are based on 61 of these files. After the statistics were analyzed, and a working draft of the paper written, we went back and examined the remaining cases, looking more closely for certain special problems, such as family disputes or "undue influence."

A case file typically contains the following documents, from back to front: a Declaration for Assignment and Filing; a Petition for Appointment of Conservator; a Notice of Hearing sent to relatives of the proposed ward; Proof of Service to these relatives, signed by the Chief Court Investigator; the Court Investigator's report; Court Review of the Investigator's Report; a Declaration of Medical Accredited Practitioner, on the diagnosis of the ward; often, too, a Voter Registration Disqualification form. After the court hearing, an Order Appointing a Conservator is drawn up. A case file also contains Proof of Service by Mail, Letters of Conservatorship, Declaration and Order for Reimbursement of Conservatorship Investigation Costs; Lawyer's Reimbursement cost forms; and Proof of Payment of Claims.

at the extreme northern end of the county. The branch drew cases from Palo Alto itself and from a number of other towns in the Palo Alto area (Los Altos, Los Altos Hills, Mountain View). Its jurisdiction also included the campus of Stanford University.

The North District is hardly typical of American urban settings. It is, by and large, residential, suburban and affluent. Palo Alto is a city of some fifty thousand people. It is decidedly upscale, for the most part, and its staggering real estate values reflect the eagerness of people with money to live there.¹⁸ Los Altos Hills is an even wealthier community.¹⁹ Most of the wards in the sample had estates of some size: There was financial information in forty-eight of the files, and 62% of these were valued at \$200,000 or more.²⁰

A conservatorship is a highly legalized relationship in which the critical roles are played by a conservator and a "conservatee" (ugly term) or "ward." The conservator is a fiduciary—that is, like an executor or a trustee, she is supposed to act on *behalf* of the ward. Conservators in their rights and duties are quite similar to guardians, and what would be called a *conservator* in California would have been called a *guardian* in many states in times past. The terminology differs in different states.²¹ Whatever the terms, there are close legal similarities between these various members of the fiduciary family. If money is left to a baby, for example, a guardian may be appointed to manage the money in the interests of the child. The

18. Palo Alto's Median Family Income in 1989 was \$68,790. [U.S. Census Database, Section 18 (1990), available in LEXIS (RN 49 90 06 002090).]

19. Los Altos' Median Family Income in 1989 was \$120,093. [U.S. Census Database, Section 18 (1990), available in LEXIS (RN 49 90 06 001625).]

20. Partly because our sample was likely to be, in some regards, quite atypical, we also drew some data from a larger sample of San Francisco files. San Francisco County's Median Family Income in 1989 was \$40,561. [U.S. Census Database, Section 18 (1990), available in LEXIS (RN 49 06 00 0075000).] Thus, the larger sample of San Francisco files helps give a somewhat better cross-section of the conservatorship population.

21. In Arkansas, a "guardian" can be appointed for an "incapacitated person," meaning someone "impaired by reason of a disability . . . to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his health or safety or to manage his estate." ARK. CODE ANN. § 28-65-101 (Michie 1987). There can also be a conservator of the estate (but not the person), for someone who "by reason of advanced age or physical disability [is] unable to manage his property." ARK. CODE ANN. § 28-67-105 (Michie 1987). Texas uses the term "guardianship" to cover all incapacitated persons of any age. TEX. PROB. CODE ANN. §§ 602-603 (West Supp. 1995). Florida uses the term "guardian" to cover both protection of person and estate and does not utilize the term "conservator." FLA. STAT. ANN. § 744.102 (West 1986 & Supp. 1995).

core of the process is the same as conservatorship.²²

There are, of course, differences. No court case and solemn decree is needed to establish the banal fact that a baby is incompetent to handle money. To be sure, the competence of a teenager is a more delicate question, but the law has long since opted for hard-and-fast rules. On her eighteenth birthday, a minor is magically transformed into a total adult (at law). Incompetence at the other end of life is quite different in onset and in its various shades of gray. For old people, the only sharp and absolute line is the moment of death.

Legal incompetence, too, is a more complex, calibrated status than it once was. There was a time when the process of establishing management called for a flat finding of total incompetence.²³ It was all or nothing. The ward instantly lost all legal rights and descended into a kind of dungeon of legal helplessness.²⁴ More recent conservatorship laws, however, have dropped this idea—at least in theory. In theory, there are all sorts of grades and strata of weakness, with corresponding grades and strata of care and management. The court has power to cut the arrangement to the individual needs of the ward.²⁵ In practice, as we shall see, it does not quite work out that way.

In California, a conservator can be conservator *of the estate* or *of the person* or both. A conservator *of the estate* manages property and goods and makes financial decisions. A conservator *of the estate* can be appointed for someone who is “substantially unable to manage his or her own financial resources or resist fraud or undue influence.”²⁶ A conservator *of the person*, on the other hand, can be appointed for someone “who is unable properly to provide for his or her personal needs for physical health,

22. Indeed, many of the provisions of the California statutes relating to conservatorships are also applicable to guardianships. See CAL. PROB. CODE §§ 2100-2808 (West 1991 & Supp. 1995) (entitled “Provisions Common to Guardianship and Conservatorship”).

23. For a discussion of the development of the notion of incompetence and its practical consequences, see Margaret K. Krasik, *The Lights of Science and Experience: Historical Perspectives on Legal Attitudes Toward the Role of Medical Expertise in Guardianship of the Elderly*, 33 AM. J. LEGAL HIST. 201 (1989).

24. For example, California’s 1957 conservatorship statutes not only made no provision for limited conservatorships, but granted “every conservator” the same broad powers allowed to guardians of “incompetents.” CAL. PROB. CODE § 1852 (West 1957).

25. Arizona has taken this so far as to give any court faced with sufficient grounds to appoint a full conservatorship the alternative of authorizing any necessary or desirable arrangement, including the establishment of a trust. ARIZ. REV. STAT. ANN. § 14-5409.A (1995).

26. CAL. PROB. CODE § 1801(b) (West 1991).

food, clothing, or shelter."²⁷ Thus, a conservator of *the estate* takes care of money matters, while a conservator of *the person* makes decisions about the very body and life of the ward: where she will live (and die),²⁸ whether to say yes or no to a dangerous operation,²⁹ whether to sell her house or merely repair it,³⁰ and the like.³¹

Usually the conservator is in charge of both aspects of the ward's life, but not always. It is certainly possible to name a bank or trust company as conservator of the estate, but conservatorships of the person require a more personal touch. In our sixty-one files, the two aspects were joined in forty-seven of the cases (77%). In one case, there was conservation only of the estate (2%); in thirteen cases, only of the person (21%).

In most cases, assuming both types of conservation are needed or wanted, it is probably a good idea to join the two roles in a single person. Otherwise, there is always the risk that dual conservatorships can turn into dueling conservatorships. We found one clear example of this in the files.³² The ward was a woman with Alzheimer's. Her husband had been her caretaker, but then he died. A friend of the family became conservator of *the estate*; a nephew took over as conservator of *the person*. They had a falling out and began to complain about each other. The nephew felt that the friend was too slow in paying him for his expenses; he also wanted to move the old woman closer to where he lived, "so he and other family members could visit more often." The conservator of the estate objected on the grounds that the costs would be higher and that the living space would be smaller. He questioned the other conservator's motives and objected to paying the high attorneys' fees. In the end, after some squabbling, the cousin resigned, and the friend took over both roles. But it was a long and arduous process.

The duties and liabilities of the conservator are spelled out in the statutes. The (financial) conservator must manage the estate with "ordinary

27. CAL. PROB. CODE § 1801(a) (West 1991). The California Probate Code also provides for a "limited conservator" for a "developmentally disabled adult." CAL. PROB. CODE § 1801(d) (West 1991). In this case, the ward is not presumed "incompetent" and keeps all rights "except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator." *Id.* We did not include such limited conservatorships in our study.

28. CAL. PROB. CODE § 2352(a) (West 1991).

29. CAL. PROB. CODE § 2353(a) (West 1991).

30. CAL. PROB. CODE § 2543(2) (West 1991).

31. The court, however, is expressly given the power to decide whether the ward may marry. CAL. PROB. CODE §§ 1900, 1901 (West 1991 & Supp. 1995).

32. Doc. No. 1 (on file with authors).

care and diligence.”³³ She must segregate the ward’s assets from her own.³⁴ When she opens a bank account for the estate, the account name must indicate that it is an estate account and not a personal account. Essentially, the conservator is not to spend estate money freely, that is, without court permission (or the advice of an attorney). The conservator may reimburse herself for official court costs paid by her to the county clerk and for the premium on her bond.³⁵ Without prior orders from the court, however, she may not pay fees to herself or to her attorney, if there is one.³⁶ If she does not obtain the court’s permission when it is required, she may be removed as conservator or be required to reimburse the estate from her own personal funds, or both.³⁷

Setting up a conservatorship is not a do-it-yourself project: Only God can make a tree, and only a court can make a conservatorship and appoint a conservator. In theory at least, every step of the process is under the eagle eye of the court. The process begins with a petition for conservatorship, which must give the “reasons why a conservatorship is necessary.”³⁸ The petitioner must also file “supplemental information,” including a “brief statement of facts” giving more details of the plight of the proposed ward.³⁹ After the petition is filed, notice is given to the spouse and relatives, and, very significantly, the Court Investigator swings into action.⁴⁰

The Court Investigator (the “Investigator”) is a unique California institution.⁴¹ The Investigator, technically an officer of the court, visits the

33. CAL. PROB. CODE § 2401 (West 1991).

34. CAL. PROB. CODE § 2610 (West 1992).

35. CAL. PROB. CODE §§ 2623(a), 2640 (West 1991 & Supp. 1995).

36. CAL. PROB. CODE § 2640 (West 1991 & Supp. 1995).

37. CAL. PROB. CODE §§ 2614.5, 2615, 2629 (West 1992). Additionally, the conservator is required to make an inventory of the property of the estate, change title to assets into the name of the conservatorship estate, and file the inventory with the court within 90 days. She must file a “General Plan” describing how the estate is going to be managed and she must keep complete and accurate records of each financial transaction affecting the estate. The judge may require the posting of a bond. Duties of Conservator Form and Acknowledgment of Receipt of Handbook, form GC-348 (1992), p. 2. For the general statutory duties of the conservator regarding inventory and accounting, see CAL. PROB. CODE §§ 2600-2630 (West 1991).

38. CAL. PROB. CODE § 1821(a).

39. *Id.*

40. On the specific role of the Court Investigator during the establishment phase, see CAL. PROB. CODE § 1826.

41. New York State uses the “court evaluator” as a primary fact-finder for the court. N.Y. MENTAL HYG. LAW § 81.09 (Consol. Supp. 1994). Michigan has a system of “visitors” from the court who act in some of the same ways as California’s court investigators. MICH. COMP. LAWS ANN. § 700.449

proposed ward before the hearing takes place. The Investigator asks the ward whether she wants a lawyer, tries to gather information about the condition of the ward and makes a recommendation to the court.⁴² The Investigator is also supposed to review the conservatorship a year after it begins, and every two years from then on.⁴³

The Office of Investigator was created in 1977 as a by-product of the so-called rights revolution.⁴⁴ For complex social reasons, a general revolt of the underdogs had taken place, the civil rights movement had burst into prominence and made its mark on the legal system, and there was a legal climate of vastly increased sensitivity to due process and fair proceedings.⁴⁵ During this period, civil commitment and institutionalization came under fire.⁴⁶ It was no small thing to be declared incompetent—it brought about a devastating loss of rights. Putting a person under guardianship or conservatorship was indeed drastic. When the judge's gavel dropped and a conservatorship was decreed, the ward suffered a kind of civil death. She lost control of her life; she had no right to buy and sell property, to vote, to marry, to demand medical attention or refuse it, to make out a will, to give gifts, or to move into one house or out of another.⁴⁷ And perhaps—just perhaps—some people were railroaded into this living death who did not belong there at all.

The trends of an age of reform were felt in this area of law as they were elsewhere. The laws changed, in state after state, to give the ward more rights, to cut the discretion of the conservator down to size, and to give judges power to craft a more flexible, less limiting form of conservatorship.⁴⁸ There was also a feeling that souls placed in tutelage were not

(West 1995). In addition, during our investigation we discovered that in 1992, court personnel from the state of Arizona visited the Santa Clara Office of Investigators to learn about their work, because they wanted to set up a similar system in Arizona. However, this has yet to happen. Interview with Chief Court Investigator, Santa Clara County (Mar. 27, 1992) (on file with June Starr).

42. CAL. PROB. CODE § 1851 (West 1991).

43. CAL. PROB. CODE § 1850(a) (West 1991).

44. See Laws Cal. 1977, ch. 453.

45. See LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985).

46. See Krasik, *supra* note 23, at 201; Barry Reisberg et al., *The Global Deterioration Scale for Assessment of Primary Degenerative Dementia*, 139 AM. J. PSYCHIATRY (1982) at 1136; Rosoff & Gottlieb, *supra* note 5; THOMAS J. SCHEFF, *BEING MENTALLY ILL: A SOCIOLOGICAL THEORY* (1966).

47. For a discussion of the law in California prior to the most recent reforms, see George J. Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003 (1979).

48. One of the first signals of this change in attitude towards the elderly can be seen in the UNIF. PROB. CODE § 5-409 (1969). The Uniform Probate Code was first adopted (with some changes) in Arizona in 1973. The Arizona formulation granted judges broad powers to provide less drastic

getting the proper attention. The National Senior Citizens' Center had done a study of 1010 conservatorships in Los Angeles County.⁴⁹ In 93% of the adult cases, the wards never appeared at their own hearing; 97% had no counsel or other representation.⁵⁰ The whole system seemed to smell of rot, or neglect, and a thorough revamping followed in California and other states.⁵¹ In California, a central feature of the reform was the invention of a new actor in the drama, an impartial third party, responsible to the court and nobody else, who would advise wards of their rights and look after their interests. This, of course, was the Court Investigator.

Over the last generation or so, then, the law has been traveling away from darkness to light—toward empowerment. The various waves of reform were meant to set up a fair, loose, minimal system. The ward was to keep as many rights as possible and suffer as few restrictions as possible. The petition to the court requesting a conservatorship must address “[a]lternatives to conservatorship considered by the petitioner and reasons why those alternatives are not available.”⁵² The legislature, according to the words of the statute, meant to “set goals for increasing the conservatee’s functional abilities to whatever extent possible” and to use “community-based services,” if one could, so as “to allow the conservatee to remain as independent . . . as possible” and to carry on, as much as possible, in the “least restrictive setting.”⁵³

California is considered an extremely progressive state in matters of conservatorship. The laws are carefully drafted, and the Court Investigator

alternatives to conservatorship appointments: If it was established that a conservator could be appointed, the court might *instead*

authorize, direct or ratify any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

ARIZ. REV. STAT. ANN. § 14-5409 (1995).

49 CAL. ASS'N SUPER. CT. INVESTIGATORS, COURT INVESTIGATOR HANDBOOK (1991).

50 *Id.* at I.I. It was not until 1977 that judges were allowed to appoint attorneys for prospective wards, and that automatic review of conservatorship by Court Investigators was instituted. CAL. PROB. CODE §§ 1461, 1500 (West 1977).

51. On the history of reform in New York, see Allen Federman, *Conservatorship: A Viable Alternative to Incompetence*, 14 FORDHAM URB. L.J. 815 (1985-86). On Oklahoma, see Teresa Collett, *Keeping my Brother's Keeper: An Introduction to Article III of the Oklahoma Guardianship Act*, 42 OKLA. L. REV. 243 (1989).

52. CAL. PROB. CODE § 1821(a)(3) (West 1991).

53. CAL. PROB. CODE § 1800(b), (d) (West 1991). Note the lack of these requirements in the 1957 California Probate Code §§ 1751, 1752, or 1754.

has no precise equivalent elsewhere. But it is one thing to be progressive on paper, quite another to make sure reality matches the words. After all, rights can be ignored; they can be *waived*;⁵⁴ and sometimes they can turn into a caricature of themselves. Whether the rights have any muscle is an empirical question. Finding the answer is one of the goals of this study. Obviously, a study at this stage, mainly examining the paper record, cannot be really definitive. But one gets a lot closer by looking into files than by just reading the statutes, their legislative history, and the handful of decided cases.

II. ASSESSING CONSERVATORSHIP: THE SANTA CLARA FILES

The sixty-one files from the Santa Clara study provide us with a good deal of information. We learn, for example, *who* becomes a ward. Most are women. In the sample of sixty-one, women made up 61% of the group. In a larger sample drawn from San Francisco, 71% of the wards were women. The wards were, not surprisingly, elderly: 82% were sixty years old or over. The average age for men was seventy-one; for women, seventy-seven. The San Francisco sample was significantly older: the average age for men was seventy-seven, for women, eighty-three; and 95.2% of the sample was over sixty.

The age discrepancy between men and women, of course, is not surprising. Men do not, on the whole, last as long as women do. Wives outlive their husbands and often care for them during their decline. Most of the women in the sample were widows, facing their last years alone; the sample included twenty-five widows and only four widowers. Wards were not, of course, entirely alone, especially if they had children or other family. The petitioners, who usually end up as conservators, are by and large family members. One would expect that women would predominate here. Women are, after all, the prime care-givers in this society. This is reflected in our small sample. Among the sixty-one petitioners, twenty-three were daughters and eleven were sons. Six wives and no husbands were petitioners. There were three sisters and only one brother. Somewhat surprisingly, the larger (San Francisco) sample does not confirm this impression. Indeed, in San Francisco, slightly more sons (10.3%) than

54. See, e.g., *Conservatorship of Mary K.*, 285 Cal. Rptr. 618 (Cal. Ct. App. 1991). The ward's lawyer orally waived the right to jury trial, and certain other statutory requirements. *Id.* at 620. The ward, who was resisting conservatorship, probably expected the judge to take her side; when he instead ordered a conservatorship, she appealed, trying to undo the waiver; but the appeal court turned her down. *Id.* at 622.

daughters (9.2%) served as conservators, and slightly more brothers (4.5%) than sisters (3.9%). This discrepancy remains unexplained.

Who were the other petitioners? In the North District of Santa Clara County, ten petitioners (16.4%) were other relatives. A few were friends or fell into other miscellaneous categories. In at least one case in Santa Clara, an elderly widow, eighty years old, was her *own* petitioner; she wrote a letter saying, "I need help in keeping clean clothing and maintaining my home. Also, I need assistance in getting Social Security benefits to which I am entitled." She asked that her daughter-in-law, who lived next door, be named as her conservator.⁵⁵ Her daughter and her daughter's lawyer probably played a larger role in this petition process than appears on the surface.

In some regards, the sixty-one files from Santa Clara deviate sharply from the files in San Francisco. All the Santa Clara files use family or friends as conservators. There are, however, two other conservatorship options. There are private professional conservators, who do this work for a living.⁵⁶ There are also conservatorships established by the Office of the Public Guardian.⁵⁷ The Public Guardian is authorized to act as a default conservator for those who need a conservator, but for whom "no one else . . . is qualified and willing to act."⁵⁸ In the Santa Clara files, there were no cases in which *either* a professional or the Public Guardian acted as conservator. By way of contrast, in San Francisco, the Public Guardian acted as conservator in 12.3% of the cases, and 20% of the San Francisco sample of conservators consisted of professionals.

In Santa Clara, Public Guardian cases were absent for a simple reason: All of these cases flowed into the San Jose Superior Court, where the Public Guardian has a bureaucratic presence, rather than to the North District, where there is no such presence. In Santa Clara County, professional conservators had yet to become established, although the Chief Court

55. Doc. No. 2 (on file with authors).

56. These professionals have been regulated, since 1990, under California Probate Code § 2341, which defines a private professional conservator as someone appointed "conservator of the person or estate, or both, of two or more conservatees at the same time who are not related to the conservator by blood or marriage." CAL. PROB. CODE § 2341 (West 1991 & Supp. 1995). Under § 2342, such conservators must file annual statements with the county clerk. CAL. PROB. CODE § 2342 (West 1991 & Supp. 1995). At the beginning of 1994, 42 private professional conservators were registered with the clerk of the San Francisco Superior Court. Rebecca Stevens, *Private Professional Conservators in San Francisco: An Evaluation* (1994) (unpublished term paper, Stanford Law School) (on file with the authors).

57. CAL. GOV'T CODE § 27430 (West Supp. 1995) (authorizing county-operated institutions).

58. CAL. PROB. CODE § 2920 (West 1991).

Investigator along with several lawyers who practiced “elderlaw,” and at least one judge were developing guidelines for a training program to encourage qualified persons to take up the profession of conservator. By 1994, twenty-three professional conservators were registered with the clerk of Santa Clara County.⁵⁹

A. What Triggers a Conservatorship in Santa Clara County?

The Santa Clara sample was fairly affluent. More than two-thirds of the estates for which there was information available were worth more than \$100,000, and one-fifth were worth more than \$500,000.⁶⁰

WHAT TRIGGERED THE CONSERVATORSHIP?

<i>Triggering Event</i>	<i>Number</i>	<i>Percent</i>
1. A slow decline in self-sufficiency, or inability to maintain adequate food supply and/or daily living routines	25	36.2
2. A precipitous event	11	15.9
3. Moved to a locked facility or transferred to a hospital or nursing home against ward's will	10	14.5
4. Does not pay bills, or cannot make necessary financial transactions	6	8.7
5. Caretaker dies or can no longer care for proposed ward	4	5.8
6. Undue influence by a close friend or family member	7	10.1
7. Undue influence by an outsider	4	5.8
8. All other situations	2	2.9
Total	69*	100.0

* This is a larger number than our 61 case sample, because sometimes it was impossible to rank the “triggers” in such a way as to assign the case to a single cause. This was because, in some cases, there were two important immediate causes (e.g., both slow decline into alcoholism *and* the requirement of confinement in a locked facility for medical care).

The most common reason for establishing a conservatorship was “a slow decline in ability to cope with everyday life.” This accounts for 36.2% of our sample - over one-third of the case files examined. Still, 15.9% of the

59. Telephone Interview with the Santa Clara County Clerk's office (Aug. 15, 1994).

60. Large estates seem to be highly correlated with home ownership in our study. Home ownership constitutes the primary (if not sole) substantial asset for many wards. Given that in Los Altos, approximately 95% of homes are valued at over half a million dollars, it is a small wonder that we found a great number of large estates. [U.S. Census Database, Section 18 (1990), available in LEXIS (RN 49 90 06 001625).]

conservatorships in our sample were triggered by some single, precipitous event. The ward might be arrested after a drunken spree; might be found wandering around the streets in a dazed condition; or might have fallen or been in an accident, hospitalized, and then assessed by the nurses as someone not capable of caring for herself.

In another 14.5% of the files examined, the conservatorship was triggered by the need to move a proposed ward to a locked facility, a hospital, or a nursing home against her wishes. The law allows someone to be moved against her wishes when a Lanterman-Petris-Short (LPS) conservatorship has been set up, which allows the conservator to arrange placement and mental health treatment for people who are unable to provide for their food, clothing, or shelter as a result of a mental disorder or chronic alcoholism.⁶¹ This type of conservatorship is only used when the person needs mental health treatment but cannot or will not accept it voluntarily. This situation often occurs together with a general slow decline in abilities, and both categories of triggering event might apply.

Perhaps the most interesting of all precipitating events is alleged "undue influence." This is a familiar term in the law of wills; a will can be invalidated (in whole or in part) if it is the product of "undue influence."⁶² This rather bizarre concept is defined to mean a degree of psychological pressure that goes so far as to mesmerize or overpower the unfortunate soul who is the object of the influence.⁶³ The concept also crops up in these petitions. There were eleven cases (15.9%) in our sample with this allegation. In seven of them, the claim was that some family member exerted the undue influence; in four cases, it was an outsider. When a relative alleges "undue influence" by another relative, this suggests a potential or actual family feud, and such a feud may indeed trigger a conservatorship. Someone may be hovering in the background, looking with

61. Technically, the LPS conservatorship is identical to the conservatorship outlined in §§ 1400-2808 of the California Probate Code except that: 1) the LPS conservatorship can be for a youth; 2) the priorities of conservatorship may be waived upon the Court Investigator's recommendation, CAL. PROB. CODE § 1812 (West 1991); and 3) the LPS conservatorship proceeding guarantees a right to a jury trial on the issue of impairment. CAL. WELF. & INST. CODE § 5350 (West 1991 & Supp. 1995). Note that under California Probate Code § 1452, there is not a right to a jury trial for ordinary conservatorships. CAL. PROB. CODE § 1452 (West 1991). Thus, the mentally disturbed have, potentially, a major procedural advantage over the elderly in contesting a conservatorship proceeding.

62. CAL. PROB. CODE § 6104 (West 1991). For recent scholarship on undue influence, see John E. Fennelly, *Up From Carpenter: Undue Influence in Will Contests*, 16 NOVA L. REV. 515 (1991), and Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200 (1989).

63. See, e.g., *Haynes v. First Nat'l Bank of New Jersey*, 432 A.2d 890 (1981).

a protective eye at the way the proposed ward is spending her money, or with a jealous or greedy eye. A sister may think mother is giving more money to brother than she ought to. Or children may be resentful that an elderly father has taken a new girlfriend, who wraps him around her finger.

It can also be alleged that some elderly person has fallen under the spell or become subject to the "will power" of a stranger. A *Los Angeles Times* study of conservatorships in Southern California reported that smooth-talking salesmen often target retirement homes for their fraudulent schemes.⁶⁴ To combat this, some retirement communities like Leisure World "run seminars, distribute flyers and counsel people on how to avoid being swindled."⁶⁵ It is hard to tell how widespread the problem is, but there is at least an echo of similar problems in the case files.

B. How Effectively Does the Probate Judge Decide Among Quarreling Families?

Family quarrels or disputes form the basis of many conservatorships, but this fact is not always apparent from the files. There were eleven cases in which such quarrels seemed obvious from the record; in each of them, the proposed ward had assets worth fighting about. Families do not need a financial excuse to start battling, but the money helps.

In one case, a daughter petitioned the court to be named conservator for her decrepit mother. She was afraid that her sister had plans to take the mother out of her (intermediate care) facility in Santa Clara County and move her to Los Angeles. This was presumably for the nefarious purpose of gaining control over assets parked in a revocable trust.⁶⁶ In another case, a daughter claimed that the proposed ward was unable to "resist undue influence." The proposed ward had let another relative collect veteran's disability payments; the relative (it was said) kept the money for herself and never turned it over to its rightful owner. To get this money back and to make sure future payments went where they belonged, the petitioner demanded to be named conservator. In this case, there was also a need for a temporary restraining order—a relative was (allegedly) harassing the proposed ward through phone calls and visits.⁶⁷

In another case, an elderly widowed man had been living in Salinas with

64. Davan Maharaj, *Retirement Centers Are Swindlers' Paradise*, L.A. TIMES, Nov. 3, 1991, at A1.

65. *Id.*

66. Doc. No. 3 (on file with authors).

67. Doc. No. 4 (on file with authors).

a daughter and son-in-law for ten years. The younger couple wanted to take a vacation in New Orleans and asked another daughter in Los Altos to look after their father for a week. That daughter drove him to her Los Altos house. When the sister returned, the Los Altos daughter told her sister that their father wanted to stay one week longer. Then she asked for another week and another. The first daughter filed for a conservatorship, and what ensued was, in effect, a kind of custody battle.⁶⁸

In another case, the mother had been injured in a car accident in 1986 and was on life-support systems. Initially, her daughter cared for her in the mother's house in San Diego. Then, however, a son took over and moved his mother to Palo Alto. The sister had apparently used the mother's credit cards, failed to give her proper care, and was herself not exactly a pillar of the community—she was guilty, for example, of “substance abuse.” The daughter was co-trustee of the mother's revocable trust and lived in the mother's house without paying rent. The son became conservator, the daughter was removed as co-trustee, and the house in San Diego went on the market. The mother's care had been swallowed up in a sibling war.⁶⁹

In fifty of the petitions, the petitioner requested specific powers. Forty of these petitions asked for the power to consent to medical treatment for the proposed ward. Twenty-six asked for various economic or financial powers or the power to decide the ward's residence and change it, if need be. The court granted the requests unconditionally in thirty-eight cases, but imposed conditions in five cases. In the remaining cases, the petitions were dropped.⁷⁰

The theory of the modern law, as we saw, is to cut the conservatorship to the particular needs of the ward and to take away only so much power and right as is absolutely necessary.⁷¹ In fact, the typical course of action in the typical conservatorship goes in the opposite direction. Decision-

68. Doc. No. 5 (on file with authors).

69. Doc. No. 6 (on file with authors).

70. We found an extreme example of a request for additional powers in a case where the nephew-petitioner was a partner in a local law firm. The list of additional powers requested was an entire page long and included: the right to perform and enter contracts, grant and take options, sell real or personal property, borrow money, purchase real property, lease property, lend money, exchange property, exercise stock options, participate in voting trusts, pay and collect debts and claims, and employ an attorney. All of these powers were granted by the court. Part of the court's compliance in this case may have derived from the fact that the total estate was valued at less than \$43,000, and that the ward was on her deathbed (in fact, dying within a month of the court order instituting the conservatorship). However, it is worth noting the rather large bill paid by the estate to the petitioner's law firm (almost \$3400) for a completely uncontested conservatorship.

71. *See supra* notes 23-25 and accompanying text.

making power is taken away from the ward, and the power of the conservator is increased.

C. How Many Proposed Wards Objected to Being Conserved and How Did the Judge Decide This Issue?

With few exceptions, California does not provide the right to a jury trial in conservatorship hearings.⁷² It is thus generally up to the judge to take into consideration any objections that the proposed ward might have about the proceeding. In twenty-eight of the sixty-one files examined, the proposed wards objected to some aspect of the conservatorship. They either did not want to have a conservator of their person or their estate, or they had some kind of objection to the particular person who wanted to be or was proposed as conservator. In nine out of sixty-one cases, there was a formal motion made, objecting to some aspect of the proceedings. In seven of these nine cases, the judge overruled the proposed ward and granted a conservatorship. In one case the conservatorship was not granted,⁷³ and in one other case the petition was dropped.⁷⁴

In six of nine cases when a proposed ward objected to the particular conservator, that conservator was appointed nonetheless. In only one case was the ward successful in preventing the person she objected to from becoming conservator;⁷⁵ in two other instances the petition was dropped. Therefore, it seems that, on the whole, the system is tilted in favor of the petitioner and against the ward. Most of the time, the judge ignores or overrules the wishes, complaints, and objections of the ward. This is especially the case when the ward is elderly. Here again, the Investigator's report and her presence at the hearing plays a decisive role.

D. Should the Court Pay More Attention to the Ward?

Of course elderly people (like people in general) can be difficult at times: needlessly cranky and irrational. They may feel neglected and accuse their relatives of ignoring them or of trying to move them to a nursing home against their own wishes (no one *wants* to move to a nursing home). There were echoes of such complaints in the dossiers. It is also true that some older people lose the capacity to judge how much they have declined

72. CAL. PROB. CODE § 1452 (West 1991).

73. Doc. No. 7 (on file with authors).

74. Doc. No. 8 (on file with authors).

75. Doc. No. 9 (on file with authors).

in memory or management capacity. Some of these elderly people are unaware that others may be using them, misleading them, defrauding them, or manipulating them. They may be unaware of how neglectful they had become in keeping body and soul together. There were wards who had not had a hot meal in months.

For such people, conservatorship can be a real protection. Does the opposite situation occur—situations where the conservatorship itself is a kind of fraud or manipulation, or simply misguided? In one case, a fifty-five-year-old woman had suffered a stroke and felt that she was at risk: “I realize that my medical condition may at times affect my mental condition and may make me vulnerable to persons who wish to take advantage of me.” Once (she claimed) she was “defrauded of several thousand dollars.” Her sister was appointed conservator, but less than two years later, the ward came to court, complaining (through a lawyer) about the sister’s behavior. The sister—it was alleged—was milking the estate, using it as an excuse to buy herself vacations in California. The Court Investigator found no need for a conservator because the ward was able to “manage her full life.” She was, in fact, taking courses at a community college, and, despite her disability, had “a social life,” and “active membership at a local church.” The court terminated the conservatorship.⁷⁶

The Court Investigator rarely disagreed with the petitioner; the Investigator almost invariably felt that a conservatorship *should* be established. In fact, the Court Investigator recommended conservatorships in all but one of the fifty-eight Santa Clara cases for which information was available—in seventeen of these, as we have seen, with conditions. In one case, the Investigator recommended against conservatorship, and the case was later dropped. In forty-eight of the cases, the judges ordered conservatorship. In eight cases, the matter was dropped—either the ward died, there was a change of plans, or the ward agreed to be moved to a different state.⁷⁷ At least fifteen of the proposed wards died during the process of establishing a conservatorship or shortly thereafter.

E. When the Court Investigator Recommended a Conservatorship, Did the Court Grant It?

The Court Investigator recommended forty conservatorships uncondition-

76. Doc. No. 10 (on file with authors).

77. In San Francisco, about 80% of the petitions were granted. In the remainder, the proposed ward either died or the petition was dropped.

ally and recommended seventeen others with conditions. In only one case did the judge deny a conservatorship that the Investigator had recommended. This case involved a thirty-eight-year-old man who was a chronic alcoholic living at home. His parents thought they could control him better if they were appointed conservators. The Investigator apparently agreed, but the judge had constitutional objections.⁷⁸

Of the seventeen cases in which a conservatorship was conditionally recommended, fifteen were granted and two cases were dropped. The Investigator's opinion seems to be of critical importance to the judge's determination whether to grant the petition. In the Chief Investigator's words, investigators are the "eyes and ears of the court," and the court seems to agree.

III. SOME REFLECTIONS ON CONSERVATORSHIP

In some jurisdictions, there are reports of corruption and incompetent management in the courts which handle conservatorships. Not so in the North District of Santa Clara County, or, for that matter, in San Francisco. The office of the Court Investigator seems to work fairly well, institutionally speaking. The investigators themselves were able, hard-working individuals—people who sincerely wanted the process to be humane and who aimed to protect the rights of elderly wards.

In our total data set of sixty-one cases, there were revealed fifty-three instances where the Investigator made a review visit to the ward after a year or so and filed a "review report." In not one of these instances did the conservator feel the ward had improved enough to terminate the conservatorship completely. In one case, the Investigator felt the elderly ward had sufficiently recovered from a coma to have voting rights restored. In seven cases, the Investigator recommended some change, often comparatively small—suggesting, for example, that the ward might need more sweaters or socks. In twenty-three instances no change whatsoever was recommended.

This suggests a certain amount of complacency. Nonetheless, it is reassuring that the Investigators did manage to revisit their wards (sometimes much sooner than the required visit at one year after the commencement of the conservatorship). Although the Investigators' busy work schedules sometimes work against their making the review visit at the required twelve-month interval, all Investigators did make a return visit

78. Doc. No. 11 (on file with authors).

within a sixteen-month interval. Also, if circumstances drastically changed (for example, when a conservator resigned and a new one was appointed), the Investigator made the required visit within the stipulated six-week time period to notify the ward of the change and determine his attitudes concerning it.⁷⁹

The Investigators' responsibilities seem to be increasing. The legal culture has been changing, and the law has been evolving; as a result, their duties have become deeper and broader.⁸⁰ Investigators attend planning meetings that consider the program, its future, and possible expansion. Some helped write the *Handbook for Court Investigators*.⁸¹ Others have been working on training films for new conservators—there have been six or seven of these. Still others, like the Chief Investigator, attend meetings with judges and work with a commission charged with the duty of developing ethical standards for professional conservators. The commission is also developing guidelines for a training program for professional conservators, who may come to occupy a role in conservatorships in the county.⁸² To us, the Investigators' work day seemed long, arduous, and at times stressful. The stories of the lives of wards had few happy endings. But Investigators find their work exciting—on the cutting edge of humane social change. Some of them value the job because it works toward humane treatment, human contact, comfort, and companionship for those near the end of life. It was our impression that, for the most part, the Investigators knew their job and did it well.

The conservators themselves are another question. They are, naturally, a mixed lot. They are lay people who come to their job without much knowledge of what is expected of them and with very different backgrounds—and, one should add, different motives and emotions as well. California does try hard to educate them in their duties and responsibilities. The Alameda County Bar Association has produced a thirty-minute video,

79. We did find one instance in which the ward herself, after two years in conservatorship, complained and got the conservatorship terminated. See *supra* text accompanying note 76.

80. In the last three years, for whatever reason, conservatorship caseloads of the Investigators have gradually declined. It seems likely that this decline is only temporary. In any event, the decline has not meant less work for Investigators; they have been given the added job of investigating guardianships for minors. CAL. FAM. CODE § 3111 (West 1994). Since no additional staff was assigned, Investigators have had to make many more visitations than previously.

81. HANDBOOK FOR COURT INVESTIGATORS.

82. Santa Clara County, as we noted, now has 23 professional conservators. Telephone Interview with the Santa Clara County Clerk's office (Aug. 15, 1994).

*With Heart: Understanding Conservatorships.*⁸³ There is also a *Handbook for Conservators*,⁸⁴ which sets out the rights and duties of conservators and is packed with useful and helpful information. How much of this sinks in, of course, we have no way of knowing.

The fact remains that this is a highly localized, low-visibility area of law. There has been very little research on conservatorships in action.⁸⁵ What happens in one or two counties, which we happened to study, does not necessarily tell us the whole story. Some investigations of conservatorship, elsewhere in the country, have turned up quite a few abuses and horror stories.⁸⁶ The question remains: How can these abuses be avoided? The best answer the system seems able to give is to beef up the procedures.

But do abuses occur mostly in places which have poor or retrograde procedures? We would not want to say that there is *no* relationship between process and justice. This would mean that the reform work of the legislature was essentially useless. But good laws and good procedures, quite obviously, are not nearly enough. Discretion is inevitable and unavoidable all over the legal system; but this area is unusually open-ended and free of restraints. It depends very much on the good will, intelligence, and authority of judges and other court workers—not to mention the conservators themselves. The reader might find this last sentence startling. Is it not true that the system is much tighter than before? That the processes have been reformed, safeguards instituted, and so on? Does this not limit excessive discretion? Indeed it does: on paper. The reality is otherwise. The reality is waivers of this and waivers of that, and a great deal of power lodged in the court and its staff.

The California system has much to recommend it, to be sure, and the Investigator is definitely an important feature. Nevertheless, there are nagging questions remaining that have to be asked. To begin with, in many real-life situations, there is a definite conflict of interest between petitioner and ward. The typical petitioner—a daughter, a son, a friend—probably does have the interests of the old man or woman at heart, or at least thinks she does. But there is the ugly fact of the money. If somebody spends the

83. WITH HEART: UNDERSTANDING CONSERVATORSHIPS (Alameda County Bar Ass'n 1993).

84. HANDBOOK FOR CONSERVATORS.

85. One exception, of course, is the earlier study in this series, Friedman & Savage, *supra* note 12.

86. For a devastating series of articles on the topic, see HOUSE SELECT COMMITTEE ON AGING, 100TH CONG., 1ST SESS., ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE app. (Comm. Print. 1987).

money during mother's declining years, there will be nothing left to inherit. The children cannot help but be aware of this mournful fact.

In the literature on conservatorships, we find the term "material abuse," obviously modeled after the term *physical* abuse. "Material abuse" is defined as "financial exploitation, exploitation of resources, material exploitation, fiduciary abuse, financial mistreatment, financial maltreatment, financial victimization, economic victimization, extortion, theft, and fraud."⁸⁷ This blizzard of terms, of course, boils down to a description of the fact that somebody may be stealing from or swindling some elderly person out of their money. Conservatorship is an obvious cure for some forms of "material abuse."

But notice that conservatorship can be a *cause* of "material abuse" as well as a cure. Sometimes, to be sure, a member of the family files a petition *because* people are taking advantage of mother, getting her money, wheedling assets out of her; or at least the family member thinks so. But sometimes the very process involves putting the fox in charge of the hen house; the "material abuse" comes from the conservator herself.⁸⁸ Of course, California's procedures were drafted with an eye toward avoiding this kind of abuse. There is no doubt, however, that the process is too crude to capture the more subtle, very human forms of greed.

There is also the inherent difficulty of trying to reduce to a legal formula a very variable and complex human problem: What constitutes competence? In our times, legal doctrine has retreated from the situation when it made sharp, brittle, black-and-white distinctions between competence and incompetence in issues of civil commitment, conservatorship, and the like.⁸⁹ California law now recognizes that you cannot simply label people one way or another. The two end-states merge gently into each other (perhaps for all of us).

Yet judges still have to decide, and do decide, whether men and women

87. Kathleen H. Wilber, *Material Abuse of the Elderly: When is Guardianship a Solution?*, 2 J. ELDER ABUSE & NEGLECT 89, 90 (1990).

88. In some cases, the unfairness of the claim almost leaps off the pages of the record. See, e.g., *In re Estate of Wagner*, 367 N.W.2d 736 (Neb. 1985). In this case, four of six children of Mrs. Delphine Wagner tried to get a conservator appointed for her. *Id.* at 737. They said she was unable to manage her property because of her "advanced age," her grief over her husband's death, and the undue influence of a daughter and two others. *Id.* at 738. The facts of the case, however, suggested only that Mrs. Wagner began to charge her children more money for land they leased, and this caused "dissension" in the family. *Id.* at 741. She was otherwise perfectly lucid, and the evidence suggested she was downright shrewd. *Id.* at 739. Conservatorship was denied. *Id.* at 736.

89. See RICHARD W. FOX, *SO FAR DISORDERED IN MIND: INSANITY IN CALIFORNIA, 1870-1930* (1978).

can manage their money for themselves; or even whether they know if they can do so. Psychologists have struggled to devise tests of decision-making capacity, but few of them would claim that the problem is anywhere near a solution.⁹⁰ It is not even clear that we know what *the* problem is. In any event, when people start sliding downhill, they often slide slowly, almost imperceptibly. They have good days and bad days. They can manage some things and not others.

The solution, such as it is, in the Probate Code, does avoid and supersede the older legalisms and slides away from hard-and-fast judgments. But the Code nonetheless embodies a kind of new legalism. What results is a paper system which is at the same time highly formalized and highly discretionary. In any event, it is strongly procedural. There are elaborate processes, safeguards, steps to be taken, occasions of review, and so on. All this, of course, has its costs. The more rights and procedures, the harder it is for ordinary people—members of the family, friends, neighbors—to handle matters by themselves and to run the conservatorship once it gets established. The process has become much more legalized. It almost demands that a conservator work with a lawyer. And, indeed, the presence of lawyers was felt in file after file.⁹¹ This, of course, adds to the costs of conservatorship⁹²—a cost borne by the individual estates for the most part.⁹³

The “legalization” of conservatorship is not an isolated development. The United States, in general, is a highly “legalized” society. By this we mean the following: There are few zones of immunity from the reach of law, few questions that cannot be litigated; in turn, this means that law is a lever that many people (and institutions) can grasp in case of need.⁹⁴ Because this

90. See generally Marshall B. Kapp, *Evaluating Decisionmaking Capacity in the Elderly: A Review of Recent Literature*, 2 J. ELDER ABUSE & NEGLECT 15 (1990).

91. By 1979, in situations where the ward might be confused or otherwise need a lawyer, the court could refer cases to a list of private attorneys on a panel of conservatorship lawyers. CAL. PROB. CODE § 1470 (West 1991 & Supp. 1995).

92. An attorney who renders service to a conservatorship is entitled to “reasonable” compensation, which can be charged to the estate. CAL. PROB. CODE § 2640(c) (West 1991 & Supp. 1995); CAL. PROB. CODE § 2642 (West 1991).

93. On the whole, in our judgment, the lawyers’ fees listed in the files did not seem excessive, although there did seem to be occasional examples where lawyers charged what seemed to be a good deal of money for relatively straightforward services. See *supra* note 70.

94. See FRIEDMAN, *supra* note 45. The decline of zones of immunity and the “legalization” of society do not mean that society is necessarily litigious, or imply any particular level of litigation on any particular subject. Compare Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31

is so, a certain amount of defensive legalization can also be expected. We see this, for example, when we look at the “trigger” that sets off a petition to appoint a conservator. A hospital may want a conservatorship to ensure that there is somebody responsible to sign off on documents, waivers, and releases from liability.⁹⁵

Yet, as we said, even though the process has been legalized, it also remains highly discretionary. The statute sets out a flock of procedural steps, forms, and requirements that must be met (or waived). But the heart, the guts of the conservatorship remains a matter of discretion. Whose discretion? A combination of the conservator and the court. The one proposes; the other disposes. The legalization, in other words, is procedural—you *must* follow the rules, you must get permission for your acts, and especially, you must file petitions. Courts, however, are allowed to grant permission under the vaguest of standards. For example, under the “substituted judgment” notion, a conservator can ask for permission to do acts which a “prudent” person might have done, even if there is no evidence the ward would have acted in this particular way.⁹⁶

A good example is gift-giving. A fiduciary normally has no right to give away money—after all, it does not belong to her; and the person who *does* own the money is not capable of making that decision. But the Code specifically empowers the judge to allow gift-giving when there will be no adverse effect on the estate and after considering several criteria, including *inter alia*, the ward’s “estate plan,” tax factors, and the “likelihood” that a “reasonably prudent person” would make such a gift.⁹⁷ Of course, there are *no* circumstances under which the ward herself is, strictly speaking, better off for giving money away (unless it is to buy some loyalty and continuing attention from kinfolk). We are not saying that the “substituted judgment” idea is wrong or unfair; it is most certainly better than the alternative, some sort of wooden rigidity. In the most recent California case

UCLA L. REV. (1983), with Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1 (1994).

95 California provides an alternative with its durable power of attorney for health care decisions. CAL. PROB. CODE §§ 4700-4702 (West Supp. 1995). As noted above, the durable power of attorney provides an inexpensive method of authorizing health care when the patient is unconscious or otherwise incapacitated, in those cases where the patient has had the foresight to utilize this option. See *supra* notes 7-8 and accompanying text.

96. The “substituted judgment” doctrine is codified in CAL. PROB. CODE §§ 2580-2586 (West 1991 & Supp. 1995).

97 CAL. PROB. CODE § 2583 (West 1991 & Supp. 1995).

on the subject, the estate was worth over \$13,000,000.⁹⁸ It would be ridiculous to pretend that a person with that kind of money would not (if “prudent”) make gifts to relatives.

Still, the rule does reflect a contradiction at the heart of conservatorship law—and conservatorship as an institution. That contradiction, or conflict, is between those people who have worn out with time and become superfluous, and those of their family or friends who are waiting for money that will drop into their laps when the wards leave the land of half-living and enter the land of the dead.

The people who take care of the old are often the same people who inherit the money when the old folks die. It must surely cross their minds—all but the most selfless—that someday the money will belong to *them*, unless it gets frittered away somehow or spent on medical care, nursing homes and other catastrophes. It is particularly frustrating when the heir sees, or thinks she sees, base ingratitude, or money spent or lavished on some worthless sibling, or somebody else who exerts “undue influence.” This rather exotic, mercilessly criticized legal concept pops up, as we have seen, with surprising frequency in the files.

In one case, for example, the petitioner was a second cousin of the proposed ward, who lived in an Odd Fellows retirement home in Sarasota, California. The petition alleged that the old man was prey to undue influence. He gave “\$7,000 to his girlfriend’s daughter. He [was] not aware of certain moneys he is entitled to.” The proposed ward told the petitioner, his cousin, that he intended to give him his car; but now, it turns out, he wants to give his car to the girlfriend. He also allegedly plans to give her some shares of stock and has promised the American Legion Post in Gilroy the munificent sum of \$119,000.⁹⁹

The Court Investigator found the proposed ward alert and aware. He objected to his cousin as conservator. If there had to be a conservator, the man suggested two friends whom he had met through the Gilroy American

98. The case is *Conservatorship of Estate of Hart*, 279 Cal. Rptr. 249 (Cal. Ct. App. 1991). Marcia F. Hart, the ward, had Alzheimer’s disease. *Id.* at 251. Wells Fargo Bank was the conservator, and the case turned on a plan to make substantial gifts to her children and grandchildren. *Id.* One heir objected. *Id.* The lower court decided in favor of the children and grandchildren, arguing that the past actions of the ward indicated a willingness to make the gifts (Santa Clara Cty. Sup. Ct. action 109304). However, the appeal court reversed and remanded. 279 Cal. Rptr. 249. The appeals court agreed that “the 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 264. The court felt that the superior court had acted hastily in allowing the disbursement without further fact-finding. *Id.*

99. Doc. No. 12 (on file with authors).

Legion Post. In this case, the judge denied the appointment of a conservator altogether. The ward, he felt, was perfectly able to manage on his own. All in all, the smell of money was downright overpowering in this file.¹⁰⁰

In 1993, the newspapers reported another interesting case—a controversy revolving around eighty-seven-year-old Victor Tchelitscheff, who fled Russia after the Revolution, and now, in his high old age, wanted to spend his money to rebuild “an ancient Russian church originally erected by his great-grandfather.”¹⁰¹ The Soviets had used the church as a warehouse, but now the Soviets were no more. This noble plan to restore a church sat very badly with Victor’s daughter Maria (herself 60 years old), who filed a conservatorship petition. Victor, she said, was unable to care for himself and was under the thumb of one Lydiya Zaburskaya, a fifty-two-year-old architect whom he planned to marry. The Superior Court was thus delivered a tangled mess of family dispute, money, hopes and dreams, love, suspicion, and age, all in the form of proceedings for conservatorship. The court responded by ordering a conservatorship of Victor’s estate and person and ordering Victor not to marry Lydiya.¹⁰²

Squabbles over money lie at the root of many of these battles. Yet the ultimate problem, and the deeper problem, may reside in society’s perception of the nature of old age itself. Experts may debate whether we have a “youth culture,” generally speaking, but it is certainly young people who set the standard for beauty and health. It is also certainly true that most people (including old people) do not find old people in their decline either mentally, emotionally, or physically attractive. There is no easy way to squeeze this prejudice against old age out of the system. It is in the air. It infects the judges, the Court Investigators, the lawyers, members of the ward’s family, and the ward herself. It is usually subtle, unconscious, insidious, and pervasive. Like a virus, it seeps through the tightest mesh screen of procedure the human mind can devise.

“Second childhood” differs in fundamental ways from first childhood. Children, too, are helpless and need constant care; what could be more dependent than a newborn baby? Not everybody finds parenthood noble

100. *Id.* The petitioner, having lost the bid to become conservator, felt that he ought to recover at least his lawyers’ fees, amounting to \$2250. By his account, he was much put upon: the proposed ward, not he, was the one whose only love was money. The petitioner, on the other hand, had “done all these things for him . . . without payment.” The judge felt that he was “without authority to award attorney’s fees to one who has unsuccessfully petitioned for appointment when no appointment is made of the petitioner or a third party.” *Id.*

101. S.F. CHRON., Dec. 1, 1993, at A17, A18.

102. SAN JOSE MERCURY NEWS, Dec. 4, 1993, at B1.

and fun, to be sure. Plenty of children get abused, and child abuse has come to be recognized as a major social problem. Still, on the whole, the vast majority of parents seem to feel an overwhelming and almost instinctual love for their babies. A mother's love seems to be one of the strongest bonds between people on earth. This love, and the love of fathers, grandparents, and general hangers-on, is what keeps most children healthy and happy and makes them grow. Legal protection is not needed. The law steps in, for the "best interests of the child," only in unusual cases, pathological cases, cases of neglect and abuse.

No such armor of instinct and bonding protects the elderly. A child is a burden and a blessing, though usually more blessing than burden. A child has a future; it develops, unfolds, produces new delights. No one but a saint could consider a senile, incontinent, dependent old mother or father as anything but a burden. And the road leads in only one direction—down. The ravages and decay of high old age constitute a terrible social problem. It is a struggle for many people, some of them at the doorstep of old age themselves, to care for very frail, very elderly parents and other relatives, even those who retain some function. Simple, everyday chores—helping them dress, paying the bills, buying the groceries, cleaning the house or the room, taking them to the doctor, trying vainly to cheer them up or ignite a spark of happiness—can become very burdensome, especially when all this comes on top of child-care, jobs, careers, husbands and wives, and the stresses and strains of daily life. These are hard facts.

Moreover, little children, except in rare instances, do not have any money. They *cost* money, of course, but paradoxically, this sometimes puts them in a better position than the old folks who have something put away, or a house, or a few tidy bank accounts. Some of the elderly appear to be sheep waiting to be fleeced. Many of the statutes contained language about elderly people who can be preyed upon by "designing" or "artful" people.¹⁰³ Indeed, some of the elderly are vulnerable: "Desperately lonely individuals, as the elderly often are," can be easily taken in by the "ostensible warmth" of salespeople—or con artists.¹⁰⁴

Of course, social attitudes are not static, and attitudes toward the elderly in this society are no exception. In some ways, the elderly are better off than in past generations. Economically, this seems to be generally true.

103. See, e.g., CAL. PROB. CODE § 1460 (West 1956), quoted in George J. Alexander, *On Being Imposed Upon by Artful or Designing Persons—The California Experience with the Involuntary Placement of the Aged*, 14 SAN DIEGO L. REV. 1083 (1977).

104. ROBERT N. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 314 (1975).

They live longer, and that is not *always* a curse. The changes in the California law on conservatorship, whether effective or not, are symptoms of changes for the better in attitudes. They reflect, among other things, the emergence of the elderly as a powerful lobby. There are other symptoms, too: the passage of age discrimination laws¹⁰⁵ and the abolition of mandatory retirement among others. The changes also run parallel to other changes in law—reforms in the law of civil commitment, for example.

California's attempt to reform the law of conservatorship marks another step in the due process revolution. But in the case of those among the elderly who are fading, it may be that law reform—at least procedural reform—is not enough. There must be a further change in the way the elderly are perceived and received and conceived. This, of course, is a tall order. Still, to be a humane society, we need to work harder on the issues that underlie conservatorship and related institutions. Procedure is only a start. What is needed are institutions that work, that are supportive, and that deal justly and adequately with the frailty and infirmity of an increasing number of older Americans.

105. See LAWRENCE M. FRIEDMAN, *YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT* (1984).

