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NOTES

GUARDIANSHIP: THE POWER OF A GUARDIAN TO MAKE GIFTS OF HIS WARD'S PROPERTY

A guardian's ability to dispose of his ward's property is limited by section 1558 of the California Probate Code, which provides in part that:

On the application of the guardian or next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward, or any part of such surplus income, to the next of kin whom the ward would, in the judgment of the court, have aided, if said ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court, but the court shall give consideration to the amount of surplus income available after due provision has been made for the proper support and maintenance of the ward, to the circumstances and condition of life to which the ward and said next of kin have been accustomed and to the amount which the ward would, in the judgment of the court, have allowed said next of kin, had said ward been of sound mind. . . .¹

It is not difficult to imagine problems which might arise under the language of this statute. Three hypothetical, though not unlikely, possibilities will serve as illustrations:

1. A, a wealthy gentleman of 70, has a son, B, who has deserted his wife and C, her child by a former marriage. A has paid all the expenses for C's college education and is about to support C through four years of medical school. A is declared incompetent and his person and property placed under guardianship.

2. D, an elderly widow with independently wealthy adult children, has given her second cousin \$5000 for each of the past ten years. E, the second cousin, does not need the money for support, but D has expressed a desire that E have the money now instead of waiting to take under her will. With this money, E is able to take a vacation each year which she could not otherwise afford. D is declared incompetent and her person and property placed under guardianship.

3. F, a millionaire many times over, having no relatives, executes a will leaving his entire estate to G, a destitute childhood friend with whom F served in the Army. G, having no income of his own, has been supported by F for the past twenty years. F is declared incompetent and his person and property are placed under guardianship.

Now C, E, and G file for an allowance from the surplus income of their respective incompetent benefactors. A reading of section 1558 will lead to the inescapable conclusion that neither C, E, nor G will be successful, because none of them fall within the accepted definition of "next of kin," defined in California as "those who would be entitled to succeed to the property of a person under the laws of intestate succession."² Thus, even though the ward, during compe-

¹ CAL. PROB. CODE § 1856 is identical to § 1558, with the exception that the terms "conservator" and "conservatee" are substituted for the terms "guardian" and "ward" or "insane or incompetent person."

² CAL. PROB. CODE § 108. "Next of kin" is defined in BLACK, LAW DICTIONARY 1194 (4th ed. 1957) as "nearest blood relative."

tency, had made gifts to, or provided support for, a friend or relative, the existence of kindred of a nearer degree would exclude a friend or relative from that class of persons eligible for aid under section 1558. If the courts were to construe "next of kin," as used in section 1558, to include all-blood relatives, this inequity would be partially corrected. However, a judicial construction of this sort would torture the accepted definition of next of kin, and in any event, would not place a close friend of the ward in any better position than that in which he now stands. Since it is obvious that a change in the definition of next of kin is not an adequate solution, an answer must be sought elsewhere.

Even if a petitioner is the ward's next of kin, he may have another obstacle to overcome before he is granted an allowance. It is not clear from reading the statute whether the court would grant an allowance to a qualified petitioner where the only aid such petitioner had received prior to the ward's incompetency had taken the form of a gift. As a general rule, neither a court nor a guardian has the power to dispose of the property of the ward by way of gift,³ although in California an exception to this rule exists in favor of a charity to which the ward had been contributing prior to his incompetency.⁴ Section 1558, as quoted above, does not specifically prohibit gifts of the ward's property, provided the donee is the ward's next of kin, but in order for the court to allow them it must be determined that the word "allowance" includes the term "gifts." Read as a whole, the statute seems to limit allowances to that amount needed for the support of the next of kin.⁵ This reasoning is supported by language in section 1558 which directs the court to consider the circumstances and condition of life to which the next of kin had been accustomed. However, the statute also states that: "the amounts and proportions thereof shall be discretionary with the court, but the court shall give consideration to . . . the amount which the ward would . . . have allowed said next of kin."⁶ The California courts have not discussed a distinction between support and gifts with reference to section 1558,⁷ and indeed, it may be a distinction too fine to draw.⁸ The California cases in point have turned on whether the ward, if competent, would have granted an allowance.⁹ Other courts do, however, discuss the "need" factor in determining what the ward would have done.¹⁰ In the absence of statute, however, no cases have been found where a petition for an allowance was denied on grounds that it was not needed for support. Moreover, in several cases courts have awarded grants of the ward's surplus income even though it was obvious that the grants were not needed for

³ *Harris v. Harris*, 57 Cal. 2d 367, 369 P.2d 481 (1962); *Guardianship of Hall*, 31 Cal. 2d 157, 187 P.2d 396 (1947) (dictum). See generally 39 C.J.S. *Guardian & Ward* § 79 (1944).

⁴ *Guardianship of Hall*, 31 Cal. 2d 157, 187 P.2d 396 (1947) (dictum).

⁵ *Harris v. Harris*, 57 Cal. 2d 367, 370, 369 P.2d 481, 483 (1962).

⁶ CAL. PROB. CODE § 1558.

⁷ *Harris v. Harris*, 57 Cal. 2d 367, 369 P.2d 481 (1962); *Guardianship of Hall*, 31 Cal. 2d 157, 187 P.2d 396 (1947); *Guardianship of Hudelson*, 18 Cal. 2d 401, 115 P.2d 805 (1941).

⁸ For example, if the petitioner were living at the very edge of poverty and earning just enough to support himself, would a donation from the ward be a gift or support?

⁹ See cases cited note 7 *supra*.

¹⁰ See, e.g., *In re Brice's Guardianship*, 233 Iowa 183, 8 N.W.2d 576 (1943).

support.¹¹ It seems, therefore, that where there is evidence that the ward, if competent, would have granted an allowance, the absence of need does not disqualify the petitioner.

Professor William F. Fratcher, in a cogent and scathing attack on the general rule prohibiting gifts of the ward's property, stated:

One of the cruelest features of the law of guardianship is the rule that the guardian may not give away the ward's funds, even with court authorization. . . . A wealthy woman, whose property is under guardianship because of her occasional lapses of memory, may be deprived of the privilege of making regular contributions to her church and other charities and obliged to see her mother, her child, or her dearest friend live in poverty and die unnecessarily for the want of the means to purchase medical care. A retired business man, who had been making regular annual gifts to his children to minimize the federal estate tax on his estate, must stop when senile disabilities result in a guardianship of his property. . . .¹²

It is conceded that Professor Fratcher's argument is less convincing in California than in some other states, since section 1558 makes provisions for those persons mentioned in his argument who qualify as next of kin. However, if relatives who do not qualify under the existing statute are mentally substituted for those who do, the force of his argument is given its full effect.

*Are Stringent Restrictions Necessary?*³

Having established the possibility that severe injustice may result because of the restrictions set out in section 1558, it becomes necessary to examine the historical basis of the rule to determine whether these restrictions are necessary. If it can be determined that reasons for these restrictions are invalid or do not exist, it would seem that a liberalization of section 1558 is justified. "When the reason of a rule ceases, so should the rule itself."¹³ The law adapts itself to varying conditions and is modified so as to subserve the ends of justice under different circumstances.¹⁴

The doctrine that a court may, under proper circumstances, approve grants to a relative was first stated by Lord Eldon in *Ex parte Whitbread*:¹⁵

I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children—to brothers and other collateral kindred; and if we get to the principle, we find that *it is not because the parties are next of kin to the Lunatic*, or, as such, have any right to an allowance, *but because the Court will not refuse to do*, for the benefit of the Lunatic, *that which it is probable the Lunatic himself would have done*. . . .¹⁶

¹¹ *In re du Pont*, 41 Del. Ch. 300, 194 A.2d 309 (1963); *Smith v. Smith*, 38 Ohio L. Abs. 503, 26 Ohio Op. 541 (Franklin County P. Ct. 1942). See also *City Bank Farmers Trust Co. v. McGowan*, 43 F. Supp. 790 (W.D.N.Y. 1942), *aff'd* 142 F.2d 599 (2d Cir. 1944), *aff'd in part, rev'd in part*, 323 U.S. 594 (1945).

¹² Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 315-16 (1960).

¹³ CAL. CIV. CODE § 3510.

¹⁴ See *Katz v. Walkinshaw*, 141 Cal. 116, 74 Pac. 766 (1903).

¹⁵ 2 Meri. 99, 35 Eng. Rep. 878 (1816).

¹⁶ *Id.* at 103, 35 Eng. Rep. at 879. (Emphasis added.)

In *Whitbread*, a niece of the incompetent petitioned for an allowance from her uncle's estate. It is not clear from the opinion whether the niece was also the next of kin, but reference is made to the Master's report¹⁷ which stated, in essence, that the lunatic's immediate family should be provided for out of the allowance for the lunatic's maintenance and support, thus implying that kindred of a nearer degree existed.¹⁸

The *Whitbread* doctrine has been used extensively in both England and the United States to justify grants from the incompetent's estate to persons to whom the incompetent does not owe a duty of support.¹⁹ Courts have, for example, permitted allowances to the ward's parents,²⁰ grandchildren,²¹ brothers and sisters,²² brothers and sisters of the half blood,²³ nephews and nieces,²⁴ cousins,²⁵

¹⁷ *Id.* at 99, 35 Eng. Rep. at 878.

¹⁸ The English rule controlling disposal of the ward's property for purposes not connected with his support is codified in Part VIII, Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, §§ 102-03; "[T]he judge shall have the power to . . . make orders . . . for . . . the gift of any property . . . for the maintenance or other benefit of members of the patient's family . . . and for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered"

¹⁹ A similar argument, supporting a more liberal conclusion, was made in Note, 43 N.C.L. REV. 616 (1965).

²⁰ *Gamble v. Leva*, 212 Ala. 155, 102 So. 120 (1924); *Ex parte Phillips*, 130 Miss. 682, 94 So. 840 (1923); *DeWald v. Morris*, — Mo. App. —, 397 S.W.2d 738 (1965); *State ex rel. Kemp v. Arnold*, 234 Mo. App. 154, 113 S.W.2d 143 (1938); *Seley v. Howell*, 115 Tex. 583, 285 S.W. 815 (1926); *In re Strozyk*, 156 Wash. 233, 236 Pac. 646 (1930) (for expenses as guardian). *But see Lewis v. Moody*, 149 Tenn. 687, 261 S.W. 673 (1924) (statute limited allowances to children or descendants); *In re Heck*, 225 Wis. 636, 275 N.W. 520 (1937) (statute limited allowances to members of the family).

²¹ *In re Schley*, 201 Misc. 522, 107 N.Y.S.2d 884 (Sup. Ct. 1951).

²² *Farwell v. Commissioner*, 38 F.2d 791 (2d Cir. 1930); *In re Buckley's Estate*, 330 Mich. 102, 47 N.W.2d 33 (1951); *In re Carson*, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962); *In re Battin*, 171 Misc. 145, 11 N.Y.S.2d 891 (Sup. Ct. 1939); *In re Calasantra*, 154 Misc. 493, 278 N.Y. Supp. 263 (Chautauqua County Ct. 1935). An allowance was denied in *Monds v. Dugger*, 176 Tenn. 550, 144 S.W.2d 761 (1940), where there was no showing that incompetent would grant an allowance if sane.

²³ *In re Farmers' Loan & Trust Co.*, 181 App. Div. 642, 168 N.Y. Supp. 952 (1918), *aff'd per curiam*, 225 N.Y. 666, 122 N.E. 880 (1919).

²⁴ *In re Brice's Guardianship*, 233 Iowa 183, 8 N.W.2d 576 (1943); *In re Ginsberg*, 267 App. Div. 995, 48 N.Y.S.2d 240 (1944); *In re Fleming*, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940); *In re Farmers' Loan & Trust Co.*, 181 App. Div. 642, 168 N.Y. Supp. 952 (1918), *aff'd per curiam*, 225 N.Y. 666, 122 N.E. 880 (1919); *Hambleton's Appeal*, 102 Pa. 50 (1883); *In re Blair*, 1 Myl. & C. 300, 40 Eng. Rep. 390 (Ch. 1836). Allowances were denied in *In re Kernochan*, 84 Misc. 565, 146 N.Y. Supp. 1026 (Sup. Ct. 1914) (ward's intent not proved); *In re Johnson*, 111 N.J. Eq. 268, 162 Atl. 96 (1932) (evidence insufficient to show that ward would have granted allowance); *Lewis v. Moody*, 149 Tenn. 687, 261 S.W. 673 (1924) (statute limited allowances to children or descendants).

²⁵ *In re Flagler*, 248 N.Y. 415, 162 N.E. 471 (1928) (second cousin); *In re Frost*, L.R. 5 Ch. 699 (1870). Applications were denied in *In re Darling*, 39 Ch. D. 208 (1888) (no evidence of intent); *In re Evans*, 21 Ch. D. 297 (1882) (no intent).

friends,²⁶ and a retired servant.²⁷ Gifts to charity have been allowed,²⁸ but are usually limited to the amount the incompetent had been in the habit of giving.²⁹ In general, the opposition, consent or support³⁰ of the next of kin has no effect on the court's decision.³¹

In recent years, several courts have granted a guardian authority to dispose, by way of gift, surplus income³² and portions of the corpus of the estate,³³ to presumptive heirs³⁴ or to charities³⁵ in order to reduce estate taxes and thereby increase the amount the heirs would take when the ward died. These cases placed great emphasis on findings that the ward, if competent, would have made the gifts. For example, in *In re du Pont*, the court said: "I am satisfied that the guardians have amply proved that the gifts will carry out a plan which he (the ward) would himself have instituted had he been capable of doing so. Therefore . . . I will authorize the guardians to make the proposed distributions . . ." ³⁶

Since there is precedent for awarding grants to persons other than the next of kin for purposes other than support, and since it has been established that the existing statute has the potential for producing harmful results, if the policy considerations which support the restrictions in the existing statute can be refuted, it would seem that section 1558 should be revised. There are several reasons, however, which militate against a change in section 1558. First, in California, any friend or relative may petition the court for a declaration of incompetency.³⁷ The existing language in section 1558, limiting grants to next of kin, could reduce the probability that a friend or relative, by design, will institute an action to declare a person incompetent in order to initiate a claim for part of such person's income. This reasoning, however, overlooks the obvious fact that such person is unlikely to benefit from having the ward's property placed under the supervision of the court, for he would still have the burden of showing that the ward, if competent, would have made such a grant. Indeed, it seems more probable that

²⁶ *In re Heeney*, 2 Barb. Ch. 326 (N.Y. 1847).

²⁷ *In re Earl of Carysfort*, Craig & Ph. 76, 41 Eng. Rep. 418 (Ch. 1840).

²⁸ *In re Heeney*, 2 Barb. Ch. 326 (N.Y. 1847).

²⁹ See, e.g., *Harris v. Harris*, 57 Cal. 2d 367, 369 P.2d 481 (1962); *Guardianship of Hall*, 31 Cal. 2d 157, 187 P.2d 396 (1947); *In re Brice's Guardianship*, 233 Iowa 183, 8 N.W.2d 576 (1943); *Citizens' State Bank v. Shanklin*, 174 Mo. App. 639, 161 S.W. 341 (1913); *In re Strickland*, L.R. 6 Ch. 226 (1871). *But see In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

³⁰ *In re Calasantra*, 154 Misc. 493, 278 N.Y. Supp. 263 (Chautauqua County Ct. 1935).

³¹ *Ex parte Whitbread*, 2 Meri. 99, 35 Eng. Rep. 878 (1816); *In re Darling*, 39 Ch. D. 208 (1888).

³² *In re du Pont*, 41 Del. Ch. 300, 194 A.2d 309 (1963); *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964); *Smith v. Smith*, 38 Ohio L. Abs. 503, 26 Ohio Op. 541 (Franklin County P. Ct. 1942).

³³ *In re du Pont*, *supra* note 32; *In re Carson*, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962); *In re Kenan*, *supra* note 32.

³⁴ *In re du Pont*, 41 Del. Ch. 300, 194 A.2d 309 (1963); *In re Carson*, *supra* note 33; *Smith v. Smith*, 38 Ohio L. Abs. 503, 26 Ohio Op. 541 (Franklin County P. Ct. 1942).

³⁵ *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

³⁶ 41 Del. Ch. 300, 315, 194 A.2d 309, 317 (1963).

³⁷ CAL. PROB. CODE § 1461.

a next of kin would bring a spurious action to declare the person incompetent in order to preserve his expectancy in the ward's estate. If the action was successful, the ward could not dissipate his estate and the next of kin's expectancy could not be defeated by the creation or change of a will. A second possible reason is that a transfer of income from the ward's estate would be in derogation of the next of kin's expectancy in the ward's estate. This objection is mooted where the ward had executed a will which disregarded the next of kin; here no reason exists for allowing only the next of kin to receive grants of surplus income. Even if the ward were intestate, a person other than the next of kin would be required to come forth with evidence sufficient to show that the ward, if competent, would have aided him. Also, the next of kin does not have a vested interest in the estate of the ward until such ward's death intestate, so it seems that an allowance to another would not be in derogation of the interest of the next of kin. Finally, it is generally recognized that the court's duty is to supervise the management of the incompetent's estate and preserve it for the day he regains his competency. However, since a grant of surplus income would not diminish the estate, it cannot be said that granting surplus income is incompatible with the court's duties.

Conversely, there are several reasons which support a change in the statute. A change would allow the court to give effect to the ward's intentions, thereby eliminating some of the undesirable consequences of his incompetency. In some cases, an allowance would prevent a donee from becoming a public charge, thereby benefitting the community by removing a burden which it would otherwise have to bear. In addition, an exception to section 1558 already exists in favor of charities.³⁸ It seems that the reason for this exception is the favored position which charities occupy in the eyes of the law. Although it is not within the scope of this note to explore the reasoning behind the favored position of a charity in this particular situation, it could be reasonably argued that since the charity will use the grant to benefit others, the ward should be permitted to benefit others directly. Finally, tax savings may result which would benefit both the donor and the donee.³⁹

While section 1558 is supported by policy considerations, it is submitted that these considerations are outweighed by policies which favor elimination of the "next of kin" provision. The word "person" should be substituted for "next of kin" in section 1558, thereby meeting the objections discussed above. In deciding whether to authorize grants of the ward's surplus income under such a revised statute, a court should consider the past conduct of the ward,⁴⁰ the ward's present and future maintenance requirements (considering age and life expectancy),⁴¹

³⁸ *Harris v. Harris*, 57 Cal. 2d 367, 369 P.2d 481 (1962); *Guardianship of Hall*, 31 Cal. 2d 157, 187 P.2d 396 (1947).

³⁹ See, e.g., *In re du Pont*, 41 Del. Ch. 300, 194 A.2d 309 (1963); *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

⁴⁰ A court could possibly use a liberal subjective standard as proposed in Comment, 17 CALIF. L. REV. 175 (1929). "Determine what had been the past course of conduct of this particular lunatic, and on the basis of such facts determine what it is probable that he, or she, would do in this particular instance." *Id.* at 178.

⁴¹ See, e.g., cases cited note 32 *supra*.

existing wills or estate plans,⁴² the ward's relationship with the donee,⁴³ and the extent of the ward's incompetence.⁴⁴

Section 423 of a proposed revision to the Model Probate Code⁴⁵ provides: "The court will exercise, or direct the exercise of its powers . . . to make gifts exceeding one year's income of the curatelic property . . . only if satisfied, after due notice and hearing, that the curatel, if of age, not disabled and present, would do so himself."⁴⁶

Professor Fratcher, commenting on this section, wrote: "[T]he creation of such authority is necessary if the property of disabled persons is to be protected against ruinous taxation. . . ."⁴⁷ It would seem, however, that while tax avoidance may be a worthy objective, tax considerations are important only in so far as they can be used to determine what the ward would have done.⁴⁸ It is possible that the ward gave no thought to tax planning during his competent period. It does not follow that the court or guardian should do his estate planning for him.

To the extent that the court's authority is based on the doctrine that the court should not refuse to do what the incompetent would have done, the need of the particular person or organization applying for a grant should be considered only if, and to the same extent as, the ward would have considered need in making his decision. This conclusion is clearly consistent with the *Whitbread* doctrine, as discussed above, and seems to be more acceptable in view of the difficulties mentioned previously, in distinguishing gifts from support.⁴⁹

One writer, although conceding that most cases do not support his view, has challenged the doctrine that the court's authority is based on what it finds the incompetent would have done.⁵⁰ After quoting out of context from *Ex parte Whitbread*, he states: "[T]he rule probably should have been that the court will do what it would have been wise and prudent for the incompetent to have done. . . ."⁵¹ The passage from *Whitbread* (quoted portions in italics) reads as follows: "[T]he Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen (sic) on the parish,—but, considering what the Lunatic would probably do, and *what it would be beneficial to him should*

⁴² See, e.g., *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964); *Smith v. Smith*, 38 Ohio L. Abs. 503, 26 Ohio Op. 541 (Franklin County P. Ct. 1942).

⁴³ See, e.g., *Guardianship of Hudelson*, 18 Cal. 2d 401, 115 P.2d 805 (1941); *In re du Pont*, 41 Del. Ch. 300, 194 A.2d 309 (1963).

⁴⁴ See, e.g., *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964); *Smith v. Smith*, 38 Ohio L. Abs. 503, 26 Ohio Op. 541 (Franklin County P. Ct. 1942).

⁴⁵ First Tentative Draft of Revised Part IV, entitled *Protection of Persons Under Disability and Their Property*. This is discussed in Fratcher, *Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1964).

⁴⁶ Section 401(g) of the First Tentative Draft, Revised Part IV, MODEL PROBATE CODE defines "curatel" as "a person who has been adjudged to be disabled."

⁴⁷ Fratcher, *supra* note 46, at 1000.

⁴⁸ See *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

⁴⁹ See note 8 *supra*.

⁵⁰ See Note, 43 N.C.L. REV. 616 (1965).

⁵¹ *Id.* at 620.

be done, makes an allowance for them proportioned to his circumstances. . . ."⁵² The italicized portion of the above quote, taken out of context, is dubious support for the proposition that the court will act as it thinks the incompetent *should* have acted. Also, it is to be noted that the quote refers to the incompetent's wife and children, for whom the incompetent has a duty to provide regardless of his status.

It seems clear that the court must act as the ward *would* have acted and not as the court thinks he *should* have acted. The applicant's need, then, is necessarily considered when the court decides what the ward would have done and should not be considered by the court a second time in deciding whether to approve the applicant's petition. Thus, if it is found that the ward would have granted an allowance or made a gift notwithstanding the applicant's lack of need, then the court should not consider such lack of need.

In California, allowances are limited to surplus income. Other states have allowed gifts to be made from the estate itself where it could be shown that the ward would have made the gifts.⁵³ In that the estate must be kept intact in order to provide support for the ward, it seems best that grants be limited to surplus income. The possibility of fluctuation in the value of the estate is a real one and fully justifies this restriction. It is noteworthy that in the cases which authorized gifts from the corpus of the estate, such estates were worth in excess of 100 million dollars apiece.⁵⁴

The court, acting for the protection of the interests of the ward, may impose a condition that the gift or allowance be considered an advancement against the applicant's share of the ward's estate upon the death of the ward.⁵⁵ This power seems desirable in that the court might refuse the application altogether if it finds the ward would not have made the gift without attaching this condition. Obviously, if the applicant is not an heir apparent or beneficiary, it would be useless to apply the condition; the applicant will not benefit from the ward's death, therefore no legacy exists against which the "advancement" could be applied.

In spite of the many good reasons for a change in the statute, some will argue that a change of this nature will "open the door" of the courts to the grasping hands of greedy friends, relatives and charities, but this age old argument cannot justify the denial of a remedy for an existing problem. Instead of requiring the applicant to prove more probably than not that the ward would have granted an allowance, the court can require "clear and convincing" evidence.⁵⁶ Since the class of persons who can apply for grants has been extended, it seems proper that evidence of this magnitude be required when the person applies to the court for an allowance because the ward would not have been under a duty to grant the allowance and the applicant would have had no legal right to demand it. California courts have required that clear and convincing evidence, as opposed to a slight preponderance of the evidence, be offered, for example, to show that a deed absolute in form is actually a mortgage⁵⁷ and that property acquired after

⁵² *Ex parte* Whitbread, 2 Meri. 99, 102, 35 Eng. Rep. 878, 879 (1816). (Emphasis added.)

⁵³ *E.g.*, *In re du Pont*, 41 Del. Ch. 300, 194 A.2d 309 (1963); *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

⁵⁴ *Ibid.*

⁵⁵ *Guardianship of Hudelson*, 18 Cal. 2d 401, 115 P.2d 805 (1941).

⁵⁶ See Witkin, CALIFORNIA EVIDENCE § 209 (2d ed. 1966).

⁵⁷ See, *e.g.*, *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 147 P.2d 583 (1944).