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## ARTICLES

### CONSERVATORSHIPS, CAPACITY, AND CRYSTAL BALLS

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*Courts have often stated that the imposition of a conservatorship over a person's assets is not a determination that the individual lacks testamentary capacity, because the capacity required to manage one's assets is greater than that required to devise them. Nevertheless, some statutes and judicial orders now prospectively deprive a conservatee of will-making ability, regardless of the conservatee's actual testamentary capacity at the time of will execution. This Article demonstrates that such statutes and orders are inconsistent with modern conservatorship reforms, which seek to impose the least restrictive alternative needed to promote the conservatee's best interest, and also with venerated wills principles, which preclude predictions about an individual's future ability to devise. In particular, this Article demonstrates that such crystal ball pronouncements are improper not only because they single out conservatees for infantilizing treatment, but also because they ignore obvious and well-established less intrusive options that are adequate to quell concerns about wills executed by conservatees.*

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## I. INTRODUCTION

When four of Delphine Wagner’s six adult children petitioned a Nebraska court to have a conservatorship imposed upon their mother’s estate against her wishes,<sup>1</sup> she responded by executing a new will disinheriting them.<sup>2</sup> Delphine’s reaction to her children’s action is neither shocking nor particularly surprising.<sup>3</sup> When a parent believes the conservatorship petition filed by her children against her to be unwarranted,<sup>4</sup> she may feel sad and rejected.<sup>5</sup> She may feel resentful and bitter.<sup>6</sup> She may be mad as hell<sup>7</sup> or, by contrast, resort to “prayerful deliberation.”<sup>8</sup> In any event,

1. *Tank v. Lange (In re Estate of Wagner)*, 522 N.W.2d 159, 163 (Neb. 1994).

2. *Id.* The conservatorship court in *Wagner* granted the petition for a conservatorship against Delphine. *Wagner v. Wagner (In re Estate of Wagner)*, 367 N.W.2d 736, 737–38 (Neb. 1985). Significant family strife followed between Delphine and the four children who petitioned for the conservatorship, and she disinherited them in a will dated April 2, 1984. *Tank*, 522 N.W.2d at 162–63. The Nebraska Supreme Court ultimately determined that Delphine did not need a conservatorship. *Wagner*, 367 N.W.2d at 741. When Delphine died in 1992, that same court affirmed a lower court’s grant of summary judgment to proponents of the will. *Tank*, 522 N.W.2d at 167 (agreeing that disinherited children failed to raise genuine issue of material fact concerning Delphine’s testamentary capacity or establish the existence of undue influence).

3. *See, e.g., Skelton v. Davis*, 133 So. 2d 432, 434 (Fla. Dist. Ct. App. 1961) (quoting will of mother providing for three of her living children but leaving only \$100 each to her two other living children who had filed successfully to have a curator appointed to manage her financial and business affairs).

4. Petitioners in conservatorship proceedings are most likely to be family members of the respondent, and the most likely family members to file the petition are adult children of the respondent. *See* Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 *ELDER L.J.* 1, 7 & n.33, 17 (2003) (noting that children, followed by nieces and nephews, are the most frequent petitioners; further noting that estimates indicate that more than seventy-five percent of guardians are family members). Since probate statutes and courts construing those statutes typically consider family members the principal objects of a decedent’s bounty, family members often have the most at stake if the respondent decides to execute a new will.

5. *See, e.g., Wagner*, 367 N.W.2d at 739 (noting testimony of psychologist who indicated that the respondent in conservatorship proceeding appeared depressed and had a dejected look).

6. *See, e.g., Skelton*, 133 So. 2d at 434 (providing terms of mother’s will, executed after curatorship was imposed upon the petition of two of her daughters; new will executed during curatorship revoked more generous provisions in pre-curatorship will and instead left curatorship petitioners only \$100 each, noting specifically that “[o]f course I resent this action on their part”).

7. *See, e.g., Bottger v. Bottger (In re Bottger’s Estate)*, 129 P.2d 518, 521 (Wash. 1942) (noting that

she may respond by changing her will to reduce or remove completely the benefits that the petitioning children otherwise would have enjoyed at her death.<sup>9</sup>

Those children are in turn likely to challenge the parent's attempts to displace or disinherit them.<sup>10</sup> The result can be years of family struggles played out in multiple legal proceedings, as happened with the Wagners, whose members ultimately appeared on four occasions before the Nebraska Supreme Court in litigation spanning more than a decade.<sup>11</sup>

Courts have acknowledged that it is "practically a universal rule" that a determination that a person needs a conservator is not, in and of itself, a determination that the conservatee lacks testamentary capacity.<sup>12</sup> Yet the rule does not mean that a

mother became incensed after her children filed guardianship petition; three days later she executed new will). The opinion notes that, in response to the petition, the elderly mother stated, "It will kill me to go on the stand and testify. . . . I would rather die than go in there and go through with this proceeding." *Id.*

8. *Skelton*, 133 So. 2d at 434 (quoting from terms of mother's will stating that, after "prayerful deliberation," she had disinherited her two children who filed a successful curatorship petition against her).

9. See *infra* notes 207–338 and accompanying text for examples of cases in which persons under conservatorship disinherited conservatorship petitioners or other expectant beneficiaries under pre-conservatorship wills.

10. See *infra* note 95 for cases involving wills executed during conservatorship.

11. The conservatorship petition against Delphine Wagner ultimately led to four appearances and four reported opinions from the Nebraska Supreme Court over a period of fourteen years. The conservatorship petition in *Wagner* was apparently filed in 1983. See *Wagner v. Wagner (In re Estate of Wagner)*, 367 N.W.2d 736, 739 (Neb. 1985) (discussing psychologist examination of respondent that occurred in 1983). The conservatorship court appointed a conservator for Delphine Wagner in 1984. *Wagner v. Lamme (In re Estate of Wagner)*, 386 N.W.2d 448, 449 (Neb. 1986). The Nebraska Supreme Court ruled on the conservatorship matter in 1985. *Wagner*, 367 N.W.2d at 736. The Nebraska Supreme Court ruled on the post-conservatorship will executed by Delphine Wagner in 1994. *Tank v. Lange (In re Estate of Wagner)*, 522 N.W.2d 159 (Neb. 1994). In the years between the two decisions, the Nebraska Supreme Court also ruled on the propriety of attorney fees concerning the estate of Delphine's deceased husband. *Lamme*, 386 N.W.2d 448, 448–450 (Neb. 1986). The question of attorney fees arose as a result of the conservatorship action. *Id.* at 448. Fourteen years after the conservatorship petition was filed, the Nebraska Supreme Court ruled on the question of attorney fees incurred by the beneficiaries of Delphine's will. *Kerrigan & Line v. Lange (In re Estate of Wagner)*, 571 N.W.2d 76, 76 (Neb. 1997); see also *Skelton*, 133 So. 2d at 433 (noting in will contest that proceedings for the appointment of a curator for testator began in 1956 and wound their way through the lower courts to the Florida Supreme Court in 1958; a subsequent contest of testator's will, executed while she was a ward, was not resolved until 1961).

12. See, e.g., *Bd. of Trustees of Park Coll. v. Hall (In re Hall's Estate)*, 195 P.2d 612, 615 (Kan. 1948) (stating that "[i]t is *practically a universal rule* that the mere fact one is under guardianship does not deprive him of the power to make a will") (emphasis added); *In re Estate of West*, 887 P.2d 222, 229 (Mont. 1994) (stating that "the mere fact that a conservator has been appointed does not mean that the protected person lacks the capacity to make a will"); *Gessler v. Miller (In re Conservatorship of Gessler)*, 419 N.W.2d 541, 541–42, 544 (N.D. Ct. App. 1988) (stating that appointment of conservator for eighty-seven-year-old woman did not affect her testamentary capacity even though facts indicated she was "easily persuaded" and subject to the influence of others); see also Richard W. Effland, *Caring for the Elderly Under the Uniform Probate Code*, 17 ARIZ. L. REV. 373, 400 (1975) (observing that "[a]lthough appointment of a guardian or conservator may be some evidence of lack of testamentary capacity, the courts recognize that the issues are different," and noting that an elderly person who cannot manage his assets may still be able to make a will).

State statutes adopting the Uniform Probate Code (UPC) also recognize that the appointment of a conservator is not a determination of lack of capacity. See *infra* note 250 and accompanying text for a discussion of the UPC statute. Federal regulations also recognize the distinction between determinations of incapacity for conservatorship or guardianship purposes and determinations of testamentary capacity. See, e.g., 38 C.F.R. § 3.355 (2014) (distinguishing testamentary capacity from mental incompetence for VA

judge necessarily lacks the authority to remove the conservatee's will-making power with a specific order. Thus, children who anticipate that a parent under conservatorship may attempt to disinherit them, and who hope to avoid the need to contest that disinheritance when the parent dies,<sup>13</sup> may request that the conservatorship order specifically declare that the parent has no ability to execute a will once the conservatorship is imposed.<sup>14</sup>

Some judges do issue such orders, engaging in a *prediction* about the conservatee's future testamentary capacity.<sup>15</sup> The conservatorship provisions and wills statutes of most states, however, provide very little or no explicit guidance concerning the propriety of such a conservatorship order.<sup>16</sup> Moreover, the reported case law has generated inconsistent decisions about such crystal ball rulings.<sup>17</sup>

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guardianship purposes). Thus, in *Romero v. Vasquez* (*In re Estate of Romero*), the court observed that both under Colorado state statute and federal VA regulations the determination that a person requires a guardian to manage his assets is not the equivalent of a finding of testamentary incapacity. 126 P.3d 228, 232–33 (Colo. App. 2006); see also *Verce v. McClendon* (*In re Estate of Gallavan*), 89 P.3d 521, 523 (Colo. App. 2004) (observing that under prior and current Colorado statute, appointment of conservator is not tantamount to a finding of testamentary incapacity).

See generally A.G. Barnett, Annotation, *Effect of Guardianship of Adult on Testamentary Capacity*, 89 A.L.R.2d 1120 (2014) (collecting cases focusing on whether the presence of guardianship deprived an adult testator's will of testamentary effect). While the rule that the mere existence of a guardianship or conservatorship does not prevent one from having testamentary capacity may be practically universal, it is not completely universal. See *infra* Part III.D.2.a for a discussion of statutes that explicitly prevent a person under conservatorship from freely executing a will.

13. Other commentators have noted that family members, particularly children, may use a conservatorship proceeding to gain current control over the respondent's assets that might otherwise wind up in the hands of third parties. For a thought-provoking exploration of the relationship between conservatorship proceedings and will contests, see Barnes, *supra* note 4, at 17–20, in which she observes that, in terms of outcomes, “the principal difference is not substantive, but is a relatively small gap in timing to encompass a death.”

14. See *infra* Part III.D.2.b for a discussion of judicial rulings in conservatorship proceedings that deprive the conservatee of will-making ability.

15. Historically, testamentary capacity is evaluated only at the time the testator executes his will. See *infra* notes 57–74 and accompanying text for a discussion of the principles of testamentary capacity. See also *In re Weedman's Estate*, 98 N.E. 956, 957 (Ill. 1912) (noting that conservatorship judgment could not predict conclusively whether the conservatee would have “sound mind” when she executed a will more than one month later). A court order removing the conservatee's will-making power may also reflect the court's concern that the conservatee is susceptible to undue influence. To the extent that influence is undue, it deprives a testator of the ability to act freely and voluntarily. If the testator's mind cannot resist the undue influence of others, she may be considered as lacking sound mind. Thus, this Article generally folds the potential judicial concern for undue influence into the consideration of the testator's capacity. Cf. Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do With It?*, 57 U. PITT. L. REV. 841, 867–68 (1996) (suggesting that a person who is “in the thrall of another” and whose will reflects that influence might properly be considered to lack testamentary capacity).

16. See *infra* Part III.D.2.b for a discussion of cases from Florida, Alabama, Missouri, and Tennessee.

17. Compare *Barnes v. Willis*, 497 So. 2d 90, 92 (Ala. 1986), with *Skelton v. Davis*, 133 So. 2d 432, 435 (Fla. Dist. Ct. App. 1961). The courts in these cases construed identical statutory language completely differently in determining whether a conservatee was without will-making power. See *infra* notes 284–318 and accompanying text for a discussion of the results of reported case law and underlying rationale.

Treatises are largely silent on the effect of a *specific* conservatorship order stating that the protected person henceforth lacks the capacity to execute a will. But see GEORGE BLUM ET AL., PERSONS UNDER GUARDIANSHIP OR CONSERVATORSHIP, 79 AM. JUR. 2D *Wills* § 56 (2d ed. updated 2014) (citing 2011 Tennessee case for the proposition that “[a]n order entered in conservatorship, however, may expressly remove

Many people, particularly those who are elderly, view the right to devise as one of the most important afforded by law.<sup>18</sup> With our rapidly aging population,<sup>19</sup> more and more individuals are likely to find themselves the subject of conservatorship proceedings.<sup>20</sup> For a number of reasons—some altruistic and some selfish—expectant beneficiaries and others interested in the conservatee’s estate are increasingly likely to seek to deprive the conservatee of future will-making ability.<sup>21</sup> This Article is the first to examine the propriety of conservatorship statutes and judicial orders that remove a conservatee’s power to make a will.

The examination of legislative and judicial prognosticative pronouncements about a conservatee’s will-making power is important not only because such pronouncements may affect a growing segment of the population, but also because the examination may reveal more broadly the extent of legislative and judicial commitment to the modern conservatorship reform movement and venerated principles of the law of wills.<sup>22</sup>

## II. CAPACITY IN CONTEXT

To investigate the propriety of a conservatorship order depriving a conservatee of will-making ability, one should compare conservatorship proceedings and the criteria by which courts decide whether a person requires a conservator,<sup>23</sup> on the one hand, and will contests and the criteria by which courts decide whether a person has the ability to execute a valid will, on the other.<sup>24</sup> As we shall see, the two proceedings and the

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an individual’s right to make a will”).

18. See, e.g., *Harrison v. Bishop*, 30 N.E. 1069, 1070 (Ind. 1892) (noting that adjudication of the inability to manage one’s estate does not mean that one lacks testamentary capacity; observing that the right to dispose of one’s property by will “is a right common to civilized people of all ages”); *Jenckes v. Court of Probate*, 2 R.I. 255, 258 (1852) (noting importance of the right to devise and stating that such a right should not be abridged merely because “it might be injuriously exercised”); *Bottger v. Bottger (In re Bottger’s Estate)*, 129 P.2d 518, 522 (Wash. 1942) (noting in will contest, for an elderly conservatee, that “[t]he right to dispose of one’s property by will is a valuable one, assured by law”).

19. See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. ON AGING, *Projected Future Growth of the Older Population*, available at [http://www.aoa.gov/Aging\\_Statistics/future\\_growth/future\\_growth.aspx#age](http://www.aoa.gov/Aging_Statistics/future_growth/future_growth.aspx#age) (2014) (indicating that the percentage of people sixty-five and older in the United States was 4.1% in 1900 and 12.4% in 2000 and is likely to be 20% by 2040); see also CARRIE A. WERNER, *The Older Population: 2010* (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf> (noting that between 2000 and 2010 the United States population sixty-five and older increased more than five percent faster than that of the general population).

20. There are no precise statistics on the number of conservatorship proceedings conducted in state courts across the country. See, e.g., NAT’L CTR. FOR STATE COURTS, CTR. FOR ELDERS AND THE COURTS, *GUARDIANSHIP BASICS*, available at <http://www.eldersandcourts.org/Guardianship/Guardianship-Basics/Guardianship-Data.aspx> (last visited Dec. 12, 2014) (noting that as of 2010 the quality data on adult guardianships and conservatorships is problematic). Nevertheless, as the elderly population swells, the number of conservatorship proceedings seems likely to grow.

21. See *infra* Part III.A for a discussion of various reasons petitioners in conservatorship proceedings might request an order declaring the conservatee to be without further will-making power.

22. See *infra* notes 28–83 and accompanying text for a discussion of the principles of the modern conservatorship reform movement and historical principles concerning testamentary capacity.

23. See *infra* Part II.A for a discussion of conservatorship principles.

24. See *infra* Part II.B for a discussion of principles of testamentary capacity as seen through an examination of relevant case law. Treatises commonly state that a person under a conservatorship does not necessarily lack testamentary capacity. See, e.g., 79 AM. JUR. 2D *Wills* § 56 (2013) (stating general rule and

criteria they examine are fundamentally different.<sup>25</sup> Moreover, many of the principles governing modern conservatorship proceedings are the result of relatively recent reforms;<sup>26</sup> in contrast, most of the principles governing will contests over testamentary capacity are the result of centuries of case law.<sup>27</sup>

#### A. Principles of Conservatorship

Although the details differ,<sup>28</sup> the conservatorship statutes of most states now pay

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citing cases from many jurisdictions); 95 C.J.S. *Wills* § 11 (2011) (observing that appointment of guardian or conservator is not a determination of testamentary incapacity); KIMBERLY DAYTON ET AL., 3 ADVISING THE ELDERLY CLIENT § 32:9 (2014) (indicating that person adjudicated incompetent to handle his affairs may still possess testamentary capacity); RALPH H. FOLSOM, INCAPACITY, POWERS OF ATTORNEY & ADOPTION IN CONNECTICUT § 2:1.5 *Conservatorships* (3d ed. 2014) (noting the confinement in mental institution and imposition of conservatorship does not necessarily indicate a lack of testamentary capacity); JEFFREY JACKSON & MARY MILLER, 9 ENCYCLOPEDIA OF MISSISSIPPI LAW § 75:25 *Wills* (9th ed. 2013) (noting that assignment of conservator is not determinative of testamentary capacity of protected person); THOMAS R. KELLOGG, 62 AM. JUR. PROOF OF FACTS 3D *Proof of Incompetency* § 1 (2014) (stating that “a person with testamentary capacity may nonetheless be sufficiently incapacitated to require a guardian”); HUGH M. LEE & JO ALISON TAYLOR, ALABAMA ELDER LAW § 8:80 (2013) (noting that assignment of conservator or guardian does not of itself indicate that protected person lacks testamentary capacity); MICHAEL P. MCELROY, 3 HORNER PROBATE PRACTICE & ESTATES § 59:6 (2014) (indicating that appointment of conservator is not determinative of testamentary capacity and that protected person with testamentary capacity may dispose of assets by will without the involvement of the conservator or court); EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 6:13 (2d ed. 2014) (stating that imposition of conservatorship does not equate to a lack of testamentary capacity and citing numerous supporting cases); ROBERT A. WEEMS, WILLS AND ADMINISTRATION OF ESTATES IN MISSISSIPPI § 4:3 (3d ed. 2014) (indicating that appointment of conservator does not necessarily indicate that protected person lacks testamentary capacity); B.E. WITKIN ET AL., 14 WITKIN, SUMMARY OF CALIFORNIA LAW § 128 (10th ed. 2005) (noting that person under guardianship or conservatorship may still have testamentary capacity); see also KARL A. MENNINGER II, 38 AM. JUR. PROOF OF FACTS 3D 227 *Proof of Testamentary Incapacity of Mentally Retarded Person* § 3 (2014) (observing that most states conclude that the appointment of guardian does not equate to lack of testamentary capacity).

25. See *infra* Part II.A which emphasizes that the question in conservatorship cases concerns the respondent’s ability to manage her assets, whereas the question of testamentary capacity concerns the testator’s ability to understand his assets, to know the objects of his bounty, and to formulate a dispositional plan that he understands. Moreover, modern courts recognize that various kinds of capacity exist, and that capacity is often a fluid concept, so that a particular capacity may increase or decrease over time. See, e.g., *In re Seyse*, 803 A.2d 694, 698 (N.J. Super. Ct. App. Div. 2002) (observing that “[d]evelopments in the study of the human mind and mental disabilities or disease have taught us that incompetency is not always immutable, and courts must be mindful not to limit the rights of an incapacitated person based on the assumption that he or she is incapacitated for all purposes”).

26. For an excellent overview of modern guardianship and conservatorship reform, see Barnes, *supra* note 4, at 4–13 (2003) (noting origins of reform movement in 1980s; discussing Wingspread and Wingspan recommendations; and stating that “[t]he goal of reform advocates was to provide every prospective ward with the least restrictive alternative in assistance . . .”).

27. See Barnett, *supra* note 12 (citing cases from nineteenth and twentieth centuries stating that mere imposition of guardianship or conservatorship does not deprive one of testamentary capacity); see also Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 93 (2006) (noting that the law of testamentary capacity “stagnated” through the twentieth century).

28. See LAWRENCE A. FROLIK & ALISON MCCRYSTAL BARNES, ELDER LAW: CASES AND MATERIALS 360 (5th ed. 2011) (noting that “[s]tates use a variety of terms” for the manager of the incapacitated person’s property). This Article uses the term “conservator” for the judicially appointed manager of the incapacitated person’s assets. In other states the manager is known as the guardian. An older term, encountered in some of the cases discussed in the text of this Article, is curator. See *infra* notes 284–318 and accompanying text for a discussion of cases from Alabama and Florida that use such old terminology.

lip service<sup>29</sup> to the major principles springing from the conservatorship reform movement that began in the 1980s.<sup>30</sup> Observers justly question whether conservatorship courts have fully embraced these principles,<sup>31</sup> but the reported opinions from state appellate courts also often pay lip service to the letter, if not the spirit, of conservatorship reform.<sup>32</sup>

Painting with the broadest of brushes, one might state that the essential question a conservatorship court must answer is whether the respondent so lacks the *ability to manage* his assets that the state must intervene by appointing a conservator to assist him.<sup>33</sup> Reform principles recognize that a conservatorship is a property management arrangement of last resort, however.<sup>34</sup> In particular, the court must weigh the need for state intervention against respect for individual autonomy.<sup>35</sup> If, for example, a person has validly designated an agent<sup>36</sup> or trustee<sup>37</sup> to manage his property,<sup>38</sup> often there is no need for a conservator if the person becomes unable to manage the property himself.<sup>39</sup>

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29. See, e.g., *In re Guardianship of Braaten*, 502 N.W.2d 512, 515–17 (N.D. 1993) (discussing the evolution of the limited guardianship movement; the adoption of limited guardianship principles in uniform laws including the UPC; and the adoption of similar language in various state codes).

30. See Barnes, *supra* note 4, at 4–13 (discussing guardianship reform principles).

31. See, e.g., Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 352–53 (1998) (observing that judges continuing to act without regard to statutory reform may not be acting from malice, but may be good faith actors who should not necessarily be vilified, but educated on the merits of modern statutes and practices).

32. Appellate courts also appear more likely than trial courts to follow the spirit of reform statutes. See, e.g., *In re Guardianship of Braaten*, 502 N.W.2d at 512, 515–17, 523 (examining carefully guardianship and conservatorship statutes incorporating modern reform principles and holding that respondent only required a limited guardian and, at most, a limited conservator; lower court had appointed general guardian and general conservator with unlimited powers).

33. See, e.g., UNIF. PROBATE CODE § 5-401 (Rev. Art. V), 8(III) U.L.A. 83 (2013) (requiring, as first part of requirements for appointment of conservator, that court find respondent “is *unable to manage* property and business affairs . . .”) (emphasis added).

34. See, e.g., UNIF. PROBATE CODE § 5-412 cmt. (Rev. Art. V), 8(III) U.L.A. 100–101 (2013) (observing UPC philosophy “that a conservator be appointed only as a last resort”; further noting that the protective arrangement ordered by the court “must be consistent with the least restrictive order consistent with the court’s findings”).

35. See, e.g., *In re Cook*, 520 N.Y.S.2d 400, 402 (App. Div. 1987) (discussing the importance of assuring that the conservatee’s best interest is protected, since state intervention inevitably imposes limitations upon the conservatee’s autonomy).

36. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 496–97 (9th ed. 2013) (providing overview of the durable power of attorney as an asset management tool for the incapacitated person).

37. See *id.* at 496 (providing overview of the revocable trust as an asset management tool for the incapacitated person).

38. See *generally id.* at 495–504 (discussing various property management arrangements that one can establish in advance to avoid conservatorship). In addition to trusts and durable powers of attorney, individuals sometimes use co-ownership properties as a property management tool in the event of incapacity. See *generally* JESSE DUKEMINIER ET AL., *PROPERTY* 335–36, 347 (7th ed. 2010) (discussing multiparty accounts and noting that concurrent owners can agree on rights and duties regarding property use, management, and improvement).

39. Courts have even noted that the agency relationship can be informal. See, e.g., *Skelton v. Davis*, 133 So. 2d 432, 433 (Fla. Dist. Ct. App. 1961) (noting that prior to petition for a curator filed by two of her daughters, woman “was able to rely on a son who until his death had advised and assisted her in the management of her financial affairs”); *Smith v. Smith*, 397 S.W. 2d 186, 186–87, 196 (Tenn. Ct. App. 1965)

Even if the property owner has not chosen someone who can act for him, under reform principles a court must avoid establishing a conservatorship if other less drastic<sup>40</sup> and stigmatizing<sup>41</sup> solutions can serve adequately to protect him and his assets.<sup>42</sup>

Put simply, when a property owner requires state assistance in managing his assets, a fundamental aspiration of the reform movement is to constrain excessive state intervention by requiring that courts impose the *least restrictive alternative* consistent with the individual's abilities.<sup>43</sup> The least restrictive alternative principle recognizes that abilities exist along a spectrum, demonstrates respect for the individual who is the subject of the conservatorship proceeding, and seeks to enhance rather than restrict autonomy.<sup>44</sup> No conservatorship is ever warranted unless it will serve the best interest of the respondent; when less intrusive options will suffice, a conservatorship will not serve the individual's best interest.<sup>45</sup>

If a conservatorship is warranted, the least restrictive alternative principle also requires that the court deprive the conservatee of rights and powers only as necessary to serve his best interest.<sup>46</sup> Moreover, modern reform principles mandate that the

(observing that octogenarian respondent did not require conservator as requested by the petition of several of her children when she had capably but informally chosen another child to act for her).

40. For example, if the property owner needs assistance with a specific, major transaction affecting her assets, a one-time protective order might suffice rather than a conservatorship. This arrangement is specifically endorsed by the Uniform Probate Code. *See* UNIF. PROBATE CODE § 5-412 cmt. (Rev. Art. V), 8(III) U.L.A. 100-01 (2013) (authorizing protective arrangements in the form of single transactions, such as for a one-time sale of land or life-care contract).

41. *See* FROLIK & BARNES, *supra* note 28, at 359 (noting how guardianships/conservatorships impinge upon fundamental rights, and observing that one “troubling aspect . . . is the stigma of being identified as one who lacks the rights normally accorded to any adult to make independent decisions”) (citing *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971)).

42. *See* UNIF. PROBATE CODE § 5-412 cmt. (Rev. Art. V), 8(III) U.L.A. 100-01 (2013) (noting the UPC philosophy “that a conservator be appointed only as a last resort”). These alternative solutions could include, for example, state-run or state-supported services to help the individual manage his property. *See, e.g., In re Guardianship of Braaten*, 502 N.W.2d 512, 523 (N.D. 1993) (noting that while respondent could not alone handle her own financial affairs, no conservatorship was necessary where she was assisted by local “workshop” program).

43. *See, e.g., In re Conservatorship of Groves*, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003) (citing Tennessee statute and stating that “public policy . . . favors allowing incapacitated persons to retain as much autonomy as possible and selecting alternatives that restrict incapacitated persons’ autonomy as little as possible”).

44. *See* NINA A. KOHN, *ELDER LAW: PRACTICE, POLICY, AND PROBLEMS* 143 (2014) (noting that because guardianship can deprive individuals of fundamental civil rights, today “it is generally agreed that it should be employed only as a last resort and that less restrictive options should be pursued where possible”).

45. *See supra* notes 43–46 and accompanying text for a discussion of the least restrictive alternative principle that permeates modern conservatorship law. Conservatorship statutes now frequently include reference to the “best interest” of the conservatee. For example, although the conservatorship statutes of many states provide a priority list of persons for a possible appointment as conservator, the statutes typically state that the court may choose someone outside the priority list if to do so would serve the best interest of the conservatee. *See, e.g., In re Conservatorship of Gaaskjolen*, 844 N.W.2d 99, 103 (S.D. 2014) (noting the general tendency to appoint a family member as a conservator and stating that “most statutes so provide, [but] the best interests of the protected person is the overriding interest”).

46. Thus, modern conservatorship laws mandate that, when a conservatorship is required, court impose only a limited conservatorship if the limited conservatorship will adequately address the respondent's needs. *See, e.g., UNIF. PROBATE CODE § 5-401 cmt. (Rev. Art. V), 8(III) U.L.A. 83 (2013)* (noting in comment that the statute “encourages the court to appoint a limited conservator whenever possible”); KOHN, *supra* note 44,

conservatorship order specifically list the rights and powers that the court is stripping from the respondent and clothing upon the conservator.<sup>47</sup>

### B. Principles of Testamentary Capacity

When a will contestant alleges that the testator lacked testamentary capacity, a long-established set of principles guides the resulting inquiry.<sup>48</sup> The inquiry is not at all concerned with the testator's ability to manage her property adequately during her lifetime,<sup>49</sup> and thus the inquiry is completely different from that in a conservatorship proceeding.<sup>50</sup>

In gauging testamentary capacity, the court asks whether the testator knew the nature of her assets;<sup>51</sup> knew the natural objects of her bounty;<sup>52</sup> made an orderly plan of

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at 158 (noting that some states now have statutory mandate for use of limited conservatorship when appropriate). *Cf.* UNIF. PROBATE CODE § 5-409 (Rev. Art. V), 8(III) U.L.A. 95 (2013) (stating that “the court shall make the least restrictive order consistent with its findings”).

47. *See, e.g.*, TENN. CODE ANN. § 34-3-107 (West 2014) (requiring that court order “[e]numerate the powers removed from the respondent and those to be vested in the conservator” and further stating that “[t]o the extent not specifically removed, the respondent shall retain and shall exercise all of the powers of a person without a disability”). An appellate court may also find that remand is necessary if the conservatorship order provides only a general conclusion that the respondent lacks the ability to manage her estate and a general statement that deprives the respondent of all powers that the court may remove under law, without providing specific findings of fact to support that conclusion. *See, e.g.*, *In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 63 (Minn. Ct. App. 1990).

48. *See generally* PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 40 (2d ed. 1994) (stating that “testator must have the mental capacity to (a) know the nature of his property, (b) know the natural objects of his bounty, (c) form an orderly plan of disposition, and (d) understand the disposition made by his will”). Most courts use a test for testamentary capacity based on these requirements, although the specifics may vary in detail. *Cf. Romero v. Vasquez (In re Estate of Romero)*, 126 P.3d 228, 230 (Colo. App. 2006) (setting forth five-part test for testamentary capacity in Colorado; fifth requirement is that “the will represents the person’s wishes”).

49. *See, e.g.*, *Jenckes v. Court of Probate*, 2 R.I. 255, 256–58 (1852) (distinguishing, in early case, between purposes of guardianship and wills, and noting that guardianship decision should not interfere with will-making capabilities).

50. *See supra* Part II.A for a discussion of the factors considered by courts in conservatorship proceedings.

51. The testator does not have to know precise details about each of her assets. *See, e.g.*, *Skelton v. Davis*, 133 So. 2d 432, 435 (Fla. Dist. Ct. App. 1961) (observing that the testator need only “mentally understand in a general way the nature and extent of the property to be disposed of”) (emphasis added); *see also In re Estate of Romero*, 126 P.3d at 231 (discussing Colorado’s requirement that the testator “know the extent of his or her property”). Consistent with the view of *Skelton* and of most courts across the country, the *Romero* court observes that the testator must have a “general” understanding of the property he wishes to bequeath. *Id.* A testator may execute a valid will even if he forgets that part of his estate exists. *Id.* (citing 1 PAGE ON WILLS § 12.22 (2003)). Thus, the testator does not have to know the true value of his estate. *Id.* (citing *Rich v. Rich*, 615 S.W.2d 795, 797 (Tex. Civ. App. 1980), and *Prichard v. Prichard*, 65 S.E. 2d 65, 68 (W. Va. 1951)). The *Romero* court noted that even though the testator “could not articulate the value of his assets” and was unaware that his estate was worth \$450,000, he understood that his assets came from VA benefits. *Id.* at 232. Moreover, the VA did not routinely furnish detailed financial information to its wards, so it was not surprising the testator did not know the precise value of his estate. *Id.* Thus, he could still satisfy the requirement that the testator know the extent of his or her property. *Id. See generally* HASKELL, *supra* note 48, at 40 (discussing elements of testamentary capacity).

52. *See* HASKELL, *supra* note 48, at 40 (discussing requirements to possess testamentary capacity).

distribution;<sup>53</sup> and understood her plan of distribution.<sup>54</sup> The threshold for testamentary capacity is minimal;<sup>55</sup> courts have observed that the capacity threshold for will execution is the lowest required to execute any legal instrument.<sup>56</sup>

Courts have long emphasized that the determinative moment for gauging testamentary capacity is the moment of will execution.<sup>57</sup> Applying this “irrefragable” principle,<sup>58</sup> even early nineteenth-century courts recognized that a “lunatic”<sup>59</sup> who is clearly unable to live in the world and care for himself may make a valid will if he

53. *See id.*

54. *See id.*; *see, e.g.*, *Skelton v. Davis*, 133 So. 2d 432, 435 (Fla. Dist. Ct. App. 1961) (indicating that the testator can satisfy the requirements for a “sound mind”—that is, meet the mental requirements for testamentary capacity—even if she only has a *general* understanding of the will’s practical effects).

55. *See, e.g.*, *In re Will of Rasnick*, 186 A.2d 527, 534–35 (N.J. Super. Ct. Prob. Div. 1962) (“As a general principle, the law requires only a very low degree of mental capacity for one executing a will.”).

56. *See, e.g.*, *In re Will of Goldberg*, 582 N.Y.S.2d 617, 620 (Sur. Ct. 1992) (“It is hornbook law that less mental capacity is required to execute a will than any other legal instrument.”). Courts frequently note that the capacity required to contract is higher than the capacity required to execute a will. *See, e.g.*, *Weeks v. Drawdy (In re Estate of Weeks)*, 495 S.E.2d 454, 461–62 (S.C. Ct. App. 1997) (stating that “[t]he degree of capacity necessary for the execution of a will is less than that needed for the execution of a contract”). *See also* Lawrence A. Frolik & Mary F. Radford, “Sufficient” Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAT’L ACAD. ELDER L. ATTY’S J. 303, 305 (2006) (“If legal capacity lies along a spectrum, testamentary capacity is at the lower end.”).

57. *See, e.g.*, *Romero v. Vasquez (In re Estate of Romero)*, 126 P.3d 228, 230 (Colo. App. 2006) (noting that trial court discounted testimony of physician who treated testator for schizophrenia on three brief occasions in the eighteen months prior to execution of testator’s will, and instead credited the testimony of the testator’s attorney who prepared the will, “because it found him to be the only individual with personal knowledge of decedent’s testamentary capacity *when the will was executed*”) (emphasis added); *Chapman v. Campbell*, 119 So. 2d 61, 64 (Fla. Dist. Ct. App. 1960) (stating that “[t]he law is well established that if the testator had capacity at the time the will is made, his past or future condition is immaterial”). Testamentary capacity is typically—but not always—evaluated after the decedent’s death. *See* *DUKEMINIER & SITKOFF, supra* note 36, at 312 (discussing statutes that in a handful of states permit ante-mortem probate, but observing that such procedure is rarely invoked); *see also* *Clinesmith v. Temmerman (In re Clinesmith)*, 298 P.3d 458, 465 (N.M. Ct. App. 2012), *cert. denied*, 299 P.3d 863 (N.M. 2013). In *Clinesmith*, a protected person executed a new estate plan, including a will, with the assistance of an attorney who had been prohibited by the conservatorship order from representing the protected person due to a conflict of interest. 298 P.3d at 460. The court invalidated the estate plan, including the will, during the protected person’s lifetime. *Id.* The protected person’s spouse challenged the court’s authority to evaluate the protected person’s testamentary capacity during his lifetime. *Id.* The reviewing court noted, however, that the lower court had not evaluated the protected person’s testamentary capacity in invalidating the plan. *Id.* at 466. Instead, the lower court invalidated the plan because of the attorney’s conduct, which had clearly violated the order and resulted in obtaining the necessary signatures improperly. *Id.* The court did state in passing, however, that evaluation of testamentary capacity is not always reserved until the testator’s death. *Id.*

58. *See Skelton*, 133 So. 2d at 435 (noting the “irrefragable” principle that testamentary capacity is evaluated “solely at the time of the execution of the will”).

59. Law and society now generally reject the term “lunatic” as demeaning and unnecessary; however, the term was commonly used in American case and statutory law throughout the nineteenth century and well into the twentieth century. It is included in the text to emphasize that while older law was much less respectful of the rights of a “lunatic” than modern law is of the rights of a person with a mental disability, even the older law refused to adopt a blanket rule denying that person the right to make a will. *See, e.g.*, *Stone v. Damon*, 12 Mass. (3 Tyng) 488, 489 (1815) (observing that “lunatic” testator who was declared insane in 1808 and placed under guardianship may nevertheless have had capacity to execute a valid will in 1811, even though the earlier decree had not been reversed); *Lucas v. Parsons*, 27 Ga. 593, 606 (1859) (stating that a person “who has been declared a lunatic, and placed under commission of lunacy is competent to make a will, if it be done in a lucid interval”).

meets the minimal requirements for testamentary capacity<sup>60</sup> when he executes his distributive plan.<sup>61</sup> In an 1815 opinion involving the validity of a will executed by an individual who had been judicially declared non compos and placed under guardianship,<sup>62</sup> the Massachusetts Supreme Judicial Court observed that the decisive issue in such a case is whether the “lunatic” is “restored to his reason” and is “perfectly capable of devising his estate” at the time of will execution.<sup>63</sup> The court also observed that

it would be a cruel and unnecessary addition to his misfortune, to deprive him of that right [to make a will], and to set aside his will, because he happened to die before he could apply to the probate court for a reversal of the decree [declaring him non compos and placing him under guardianship]: or because those, who might be interested in avoiding his will, should by appealing, or other means of delay, prevent the reversal of the decree before his death.<sup>64</sup>

Moreover, the law of wills recognizes that even an individual who is suffering insane delusions<sup>65</sup> *at the time of will execution* may possess testamentary capacity if the delusions do not affect the will.<sup>66</sup>

Because the canon of wills law focuses on the moment of will execution in ascertaining testamentary capacity, judicial evaluation occurs only *after* an individual has executed her will.<sup>67</sup> Prospective rulings about testamentary capacity have no place in the history of wills law, and this is true even when common sense suggests that the individual is so impaired that she will never have testamentary capacity.<sup>68</sup> For example, in *In re Sterrett's Estate*,<sup>69</sup> the Supreme Court of Pennsylvania emphasized that

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60. See, e.g., *Stone*, 12 Mass. at 489 (noting that an adjudicated “lunatic” can execute a valid will if he has recovered his reason at the time of will execution; reversal of adjudication is not required for the will to be valid).

61. See *id.* at 489 (asking whether individual has recovered his reason and is capable of devising at will execution).

62. *Id.* at 488.

63. *Id.* at 489.

64. *Id.* The court concluded that although the testator had been declared non compos in 1808 and a guardian had been appointed for him, evidence of insanity at that time did not conclusively show that he was insane three years later, when he executed his will. *Id.*

65. An insane delusion is “a persistent belief in that which has no existence in fact, and which belief is adhered to against all evidence.” *Breeden v. Stone* (*In re Breeden*), 992 P.2d 1167, 1170 (Colo. 2000). See generally THOMAS P. GALLANIS, FAMILY PROPERTY LAW 161–62 (5th ed. 2011) (discussing “insane delusion” and noting that it is also called monomania or partial insanity).

66. See, e.g., *In re Breeden*, 992 P.2d at 1171 (citing cases from various states); *Verce v. McClendon* (*In re Estate of Gallavan*), 89 P.3d 521, 522 (Colo. App. 2004) (noting that “a person lacks testamentary capacity when she suffers from an insane delusion *that materially affects her disposition in the will*”) (emphasis added).

67. But see *infra* notes 284–318 for a discussion of conservatorship orders requiring a conservatee to appear before a judge if he or she wishes to execute a will; in at least some of those instances, if the conservatee makes the subsequent appearance and brings the proposed will to court, the judge may ascertain testamentary capacity simultaneously with the execution of the will.

68. See *infra* notes 69–74 and accompanying text for a discussion of judicial refusal to predict testamentary capacity of long-term incapacitated person who had not had lucid intervals in years.

69. 150 A. 159 (Pa. 1930). In the case, a father established a trust for the life of his three daughters, giving a majority of them or the survivor of them a power to appoint the remainder. *In re Sterrett's Estate*, 150 A. at 160. Two daughters died and, at the time of the case, the surviving daughter Laura was under a guardianship and had been “judicially found to be a lunatic.” *Id.* at 161. The trustee of the trust sought a declaratory judgment determining whether a joint will exercised by the two deceased sisters or a later will

although a seventy-eight-year-old woman<sup>70</sup> had been adjudicated a “lunatic” almost a quarter of a century earlier,<sup>71</sup> had been living in a state mental hospital for thirty years,<sup>72</sup> and had not had a lucid moment in many years,<sup>73</sup> “so long as she lives, it cannot be taken as a basic fact that [she] will not leave a valid will.”<sup>74</sup>

Since the fundamental inquiries in a conservatorship proceeding<sup>75</sup> and a will contest alleging lack of testamentary capacity are different, the “practically . . . universal” rule<sup>76</sup> developed that a determination that an individual requires a conservator is not a determination that the individual lacks testamentary capacity.<sup>77</sup> This is so even though some individuals requiring a conservator do lack testamentary capacity at the time the court issues the conservatorship order<sup>78</sup> and some of those individuals will never regain testamentary capacity.<sup>79</sup>

In contrast to statutes concerning testamentary capacity, the conservatorship statutes of most states are generally much newer<sup>80</sup> and much more detailed.<sup>81</sup> Of course, states retain the power to amend the law of wills,<sup>82</sup> no matter how old and

executed by one of the two sisters had properly exercised the power of appointment. *Id.* at 160. The court, however, recognized that to give effect to either of those wills would be to deny that the third sister was still living and was thus in fact the survivor. *Id.* at 161. As unlikely as it might be that seventy-eight-year-old Laura would ever have testamentary capacity, the court specifically recognized that she might one day execute a valid will. *Id.* Thus, despite averments that Laura had not had a lucid moment in many years, the question concerning exercise of the power of appointment in the father’s will was not ripe for determination. *Id.* at 161–62.

70. *Id.* at 161.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* The court noted that the petition statements concerning Laura’s history “cannot be taken as establishing anything so far as Laura’s possible future capacity to make a will is concerned. . . . [D]espite her impaired mental state and advanced age, [Laura] may yet . . . make a valid will.” *Id.*

75. See *supra* Part II.A for a discussion of the considerations in a conservatorship proceeding.

76. See *supra* note 12 for an analysis on how the “practically” universal rule is not in fact universal. This Article ultimately makes the argument that the practically universal rule should be universal.

77. See *supra* note 12 for cases stating the rule. See also Effland, *supra* note 12, at 400 (noting that courts recognize that the issues to be examined in guardianship and conservatorship proceedings differ from those to be examined in ascertaining testamentary capacity).

78. For example, a person who is comatose at the time the conservatorship is established will have neither the ability to manage his assets nor testamentary capacity. See, e.g., Gardner v. Cox (*In re Conservatorship/Guardianship of Blackman*), 843 P.2d 469, 470 (Or. Ct. App. 1992) (noting appointment of conservator for victim of stroke who entered into a “coma-like state”).

79. For example, a person who is comatose at the time the conservatorship is established *and* who never awakens from the coma will have neither the ability to manage her assets or testamentary capacity throughout the period of the conservatorship. Of course, one can never know when the conservatorship is established whether the person will awaken from the coma.

80. This is particularly true of laws based on modern conservatorship reform principles. See *supra* Part II.A for a discussion of the goals of the reform movement that began in the 1980s.

81. Compare UNIF. PROBATE CODE §§ 5-401 to -434 (Rev. Art. V), 8(III) U.L.A. 83-128 (2013) (covering conservatorship/protective proceedings), with UNIF. PROBATE CODE § 2-501 (Rev. Art. II), 8(I) U.L.A. 205 (2013) (providing testamentary capacity requirement in will provision stating only that to make a will an individual must be eighteen or older and “of sound mind”).

82. See STEWART STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, *ESTATES AND TRUSTS* 9 (4th ed. 2011) (stating that “for Anglo-American courts and legislatures, both the right to receive property and the right to dispose of property, are rooted in positive law, subject to legislative adjustment”).

enerated those laws may be.<sup>83</sup> The remainder of this Article explores whether state conservatorship statutes should impose special limitations or restrictions—or permit judges to impose special limitations or restrictions—on a conservatee’s will-making ability.

### III. ON DETERMINING WILL-MAKING ABILITY WITHIN A CONSERVATORSHIP PROCEEDING

As we have seen, the history of wills law indicates that no court may properly rule that an individual lacks the *future* ability to execute a valid will.<sup>84</sup> Nevertheless, conservatorship courts have issued such prospective rulings,<sup>85</sup> and the statutes of at least a couple of states now explicitly deny conservatees the unfettered ability to execute a will.<sup>86</sup> Because such prospective determinations fly in the face of centuries of wills law,<sup>87</sup> one must ask whether something peculiar about conservatorships justifies such a remarkable departure from wills precedent.<sup>88</sup>

#### A. *Reasons for Prospective Rulings*

Petitioners request that the conservatorship court strip the respondent of her ability to make a will for a variety of reasons. Some of these reasons may be based on the petitioners’ self-interest;<sup>89</sup> others may be based on the petitioners’ desire to promote what they believe is the respondent’s best interest.<sup>90</sup> It is likely that petitioners who

83. See *id.* (indicating that the Statute of Wills was first enacted by Parliament in 1540). *But see* DANAYA C. WRIGHT, *THE LAW OF SUCCESSION: WILLS, TRUSTS, AND ESTATES* 6–10 (2013) (excerpting *Hodel v. Irving*, 481 U.S. 704 (1987), and noting that it is the leading case for asserting that “the right to determine how your property will pass is a *constitutionally* protected property right”) (emphasis added).

84. See *supra* notes 57–74 and accompanying text, which demonstrate that judicial evaluation of testamentary capacity historically occurs only after the testator has made the will.

85. See *infra* Part II.D.2 for a discussion of cases in which courts ruled prospectively that a conservatee had no will-making ability.

86. See *infra* Part III.D.2.a for a discussion of statutes and cases from New Jersey and Oklahoma.

87. See, e.g., *Skelton v. Davis*, 133 So. 2d 432, 435 (Fla. Dist. Ct. App. 1961) (noting that the principle that testamentary capacity is to be judged solely at the time of the execution of the will is irrefragable and no authority need be cited); *Stone v. Damon*, 12 Mass. (3 Tyng) 488, 489 (1815) (refusing in early nineteenth century to rule that person under guardianship could not execute a will and emphasizing importance of the right of will making). See generally *supra* notes 51–54 and accompanying text for an analysis of principles involved in evaluation of testamentary capacity.

88. See *infra* Part III.A for a discussion of the potential reasons in conservatorship cases for a prospective ruling denying conservatee testamentary capacity.

89. Adult children who fear the respondent-parent is planning to disinherit them have a financial incentive for requesting that the parent be stripped of her will-making ability.

90. Undoubtedly, some adult children use the conservatorship process not primarily to protect a parent, but rather to preserve the parent’s estate for themselves. Yet a petition filed by the respondent’s children—even one filed against the parent’s wishes—does not necessarily mean that the children do not have her best interest at heart. Honest, well-intentioned children may know that their parent can no longer manage resources she will need in old age or that the parent is likely to become the victim of one or more of the many designing individuals who prey upon those whose management abilities are faltering. *Cf. Gessler v. Miller (In re Conservatorship of Gessler)*, 419 N.W.2d 541, 541–42, 544 (N.D. Ct. App. 1988) (observing that long-time friend filed conservatorship petition for eighty-seven-year-old woman who was physically impaired, “easily persuaded,” and subject to influence of others; friend was expectant beneficiary of small bequest in woman’s will, but primary beneficiary appeared to be church, whose pastor, through his conduct, “created an appearance

request the testamentary constraint have mixed motives.<sup>91</sup> In addition to the petitioners' concerns, the court may have its own reasons for ruling that a conservatee is without the further ability to execute a valid will.<sup>92</sup>

Petitioners often seek to have the conservatorship court strip the respondent of her right to make a will to protect their own interests under the respondent's existing estate plan.<sup>93</sup> If a son is the principal beneficiary of his mother's existing and presumably valid will at the time he files a petition seeking a conservatorship for her *against her wishes*,<sup>94</sup> he might very well fear that she will attempt to retaliate following the imposition of the conservatorship by executing a new will that disinherits him.<sup>95</sup> Similarly, he may fear a new will executed by his mother if he is her heir apparent and she is intestate when he files the petition.<sup>96</sup> Moreover, if he is also the designated beneficiary of her nonprobate assets and those assets require only that the account holder have testamentary capacity to change the beneficiary designation, he may fear that she will attempt to change those beneficiary designations.<sup>97</sup> A conservatorship

of improper influence" over the woman).

91. As an example of a petitioner with mixed motives, consider the petitioner who is the beneficiary named in the respondent's pre-conservatorship will but who also sincerely believes the respondent to be subject to undue influence of designing persons.

92. See *infra* notes 99–101 and accompanying text for a consideration of the mixed motives of petitioners.

93. The desire to protect the conservatee's estate for themselves is also why some relatives file the conservatorship petition in the first place. Human nature has not changed that much over the centuries in which wills cases have been reported. See, e.g., *Stone v. Damon*, 12 Mass. (3 Tyng) 488, 489 (1815) (noting the "cruel and unnecessary addition to [the] misfortune" of a person under guardianship that could be caused by persons "interested in avoiding his will" executed during the period of his guardianship).

94. See *infra* note 95 for cases in which a conservatee-parent executed a will disinheriting children who had filed a conservatorship petition.

95. See *Tank v. Lange (In re Estate of Wagner)*, 522 N.W.2d 159, 162–63 (Neb. 1994) (discussing will in which mother disinherited children who filed conservatorship petition against her). See also *supra* notes 1–11 and accompanying text for a discussion of the contentious litigation over Delphine Wagner's estate. See also *In Skelton v. Davis*, a mother provided equally for her five living children in a will executed a few months before two children filed a petition for a curatorship over the mother's estate. 133 So. 2d 432, 433–34 (Fla. Dist. Ct. App. 1961). Shortly after a circuit court granted the petition of the two children, the mother revoked the earlier will and executed a new will leaving only \$100 each to the two children who had filed the petition for the curatorship. *Id.* at 434. The other three children succeeded to substantially all of the remainder of the mother's estate. *Id.* The will specifically noted that the two petitioners "have harassed me recently with litigation" and that "[o]f course I resent this action on their part." *Id.* See also *In re Will of Maynard*, 307 S.E.2d 416, 422–23 (N.C. Ct. App. 1983) (noting that mother who had provided by will equally for her five children prior to guardianship proceeding subsequently executed will that disinherited two children, including daughter who filed the guardianship petition); *Bottger v. Bottger (In re Bottger's Estate)*, 129 P.2d 518, 519, 521 (Wash. 1942) (discussing will contest brought by testator's children against will executed by their mother three days after children signed guardianship petition).

96. See, e.g., *Skelton*, 133 So. 2d at 434. The *Skelton* opinion indicates that the two daughters who were disinherited by their mother after they filed a successful curatorship petition against her estate did not know of their mother's will disinheriting them until their mother died. *Id.* The opinion indicates that the petitioners were to take equally with their living siblings under the will their mother had executed months prior to the filing of the curatorship petition. *Id.* at 433–34. The opinion does not indicate whether the petitioners were aware of the earlier will when they filed the curatorship petition.

97. See, e.g., *Miller v. Fischer (In re Estate of Oliver)*, 934 P.2d 144, 148 (Kan. Ct. App. 1997) (indicating that conservatee who had testamentary capacity could not only execute wills, but also change beneficiary designations on payable-on-death accounts).

order that limits the decedent's ability to contract is very common, but such a ruling stripping the conservatee of the ability to contract would not guarantee the preservation of the son's expected interests under probate law or survivorship designations governed by a testamentary capacity standard.<sup>98</sup> A ruling that the conservatee is without testamentary capacity provides such a guarantee.

A petitioner's request that the court remove the conservatee's will-making power may not be based entirely, or even partly, on self-interest.<sup>99</sup> Along with his concern for preserving "his share" of his mother's estate,<sup>100</sup> or perhaps without any concern for preserving his mother's estate for himself, the son may hold a sincere belief that his mother's current estate plan represents what she wanted when she was functioning with her maximum capabilities, and that the person *who she was* would never want that plan to be changed by the less capable person *she has become*.<sup>101</sup>

Concern for convenience may play a role in a petitioner's request.<sup>102</sup> For example, the respondent may be easily swayed by family members, caregivers, health-care providers, religious leaders, neighbors, or even casual acquaintances.<sup>103</sup> If the petitioner

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98. *See id.* (adopting a modern view that if conservatee has testamentary capacity, he not only can execute a will, but also change beneficiary designations on will substitutes). *But cf.* SunTrust Bank v. Harper, 551 S.E.2d 419, 425 (Ga. Ct. App. 2001) (holding that because ward had no capacity to contract, he could not change IRA beneficiary or beneficiary on existing life insurance policy; rejecting argument that, because the beneficiary designations represent will substitutes, changes to such designations require only testamentary capacity).

99. Although most petitioners in conservatorship cases are family members, conservator statutes typically permit the petition to be brought by any person interested in the welfare of the respondent. *See, e.g.*, UNIF. PROBATE CODE § 5-403(a)(2) (Rev. Art. V), 8(III) U.L.A. 85-87 (2013) (permitting petition by "an individual interested in the estate, affairs, or welfare of the person to be protected"). Thus, for example, a close friend may file the petition of an elderly person with no family and request that the court remove the person's will-making ability if it appears probable that designing persons will prey upon her and unduly influence her to change her will.

100. The reported case law strongly suggests that in many instances, children of the respondent file the conservatorship petition not only to preserve part of the parent's estate for themselves, but also to prevent their siblings from unduly influencing the parent to the potential detriment of the petitioners. *See, e.g.*, Smith v. Smith, 397 S.W. 2d 186, 186-88, 196 (Tenn. Ct. App. 1965) (noting respondent's belief that petitioning children filed because they were jealous of the nonpetitioning children, whom the petitioners felt that respondent favored). Jealousy among a respondent's children, however, does not necessarily indicate that the petitioners lack a good faith belief that the parent is being unduly influenced by their nonpetitioning siblings.

101. In *In re Estate of Wagner*, a petitioning child noted that his mother was now leasing certain land to a third party for substantially more rent than he had had to pay when he was leasing the land. 367 N.W.2d 736, 740 (Neb. 1985). He suggested this was evidence of his mother's inability to manage her assets, since she would have to pay more taxes as a result of her decision. *Id.* The Nebraska Supreme Court observed that the son's logic was "difficult to grasp" and stated that the new lease entered into by the respondent demonstrated that "she knew exactly what to do with her property." *Id.*

102. Convenience is often a motivating reason for family members to request a full conservatorship rather than a limited one. *Cf. In re Guardianship of Braaten*, 502 N.W.2d 512, 522 (N.D. 1993) (noting testimony of respondent's brother that family sought a full guardianship and conservatorship, even though the family planned only limited involvement in her affairs, because limited guardianships and conservatorship are "a waste of time," "can be undermined" [presumably by state interference], and leave the limited guardian-conservator unclear as to what precisely he or she can do). The court noted that the family was a loving one and commended the family for the way it had assisted the respondent when state-provided social services were inadequate. *Id.* Nevertheless, it concluded that only a limited guardianship was necessary. *Id.* at 523.

103. *See, e.g.*, Gessler v. Miller (*In re Conservatorship of Gessler*), 419 N.W.2d 541, 542-44 (N.D. Ct. App. 1988) (affirming the trial court's appointment of a conservator for an eighty-seven-year-old woman who

knows that the respondent could be easily and unduly influenced to change her will to include any of these individuals who might prey upon her, the petitioner may seek to have the conservatee's will-making power removed to avoid the possibility or probability of a will contest following her death.<sup>104</sup>

The conservatorship court itself may also be influenced by concern for convenience.<sup>105</sup> If a will contest arises later, the conservatorship court judge will often be the very same judge that will hear the will contest.<sup>106</sup> If the conservatorship court is convinced that the respondent currently lacks and will never regain testamentary capacity, it may attempt to protect the estate from a will contest by ruling that the conservatee henceforth lacks the ability to execute a valid will;<sup>107</sup> fortuitously for the court, such an order also reduces the likelihood that the court will be bothered with such a will contest.<sup>108</sup>

Before leaving this discussion, we should note that each of the preceding reasons for stripping the conservatee of her ability to execute a will while under conservatorship is based on the wishes, concerns, or beliefs of *someone other than the conservatee*.<sup>109</sup> And yet, under modern conservatorship law, these reasons are a valid basis for such an order only if the order will serve that conservatee's best interest, which necessarily entails an exploration of the conservatee's abilities and wishes.<sup>110</sup> So now we turn to that exploration.

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was physically compromised and easily vulnerable to the influences of others as opposed to appointing a pastor because of "the possibility of undue influence on the respondent"). Another reason petitioners might wish to strip the conservatee of will-making ability is to protect the conservatee from the conservator. In *In re Estate of McCormick*, the conservator and his wife, who were unrelated to the conservatee, assisted the conservatee in making a holographic will that left them the bulk of her estate. 765 A.2d 552, 555–56 (Me. 2001). The conservator presented the holographic will for probate following the conservatee's death. *Id.* at 556. In closing the conservatorship, he filed an affidavit that the conservatee had no living relatives. *Id.* A relative did appear, however, and subsequently the conservator withdrew his petition for probate "when he realized its validity would not withstand scrutiny." *Id.* at 555–56, 562.

104. See *infra* note 313 and accompanying text for a judicial statement that will making by a conservatee presents a scenario ripe for designing persons to take advantage of the conservatee.

105. Anecdotal evidence suggests that lawyers representing conservatorship petitioners often request that the court remove all powers of the conservatee and vest them in the conservator. See *supra* notes 89–110 and accompanying text for a discussion of some suggested reasons petitioners may want a full conservatorship, even if the petitioners are not potential beneficiaries of the respondent's estate. It is easier for the court to issue an order establishing a full conservatorship than to issue a detailed order specifying individual powers removed from the conservatee and vested in the conservator.

106. See, e.g., IOWA CODE ANN. § 633.10 (West 2014) (providing district court sitting in probate with jurisdiction over will contests and conservatorship proceedings); TENN. CODE ANN. § 16-16-201 (2014) (providing chancery courts jurisdiction over probate of wills and conservatorships except in counties otherwise specifically provided for).

107. See *infra* notes 307–17 and accompanying text for a discussion of a case involving judicial concern that a conservatee may be especially susceptible to undue influence.

108. See *supra* note 106 and accompanying text for the proposition that the same court often has jurisdiction over conservatorship matters and will contests.

109. See *supra* notes 89–108 and accompanying text for an examination of various reasons both petitioners and the court may wish to deny a conservatee the ability to make a will.

110. See *supra* Part II.A for a discussion of the principles governing modern conservatorship proceedings.

B. *Whose Best Interest?*

Ultimately, modern principles of conservatorship reform are designed to protect and promote the best interest of the conservatee.<sup>111</sup> A conservatorship order may *incidentally* benefit expectant beneficiaries under an existing estate plan.<sup>112</sup> It may make their lives more convenient.<sup>113</sup> It may save judicial resources by staving off future proceedings.<sup>114</sup> Nevertheless, those effects divorced from a careful inquiry into the conservatee's best interest are not enough to justify the order.<sup>115</sup>

In ensuring and enhancing the conservatee's best interest, modern conservatorship law begins by assuming that the conservatee's best interest will be served by allowing her to retain the maximum amount of control over her estate consistent with her abilities.<sup>116</sup> Conservatorships, of course, can last for many years, and no one can predict what the conservatee's future needs will be.<sup>117</sup> Conservatorship law seeks to preserve her estate through prudent management not to maximize the assets that will pass at her death, but rather to ensure that she is adequately provided for while she lives.<sup>118</sup>

If a conservatee cannot understand the basic implications of contracts and gifts and is likely to impoverish herself by making foolish agreements or improvident gifts, the court may find it necessary to remove her power to enter contracts or make gifts.<sup>119</sup>

111. See *supra* Part II.A for an overview of modern conservatorship law.

112. See *supra* notes 93–98 and accompanying text for the observation that foreclosing the possibility of a subsequent will execution by the conservatee indirectly favors beneficiaries under an existing will or heirs if there is no will.

113. See *supra* notes 102–04 and accompanying text for a discussion of convenience to the respondent's family as a motivating factor underlying some petitions for conservatorship.

114. See *supra* notes 105–08 and accompanying text for a discussion of the convenience to the court that results from granting full powers to a conservator, in particular the convenience of avoiding a will contest if the court denies a conservatee the ability to execute a will.

115. See, e.g., *In re Estate of West*, 887 P.2d 222, 231 (Mont. 1994) (concluding that proposed program of gift giving was inappropriate, since “the only persons to be benefited by a program of gifting and other estate tax planning, according to the evidence presented at the hearing, are the persons to receive the gifts and the devisees of his estate upon [the protected person's] death”). The court noted that the paramount concern is the best interest of the protected person. *Id.* The court further stated that it was “not concerned with maximizing the estate for such future heirs and devisees.” *Id.* at 229.

116. See *supra* notes Part II.A for a discussion of the principles of modern conservatorship reform, including use of least restrictive alternative.

117. See, e.g., *In re Karp*, 537 N.Y.S.2d 510, 513–14 (App. Div. 1989) (expressing concern, in response to petition for distributions from conservatee's estate, that proposed inter vivos distribution plan could possibly leave conservatee with inadequate income to provide for his expenses, including medical care, which would likely increase over time).

118. See, e.g., *Verce v. McClendon (In re Estate of Gallavan)*, 89 P.3d 521, 523 (Colo. App. 2004) (noting that a statutory purpose of conservatorship is “to ensure that assets a person needs for her own support, care, education, health, and welfare . . . are not wasted or dissipated”). Serving the conservatee's best interest may also, however, include protection of the conservatee's estate for those who “are entitled to her support.” *Id.* This concern for others, however, focuses on those entitled to support during the conservatee's lifetime, not those who are objects of her bounty at death. See, e.g., CAL. PROB. CODE § 2582(b) (West 2014) (stating that court may authorize proposed action only if “the proposed action will have no adverse effect on the estate or the estate remaining after the proposed action is taken will be adequate to provide for the needs of the conservatee and for the support of those legally entitled to support, maintenance, and education from the conservatee . . .”).

119. See, e.g., *Gessler v. Miller (In re Conservatorship of Gessler)*, 419 N.W.2d 541, 544 (N.D. Ct. App. 1988) (indicating that a person under a conservatorship nevertheless “ought to be free to make gifts if he

Even so, however, courts acting consistent with the spirit of the reform movement will often permit the conservatee a regular allowance (whose size is likely to vary with the size of her estate) from her assets to use as she wishes.<sup>120</sup> These courts recognize that the allowance will help preserve the conservatee's sense of dignity and independence despite the imposition of the conservatorship.<sup>121</sup> By granting the allowance, the court does not reduce the conservatee to the status of a young child who must ask permission each time she wants to purchase small items or make small gifts.<sup>122</sup>

Noting their primary concern for the conservatee's best interest *during her lifetime*,<sup>123</sup> conservatorship courts have sometimes observed that their task does not include examining and determining who should get what from her estate when she dies.<sup>124</sup> Nevertheless, the conservatee has an interest in the distribution of her estate at death,<sup>125</sup> and thus her known wishes concerning her estate plan should be important to the conservatorship court.<sup>126</sup> Moreover, when the conservatee can no longer reliably express her wishes by will or otherwise, a court may use substituted judgment principles<sup>127</sup> to do what she would have done regarding her estate.<sup>128</sup> In light of this

understands the consequences of his acts and has sufficient assets to meet current and projected needs").

120. *See, e.g.*, *Stewart v. Bush (In re Conservatorship of Stallings)*, 523 So. 2d 49, 52–53 (Miss. 1988) (upholding award of allowance to conservatee); *Nelson v. Nelson (In re Nelson)*, 891 S.W.2d 181, 187. (Mo. Ct. App. 1995) (providing allowance to conservatee).

121. *See, e.g.*, *Benge v. Sutton (In re Estate of Gorthy)*, 100 N.W.2d 857, 864 (Neb. 1960) ("No right of a citizen is more valued than the power to dispose of his property by will. The right is in no manner based upon its judicious exercise.").

122. Another goal, at least in some instances, is that the conservatee will learn through using her allowance more about the nature and importance of contractual obligations and completed gifts. *See, e.g.*, *In re Conservatorship of Stallings*, 523 So. 2d at 53 (upholding chancellor's award of allowance to incapacitated person and noting "it is neither necessary nor desirable that the conservator write a check for every tube of toothpaste or soft drink that the ward may wish to purchase"); *In re Nelson*, 891 S.W.2d at 187–88 (stating that evidence supported substantial spending allowance to conservatee).

123. *See, e.g.*, *Jenckes v. Court of Probate*, 2 R.I. 255, 257 (1852) (noting even in mid-nineteenth century the concern of guardianship law for "persons who, for want of discretion in managing their estate, shall be likely to bring themselves and families to want").

For this reason, courts must take care when petitioners or conservators request current distributions from the conservatee's estate, even if the conservatee's estate appears ample and circumstances suggest that the conservatee herself would have approved the distributions had she not lost her ability to manage her assets. *See In re Karp*, 537 N.Y.S.2d 510, 513 (App. Div. 1989) (listing factors other than just size of estate and disposition of conservatee for a court to consider when deciding whether to permit a distribution). The court's ultimate concern for the conservatee's best interest generally requires the court, first and foremost, to ensure that her assets are used for her own benefit. *See In re Estate of Gallavan*, 89 P.3d at 523 (underscoring that a reason for conservatorship is to protect assets conservatee needs for her own welfare).

124. *See, e.g.*, *Citizens State Bank & Trust Co. of Hiawatha v. Nolte*, 601 P.2d 1110, 1114 (1979) ("The conservator's duty . . . is to manage the estate during the conservatee's lifetime. It is not his function, nor that of the probate court supervising the conservatorship, to control disposition of the conservatee's property after death.").

125. *See, e.g.*, *Oliver v. Braaten (In re Conservatorship of Sickles)*, 518 N.W.2d 673, 678 (N.D. 1994) (noting that conservatorship court has broad powers to protect the conservatee's affairs and estate, including the power to create revocable or irrevocable trusts that may extend *beyond* the conservatee's life) (emphasis added).

126. *See id.* at 678–80 (affirming conservatorship court's approval of revocable trust not to avoid having assets pass under conservatee's will, but rather to ensure that assets passed pursuant to conservatee's wishes).

127. Courts that apply substituted judgment in its traditional form act or approve acts by the

judicial power to do for her what she would have done for herself, *might it serve the conservatee's best interest to prevent her from executing a new will?*<sup>129</sup>

It seems doubtful. Because no one can know whether the conservatee will satisfy the minimal threshold for testamentary capacity at some future moment,<sup>130</sup> depriving the conservatee of prospective will-making ability necessarily runs a risk—often a high risk—of shutting the door prematurely on one of the greatest and most valuable of personal rights.<sup>131</sup> A person may be unable to manage assets<sup>132</sup> and yet know what those assets are and whom she wants to receive them.<sup>133</sup> The reported case law repeatedly demonstrates instances in which a conservatee voluntarily and knowingly executed her independently conceived wishes by valid will.<sup>134</sup> To strip her of the *legal* right of will making when she may clearly satisfy the *actual* requirements for will

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conservator that reflect the values or probable wishes the conservatee had before she lost the ability to manage her assets. See Ralph C. Brashier, *Policy, Perspective, and the Proxy Will*, 61 S.C. L. REV. 63, 87 (2009) (discussing history of substituted judgment doctrine). For a thoughtful exploration of the “distinction” between decisions based on substituted judgment and those based on best interest, see Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739, 747–60 (2012) (exploring inadequacies in statutes that do not recognize that substituted judgment and best interest exist along a continuum).

128. For example, the court may authorize current gifts from the estate when that estate is clearly more than ample to meet the conservatee’s present and future needs and the gifts will minimize taxes consistent with the conservatee’s known wishes. See, e.g., *In re Karp*, 537 N.Y.S.2d at 513–14 (noting that court may order inter vivos distributions from conservatee’s estate under substituted judgment principles, but concluding that evidence did not demonstrate that conservatee’s income was sufficiently ample to grant proposed inter vivos distributions in question).

129. See *supra* notes 89–108 and accompanying text for a discussion of the most likely reasons petitioners or a court would want to expressly deny a conservatee’s will-making power in a conservatorship order. Perhaps the most obvious reason for a petitioner who is an expectant beneficiary under the respondent’s current will (or is an heir apparent, if the respondent is intestate) is to ensure that her expectancy will come to fruition without the necessity of bringing a will contest against a will executed by the conservatee during the conservatorship. When the expectant beneficiaries are family members who are happy with the conservatee’s existing will, the request might also help to preserve family harmony—at least for a while. But if one of the family members also becomes the conservatee’s principal caregiver while the other children do nothing for their mother, the court order maintaining the existing estate plan may actually assist in destroying family harmony. Similarly if the family member who is also conservator appears to be reaping substantial benefits from that position, leaving less to pass through the conservatee’s probate estate, other family members may change their minds about the propriety of the arrangement.

130. See, e.g., *In re Weedman’s Estate*, 98 N.E. 956, 957 (Ill. 1912) (observing that conservatorship judgment could not conclusively predict whether conservatee would have “sound mind” when she executed a will more than one month later); *In re Sterrett’s Estate*, 150 A. 159, 161 (Pa. 1930) (stating that “it cannot be taken as a basic fact” that an elderly woman who was an adjudicated “lunatic” would never be able to execute a valid will, even though she had been in a state institution for thirty years and had not had a lucid moment in many years). See also *supra* notes 51–56 and accompanying text for a discussion of the low threshold of capacity required to execute a will.

131. See, e.g., *Benge v. Sutton (In re Estate of Gorthy)*, 100 N.W.2d 857, 864 (Neb. 1960) (stating that no right is more valued than the power to dispose of assets by will).

132. See *supra* notes 33–42 and accompanying text for a discussion of the test to determine whether a conservatorship is needed.

133. See *supra* notes 51–54 and accompanying text for a discussion of the test to determine whether testamentary capacity exists.

134. See generally A.G. Barnett, *supra* note 12, at 1120 *passim* (providing collection of cases in which conservatee executed valid).

making violates the judicial obligation to impose the least restrictive alternative<sup>135</sup> and maximize her autonomy consistent with her abilities.<sup>136</sup>

Nor is it justifiable to terminate her will-making ability because the court is convinced that the existing estate plan represents what the conservatee wanted when she was “capable.”<sup>137</sup> Such reasoning ignores the obvious fact that each of us changes over time, and tomorrow we may freely discard what we today believe is our unalterable desire.<sup>138</sup> This is no less true of the conservatee than of those of us who still have full management of our assets.<sup>139</sup> Indeed, one of the bedrock principles of modern conservatorship is the acknowledgment that capabilities take many varied forms and evolve with time.<sup>140</sup> Moreover, the law of wills does not require that a testator be functioning at his maximum capabilities when executing his will.<sup>141</sup>

Along these same lines, fears that the conservatee may now act in retaliation against those who supported the conservatorship petition also cannot justify depriving her of future will-making ability.<sup>142</sup> Testators in all walks of life sometimes execute wills in a fit of pique, retaliating against family members who were beneficiaries in prior wills.<sup>143</sup> Such wills, however unfortunate they may seem to the objective observer, are not invalid simply because they were executed in moments of anger or resentment.<sup>144</sup> If a conservatee satisfies the minimal elements for testamentary capacity

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135. See *supra* notes 43–46 and accompanying text for a discussion of the least restrictive alternative principle.

136. Moreover, if she is unduly influenced, her conservator, the personal representative of her estate, or other interested parties have alternative methods of recourse. See *infra* notes 157–75 and accompanying text for a discussion of alternatives.

137. If the conservatee can reliably express her wishes, modern reform principles and the doctrine of substituted judgment would at least demand that the judge consider her current wishes. Cf. A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 66 (1999) (noting that some judges, particularly those on the bench for a long time, sit on those benches “as if on thrones” and believe “they have the right to arbitrarily dictate the process or adjudication” regardless of statutory mandates).

138. See, e.g., *Benge v. Sutton (In re Estate of Gorthy)*, 100 N.W.2d 857, 862–64 (Neb. 1960) (describing how mother, apparently in response to changing events over time, executed 1951 will that favored one child over others in contrast to her 1939 will, under which all children benefitted similarly).

139. Compare *In re Estate of Gorthy*, 100 N.W.2d at 862–65 (detailing how mother’s later will favored one child in contrast to her earlier will giving all children similar benefits), with *Skelton v. Davis*, 133 So. 2d 432, 434 (Fla. Dist. Ct. App. 1961) (noting how mother under curatorship executed new will to essentially disinherit two children who petitioned for curatorship, in contrast to old will under which all her children were treated similarly).

140. See *supra* notes 33–42 and accompanying text for a discussion of capacity considerations in conservatorship law.

141. See *supra* notes 51–54 and accompanying text for an overview of the minimal requirements to possess testamentary capacity.

142. The law of wills has never required that wills be objectively fair or reasonable. See, e.g., *In re Estate of Gorthy*, 100 N.W.2d at 864 (noting that the right to devise need not be exercised judiciously; that the right may produce inequality among heirs for a reason that only the testator finds sufficient; that the right may be used to produce unjust results concerning his children or other relatives).

143. See, e.g., *Skelton*, 133 So. 2d at 435 (stating that “[e]ven a wholly and unreasonable and ill founded prejudice against a child or other relative is not of itself a ground for invalidating a testator’s will, for people may hate their relatives for bad reasons without being deprived of testamentary power”).

144. See *supra* note 142 and accompanying text for a judicial observation that wills need be neither fair nor reasonable to be valid.

at will execution, no satisfactory reason exists to give her will exceptional treatment.<sup>145</sup>

In some instances, depriving the conservator of future will-making ability may seem to hold the promise of minimizing family friction by placating expectant beneficiaries under an existing will.<sup>146</sup> Can such promise serve the best interest of the conservatee? Certainly the conservator's well-being is likely to be enhanced by the presence of responsible, caring family members in her life; however, judicial removal of the conservator's will-making ability can hardly ensure ongoing, meaningful participation by family members in the conservatee's life. In fact, just the opposite may be true. If the conservatee no longer has the power to remove current expectant beneficiaries from her estate plan after the conservatorship is established, those beneficiaries—or at least the greediest, most self-interested among them—may have no incentive to remain on good terms with the conservatee and may prefer that she die sooner rather than later.<sup>147</sup> As long as the conservatee holds the power to disinherit the objects of her bounty, those individuals may find it necessary, or at least prudent, to participate meaningfully in her life.<sup>148</sup>

Judicial concern for the best interest of conservatees *as a class* could partly underlie an occasional order denying a particular conservatee the power to make a will.<sup>149</sup> Simply put, courts may fear that allowing a conservatee to disinherit those who filed the conservatorship petition against her will have a chilling effect on the filing of conservatorship petitions by other individuals whose family members clearly need conservatorship assistance.<sup>150</sup> The response to this concern, however, is that the

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145. See, e.g., *Skelton*, 133 So. 2d at 435 (involving a person whose assets were under curatorship and observing that “[a]s long as a testator does not will against the law or public policy he may will as he chooses, and has the right to select the objects of his bounty”).

146. It is not uncommon for families to demand full powers over the ward or conservatee. See, e.g., *In re Guardianship of Braaten*, 502 N.W.2d 512, 522 (N.D. 1993) (noting testimony of respondent's brother that respondent's family would not be willing to accept a limited guardianship because of the uncertainty a limited guardianship creates). Although granting family members full powers as guardians or conservators may placate them, courts committed to the least restrictive alternative focus on the ability of the ward or conservatee, not on the demands of the family. See *id.* (granting limited guardianship and stating that there was “no reason why the trial court cannot fashion an appropriate order that leaves no doubt about the conditions and extent of the guardians' limited powers and duties”). Moreover, even before the days of conservatorship reform, at least some courts observed that the right to devise is too important to be constrained by conservatorship laws. See, e.g., *Jenckes v. Court of Probate*, 2 R.I. 255, 258 (1852) (observing that right to devise is so valuable that it should not be abridged merely because “it *might be* injuriously exercised” by the testator) (emphasis added).

147. As long as the conservatee lives, the principal purpose of the conservatorship is to ensure that she is adequately maintained. If she lives a long time after the conservatorship is established, and if she also incurs great medical bills over time while accruing no significant income or interest, much or all of the conservatorship estate may be expended on her care. Thus, the estate beneficiary who is to receive a guaranteed portion of the conservatee's estate will receive more if she dies sooner rather than later.

148. Even if the child is disinherited, by participating actively in the conservatee's life, she greatly increases her chances of successfully contesting the disinheriting will. See Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 558–59 (1999) (observing that “[i]f the contestant appears to have been actively involved in the testator's life, the fact-finder is apt to set aside the will to enable the contestant to receive a share of the testator's estate”).

149. The author notes that he has found no positive reference in the case law indicating that judges have issued such orders with class implications in mind. Nevertheless, this practical concern based on a common-sense observation may provide an incentive for judges to issue such orders.

150. Even family members who are concerned about a loved one are seldom totally selfless in their

conservatorship charge is to promote the best interest of *the particular individual* before the court.<sup>151</sup>

In sum, a number of arguments strongly indicate that depriving a conservatee of will-making ability runs counter to her best interest.<sup>152</sup> Moreover, such deprivation seems always to violate the mandate of modern conservatorship law under which a court must impose the least restrictive alternative. As the next Part of this Article demonstrates, conservatorship courts have a wide range of well-established alternatives that are more than adequate to address concern that the conservatee will somehow misuse his will-making power.<sup>153</sup> These alternatives are less intrusive and stigmatizing than an order or statute removing the conservatee's will-making ability.<sup>154</sup>

### C. Alternatives to Crystal Ball Rulings

Courts have long had the power to affect the conservatee's estate plan in a wide variety of ways without resorting to an order depriving her of future will-making ability.<sup>155</sup> They also have well-established means of invalidating any will the conservatee may have executed when she was acting without testamentary capacity or as the result of undue influence, fraud, or duress.<sup>156</sup>

As we have seen, during the conservatee's lifetime the court may use substituted judgment to authorize various property management arrangements or transfers when the conservatee is no longer able to reliably express her wishes and act for herself.<sup>157</sup> In the typical scenario, the court will seek to accomplish what the conservatee would have wanted had she retained the ability to act.<sup>158</sup> If no reliable evidence indicates what she would have wanted, the court may still authorize property arrangements and transfers that are consistent with her best interest.<sup>159</sup>

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devotion to that loved one; thus, it is not surprising that if children know that a parent can and is likely to disinherit them for filing a conservatorship petition—even one brought in unquestioned good faith—they may be reluctant to bring that petition.

151. See *supra* Part II.A for a discussion of conservatorship principles.

152. See *supra* notes 45–46 and accompanying text for an examination of the importance of serving the respondent's best interest.

153. See *infra* Part III.C for a discussion of alternatives to an order depriving conservatee of will-making ability.

154. See *infra* notes 172–75 and accompanying text for a discussion of the will contest as an alternative which of itself eliminates the need for an order depriving a conservatee of will-making ability.

155. See *infra* notes 160–71 and accompanying text for an observation that conservatorship orders concerning trusts, inter vivos distributions, and contracts can affect an estate plan.

156. See *infra* notes 172–75 and accompanying text for an examination of the will contest.

157. See *supra* notes 127–28 and accompanying text for an example and explanation of substituted judgment.

158. See, e.g., *In re Cohen*, 760 A.2d 1128, 1138–40 (N.J. Super. Ct. App. Div. 2000) (finding that request to alter “incompetent” person's estate plan would not serve her best interest and defining substituted judgment as “[t]he common law equitable doctrine [that] encompasses the view that a court has inherent power to deal with the estate of an incompetent in the same manner as the incompetent would if [he or she was] able to function at full capacity”) (quoting *In re Labis*, 714 A.2d 335, 337–38 (N.J. Super. Ct. App. Div. 1998)).

159. See, e.g., *In re Keri*, 853 A.2d 909, 913 (N.J. 2004) (noting that in managing an incompetent person's estate, court must find that proposed action serves person's best interest and that proposed gifts are those that “the ward might have been expected to make”) (quoting N.J. STAT. ANN. § 3B:12-58 (2006)). The *Keri* court observed that state statutes incorporate “the best interests standard with the common law equitable doctrine of substituted judgment.” *Id.* The court further emphasized that gifts from the estate are possible only

Thus, if the estate is ample, the court may authorize distributions from the estate to minimize estate taxes or to reflect a gift-giving pattern that the conservatee had established before the conservatorship.<sup>160</sup> Similarly, the conservatorship court typically has the power to establish trusts with the conservatee's assets that are designed to benefit the conservatee and to further her wishes concerning the passing of her assets at death.<sup>161</sup> Moreover, these trusts can serve to protect the conservatee from financial predators.<sup>162</sup> Thus, in a case from North Dakota,<sup>163</sup> serious questions arose whether the conservatee's pre-conservatorship would accomplish the conservatee's known objectives;<sup>164</sup> while the conservatorship court noted that it could not make a new will for the conservatee,<sup>165</sup> it could order the conservator to establish an inter vivos trust that would clearly accomplish the conservatee's objectives.<sup>166</sup> At the conservatee's death, the assets pass free of probate.<sup>167</sup> If the trust is made irrevocable, the conservatee's later-executed will can have no effect on the trust assets.<sup>168</sup>

Conservatorship courts also have the power to remove the conservatee's right to contract. The capacity required to contract is substantially greater than that required to execute a valid will, and one frequent purpose of conservatorships is to protect the conservatee from designing persons or financial predators.<sup>169</sup> Depriving the conservatee of the power to contract typically means she can no longer establish payable-on-death (POD) and transfer-on-death (TOD) accounts with banks and financial institutions, because such accounts are based on contract.<sup>170</sup> Moreover, the

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after determining that the estate "contains the resources necessary for the benefit of the ward." *Id.*

160. *See, e.g.*, UNIF. PROBATE CODE § 5-411(a)(1), (c), 8(III) U.L.A. 97-98 (2013) (permitting court to authorize gifts by conservatee that are not otherwise authorized by section 5-427(b), but noting that court shall consider primarily the decision the conservatee would have made).

161. *See id.* § 5-411(a)(4) (permitting court to authorize conservator to create revocable or irrevocable trust of conservatorship property).

162. When one or more known individuals are likely to prey upon the conservatee, courts have also issued orders protecting the conservatee against those named individuals. *See, e.g.*, *Clinesmith v. Temmerman*, 298 P.3d 458, 460, 466, (N.M. Ct. App. 2012), *cert. denied*, 299 P.3d 863 (N.M. 2013) (indicating that lower court judge ordered lawyer with conflict of interest not to engage in estate planning with conservatee).

163. *Oliver v. Braaten (In re Conservatorship of Sickles)*, 518 N.W.2d 673 (N.D. 1994).

164. *Id.* at 675-78.

165. *Id.* at 678-79.

166. *Id.* at 679.

167. *Id.*

168. *See, e.g.*, *In re Guardianship of A.D.L.*, 506 A.2d 792, 795 (N.J. Super. Ct. App. Div. 1986) (noting that if court exercises its power to create, inter alia, irrevocable trusts lasting beyond a person's disability, then court can "effectively 'impound' the estate" and thereby deprive the person of enjoyment even when his disability is removed); *In re Conservatorship of Sickles*, 518 N.W.2d at 678 (noting court authority "to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life").

169. Also, courts have the power to remove or limit the conservatee's right to make inter vivos gifts. Although not everyone agrees, some courts note that the capacity to make an inter vivos gift is higher than that required to execute a will because, unlike a will, an inter vivos gift by definition deprives the donor of *current* rights. *See Brashier, supra* note 127, at 73 & n.44 (noting that courts disagree about the threshold of capacity required to make an inter vivos gift; citing some cases that indicate the capacity threshold for gifts is the same as that required for testamentary capacity and other cases holding that the capacity threshold for gifts is higher than that required for testamentary capacity).

170. Moreover, some courts have indicated that a conservatee without contractual capacity can no longer even change beneficiary designations on preexisting POD and TOD accounts. *See, e.g. In re Estate of*

court has the ability to approve the conservator's management plan that includes POD and TOD accounts. In most if not all states, such accounts and the beneficiary designations upon them cannot be revoked by will.<sup>171</sup> Thus, beneficiaries of such TOD accounts cannot be disinherited by a later will executed by the conservatee.

Finally, and most importantly, even if the conservatorship court takes no action that protects the conservatee's assets from passing under a later-executed will, *heirs and beneficiaries under prior wills can contest the later-executed will upon the testator's death*.<sup>172</sup> In other words, regardless of what the conservatee does in her later-executed will, the conservatee's heirs and beneficiaries under prior wills have precisely the same recourse as their counterparts in nonconservatorship settings.<sup>173</sup> It is recourse to the will contest that makes the very notion of a prospective ruling that a conservator lacks testamentary capacity so unfortunate and unnecessary.<sup>174</sup> Will contests provide a thorough opportunity to gauge whether the conservatee possessed testamentary capacity and was acting as a free agent at the moment she executed the will. The event in question—will execution—has already occurred. Witness testimony can help prove or disprove the validity of the will. In contrast, an order denying a conservatee of future will-making ability is inevitably based on nothing more than a prediction. Worse still, such crystal ball rulings are binding even if, at the conservatee's death, the most convincing evidence imaginable demonstrates that she possessed testamentary capacity when she executed the later will.<sup>175</sup>

In sum, a wide variety of planning measures approved by the conservatorship court short of depriving the conservatee of future will-making ability can serve to

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Marquis, 822 A.2d 1153, 1156–57 (Me. 2003) (ruling that contractual capacity, not mere testamentary capacity, is required to change beneficiary on annuity). *See generally* 3B C.J.S. *Annuities* § 36 (2013) (stating that party must have capacity to contract when changing beneficiary designation on an annuity policy). Since these designations function as will substitutes, however, the reasoning of such courts and commentary is questionable; nevertheless, where this interpretation applies, beneficiaries of preexisting POD and TOD accounts typically do not have to worry that the conservatee will effectively disinherit them by removing their names.

Modern courts—particularly those incorporating the spirit of conservatorship reform and attempting to impose the least restrictive alternative—are more inclined to recognize that an account holder with testamentary capacity can indeed change the beneficiary designation on will substitutes. *See, e.g., In re Guardianship and Conservatorship of Anderson*, 218 P.3d 1220, 1223 (Mont. 2009) (observing that protected person may make testamentary dispositions and change beneficiary designations on insurance policies and annuities and investment accounts, and citing cases from Kansas).

171. *See, e.g., UNIF. PROBATE CODE* § 6-213(b), 8(III) U.L.A. 373 (2013) (“A right of survivorship arising from the express terms of the account, . . . or a POD designation, may not be altered by will.”).

172. *See, e.g., In re Cohen*, 760 A.2d 1128, 1132 (N.J. Super. Ct. App. Div. 2000) (noting lower court ruling that son who was unhappy with the will of his incompetent mother, who was still alive, had no standing to contest that will during her life). *But see Barnes, supra* note 4, at 20 (noting that it is more difficult to gauge someone's capacity after death).

173. *See, e.g., In re Guardianship and Conservatorship of Estate of Tennant*, 714 P.2d 122, 128–29 (Mont. 1986) (describing successful contest of will executed prior to testator's conservatorship).

174. *See, e.g., Citizens State Bank & Trust Co. of Hiawatha v. Nolte*, 601 P.2d 1110, 1114 (Kan. 1979) (noting that “the execution of a will by the conservatee did not interfere with the conservator's function” and further observing that it is not the function of the conservator or the probate court “to control disposition of the conservatee's property after death”).

175. *See infra* notes 262–68 and accompanying text for an example of how a court refused to consider whether conservatee actually possessed testamentary capacity at execution of will because statute imposed blanket restriction on will making by conservatees.

protect her assets and accomplish her known or probable wishes. In the event that heirs or beneficiaries under pre-conservatorship wills are disinherited by a will executed by the conservatee, the heirs or beneficiaries always have the opportunity to contest the conservatee's will.

#### D. State Approaches

While the elements of testamentary capacity do not vary significantly across the states,<sup>176</sup> statutes in a few states do place or permit additional restrictions on conservatees that make it considerably more difficult,<sup>177</sup> if not impossible,<sup>178</sup> for them to make a will.<sup>179</sup> In some instances, the restriction imposed by the state is tantamount to a legal conclusion that the conservatee has no testamentary capacity while under the conservatorship.<sup>180</sup> A will executed by a conservatee in such a state is meaningless;<sup>181</sup> it cannot be probated, because the state restriction forecloses any inquiry into her actual testamentary capacity when she executed that will.<sup>182</sup>

Another restrictive approach permits a conservatee to make a will, but only if she first obtains judicial approval.<sup>183</sup> If the conservatee fails to obtain judicial approval, the will she executes during the conservatorship is a nullity.<sup>184</sup> Again, it matters not that, when she executed that will, her actual testamentary capacity was equal to or greater than that of many nonconservatees who execute valid wills.<sup>185</sup>

In contrast, courts in some states have indicated that judicial restrictions on the prospective will-making ability of a conservatee are impermissible.<sup>186</sup> In many states,

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176. See *supra* notes 51–54 and accompanying text for a discussion of elements of testamentary capacity that are rather consistent across the country and over time.

177. See *infra* Part III.D.2.a for a discussion of state statutes and judicial orders that, as a practical matter, mean the conservatee is highly unlikely to be able to execute a will during the conservatorship.

178. See *infra* Part II.D.2.b for a discussion of judicial orders precluding conservator from making a will during the conservatorship.

179. The right to devise is conferred by the state. See, e.g., *Coleman v. Lee (In re Wilkins' Estate)*, 94 P.2d 774, 775 (Ariz. 1939) (providing an overview of will-making authority from the time of the Norman Conquest and stating that “[i]t is universally held that the legislative authority has the power to withhold or to grant the right to make a will, and if it grants it, may make its exercise subject to such regulations and requirements as it pleases”). Having been conferred by the state, the right to devise is subject to expansion and contraction through the state legislative and judicial processes. *Id.* But see WRIGHT, *supra* note 83, at 6 (discussing suggestion that, at least to some extent, the right to pass property may be constitutionally protected).

180. See, e.g., N.J. STAT. ANN. § 3B:12-27 (West 2014). The statute is discussed at notes 261–68 and accompanying text.

181. See, e.g., *In re Bechtold*, 376 A.2d 211 (N.J. Super. Ct. Ch. Div. 1977). The case is discussed at notes 261–68 and accompanying text.

182. See *infra* note 266 for a case that exemplifies the restrictions imposed by New Jersey law.

183. See, e.g., OKLA. STAT. ANN. tit. 84, § 41(B) (West Supp. 2014). The statute is discussed at notes 269–75 and accompanying text.

184. See *Urban v. Urban (In re Estate of Lahr)*, 744 P.2d 1267 (Okla. 1987). The case is discussed at notes 270–75 and accompanying text.

185. See *id.* at 1269–70 (rejecting equal protection challenge to Oklahoma statute that treated conservatee-testators unlike other testators).

186. See *infra* notes 207–34 and accompanying text for a discussion of the finding that conservatorship court has no veto power of a conservatee's will-making ability.

no clear guidance indicates whether such restrictions are permissible.<sup>187</sup>

Because the Uniform Probate Code (UPC) provides the most widely adopted set of model probate laws in the United States, the following discussion of state approaches begins with both old and new UPC provisions. It then examines particular developments in some non-UPC states.

### 1. The Uniform Probate Code

The Uniform Probate Code includes detailed provisions for protective proceedings that allow a court to appoint a conservator.<sup>188</sup> In defining the court's powers in conservatorship proceedings, a number of states still use the provisions from a prior version of the UPC (Prior UPC).<sup>189</sup> Other states use the provisions from the revised version of the UPC (Revised UPC).<sup>190</sup> Notable differences exist between the two versions, especially concerning the will-making process during conservatorship.<sup>191</sup> Both versions are examined below.

#### a. *The Prior UPC*

The conservatorship provisions of the Prior UPC state that the court “has all the powers over the estate and business affairs which the [conservatee] could exercise if present and not under disability, *except the power to make a will.*”<sup>192</sup> The provisions also include a long list of powers that a court may exercise for the person.<sup>193</sup>

Judicial power to deny a conservatee future will-making ability is not among those listed in the conservatorship statute,<sup>194</sup> but the statute clearly indicates the list is not exclusive.<sup>195</sup> Because a person can always refrain from making a will,<sup>196</sup> which is a

187. See *infra* note 338 and accompanying text for an example demonstrating that in Tennessee no appellate court has determined the validity of conservatorship orders depriving the conservatee of will-making power.

188. See UNIF. PROBATE CODE §§ 5-401 to -434 (Rev. Art. V), 8(III) U.L.A. 83-128 (2013) (providing statutes and commentary to UPC statutes entitled “Protection of Property of Protected Person”).

189. See, e.g., D.C. CODE § 21-2055(b)(2) (2014) (denying court power to make will for protected person); MICH. COMP. LAWS ANN. § 700.5407(2)(c) (West 2010) (giving court all powers except the power to make a will); MONT. CODE ANN. § 72-5-421 (2013) (incorporating language of 1969 UPC); N.D. CENT. CODE ANN. § 30.1-29-08(2)(c) (West 2013) (stating that court has all powers except that of will-making); OR. REV. STAT. ANN. § 125.025(7) (West 2014) (expressly denying the court the power to make a will for the protected person); *In re Gierman*, No. 288264, 2010 WL 866146 (Mich. Ct. App. Mar. 11, 2010) (discussing Michigan statute).

190. Like the revised version of Article V of the UPC, all of these statutes permit a court to authorize the conservator “to “make, amend, or revoke” the conservatee’s will. See, e.g., COLO. REV. STAT. ANN. § 15-14-411(1)(g) (West 2014); HAW. REV. STAT. § 560:5-411(a)(7) (2014); MASS. GEN. LAWS ANN. ch. 190B, § 5-407(d)(7) (West 2014); MINN. STAT. ANN. § 524:5-411(a)(9) (West 2014).

191. See *infra* notes 192–256 and accompanying text for a discussion of the provisions of Prior UPC and Revised UPC concerning judicial authority over a conservatee’s will-making power.

192. UNIF. PROBATE CODE § 5-407(b)(3) (Prior Art. V), 8(III) U.L.A. 209 (2013) (emphasis added).

193. See *id.* (listing, *inter alia*, power to make gifts; power to convey or release contingent and expectant interests in property; power to enter into contracts; power to create revocable or irrevocable trusts).

194. See *id.*

195. *Id.* The comment to the conservatorship provisions of Prior Article V of the UPC further notes that the provisions give the court “all the powers that the individual would have if the person were of full capacity.” UNIF. PROBATE CODE § 5-407(3) cmt. (Prior Art. V), 8(III) U.L.A. 210 (2013). See, e.g., *Gonzales v. Garcia* (*In re Guardianship & Conservatorship of Garcia*), 631 N.W.2d 464, 470 (Neb. 2001) (noting that

*failure* to exercise a power, one could make the literal argument that the court has a similar ability to restrain the person from making a will. Looking at the statute as a whole, however, leads to the conclusion that this argument is pedantic and disingenuous.

The statute speaks in terms of powers that a court may *exercise* for the person,<sup>197</sup> thus seeming primarily to contemplate *affirmative* steps that the court may take for the conservatee.<sup>198</sup> The illustrative list of powers also speaks primarily<sup>199</sup> in terms of affirmative acts such as establishing trusts, making gifts, releasing property interests, and so forth.<sup>200</sup> Perhaps more importantly, the power to make a will is the *only* affirmative power denied to the court under the statute.<sup>201</sup> This striking language<sup>202</sup> provides a strong implication that the drafters considered the person's will-making power sacrosanct<sup>203</sup> in all respects.<sup>204</sup> If the drafters of the act considered will making so personal and important it refused to give the court the affirmative power to exercise it on behalf of the conservatee, it seems probable that those same drafters intended to deny the court the negative power of removing will-making ability from the

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common law trust principles would not permit court to exercise ward's power to revoke her existing trust, since that power was personal to her; nevertheless concluding that guardianship statute which excepted from the court only the power to make incompetent person's will was so broadly worded that the court could exercise the power to revoke after settlor became incompetent).

196. All states provide intestacy statutes to govern the distribution of probate assets left by a person who dies without a will. See SUSAN N. GARY, JEROME BORISON, NAOMI R. CAHN & PAULA A. MONOPOLI, CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 117–28 (2011) (discussing why people choose not to execute a will and also discussing intestate succession generally).

197. See *supra* note 193 for a list of some of the powers explicitly mentioned in the statute.

198. In both Prior Article V and Revised Article V, the UPC applies the term “protected person” to persons for whom a protective order is issued or a conservatorship is established. Readers should be aware that, in this Article, the author generally refers to protected persons under conservatorship as “conservatees” for the sake of simplicity.

199. Note, however, that the exercise of some rights in the list is negative in effect. For example, the court has the power to “renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer.” UNIF. PROBATE CODE § 5-407(3) (Prior Art. V) cmt., 8(III) U.L.A. 209 (2013).

200. *Id.*

201. See *id.* (conspicuously removing from the court “the power to make a will” for the conservatee).

202. See, e.g., *Kronberg v. Kronberg*, 623 A.2d 806, 810 (N.J. Super. Ct. Ch. Div. 1993) (observing significance in the fact that while the statute confers “a broad, nonexclusive list of powers on a guardian, the only power that was withheld was the power to make a will”).

203. Such a view would be consistent with wills history. See, e.g., *Brimmer v. Hartt (In re Estate of Hartt)*, 295 P.2d 985, 1002 (Wyo. 1956) (“It is, and for many centuries has been, a common thought in our economic system, that to execute a last will and testament is the most solemn and sacred act of a man's life. It is not our province to make light of that.”).

204. See, e.g., *Franklin v. First Nat'l Bank of Atlanta*, 200 S.E. 679, 682 (Ga. 1938) (discussing wills and noting “the zeal with which the law strives to carry out these sacred mandates to the letter”); *Reeder v. Dupuy*, 65 N.W. 338, 338 (Iowa 1895) (describing the will as “so sacred an instrument”); *Succession of Lewis*, 148 So. 29, 30 (La. 1933) (stating that procedural rules in probate are “sacramental” for “the time-honored reason that testaments are in themselves sacred”); *Stone v. Damon*, 12 Mass. (3 Tyng) 488, 489 (1815) (stating that even a lunatic should not be deprived of the right of will-making if he be “restored to his reason” when he executed the will); *Miss. School for Blind v. Armstrong*, 62 So. 2d 369, 372 (Miss. 1953) (stating that law and equity regard the will as “sacred”); *Metzdorf v. Borough of Rumson*, 170 A.2d 249, 252 (N.J. Super. Ct. App. Div. 1961) (noting that power to devise has “its roots in the ‘sacred and inviolable right’ of ‘absolute dominion’ of every man over his own property”); *In re Redfield*, 158 N.Y.S. 1004, 1007 (Sur. Ct. 1916) (observing that the will is considered “the most sacred of instruments”).

conservatee.<sup>205</sup> Indeed, a court adopted this position in what is apparently the only reported opinion interpreting the import of this language on a court's ability to deprive a conservatee of her will-making power.<sup>206</sup>

In the 1983 opinion *In re Estate of Anderson*,<sup>207</sup> the Supreme Court of Utah ruled that a court has no veto power to circumscribe the testamentary privilege<sup>208</sup> of a conservatee through a protective order.<sup>209</sup> The power to make a will belongs exclusively to the testator,<sup>210</sup> even if the testator is under a conservatorship.<sup>211</sup>

In the case, octogenarian Grace Anderson executed a joint will with her husband.<sup>212</sup> After his death, she made a second will naming new beneficiaries.<sup>213</sup> In response to a conservatorship petition filed near the time Grace executed the second will, the conservatorship court ultimately determined that Grace required the assistance of a conservator.<sup>214</sup> In subsequent litigation over which beneficiary under the earlier wills should serve as Grace's guardian and conservator,<sup>215</sup> the court appointed a beneficiary under the second will as conservator,<sup>216</sup> but only after she and the beneficiary under the earlier will agreed that Grace would not sign any further testamentary documents without first obtaining court approval.<sup>217</sup> The consent agreement between the will beneficiaries was incorporated into the conservatorship order.<sup>218</sup>

Despite the conservatorship order, a few months later Grace executed a third will that apparently gave additional benefits to the beneficiary of Grace's second will.<sup>219</sup> In further conservatorship proceedings,<sup>220</sup> the court appointed an institutional conservator for Grace. In those proceedings, the beneficiaries of the first two wills stipulated to a

205. See *supra* notes 203–04 for a sample list of cases that demonstrate historical respect for the sacred, personal act of will making.

206. See *infra* notes 207–34 and accompanying text for a discussion of a Utah case in which the court held that the conservatorship court had no veto power over conservatee's will-making ability. The strongest support this author has found for the contrary view in interpreting the provisions of Prior Article V is a passing observation in *In re Guardianship & Conservatorship of Anderson*, 218 P.3d 1220 (Mont. 2009). In that case—which did not involve a question of the conservatee's will-making power, but rather concerned the ability to change a beneficiary designation on a TOD account—the court noted that the lower court order “did not itself prohibit her from making testamentary dispositions, including changing [a] TOD beneficiary designation.” *Id.* at 1224. The court thus does not indicate whether it would have upheld a restriction on the conservatee's will-making ability had the lower court attempted to impose such a restriction.

207. *Smith v. Osborn (In re Estate of Anderson)*, 671 P.2d 165 (Utah 1983).

208. *Id.* at 166.

209. *Id.* at 166, 169.

210. *Id.* at 169.

211. See *id.* at 166, 169 (noting order of conservator court prohibiting conservatee from making further testamentary dispositions without prior court approval).

212. *Id.* at 166.

213. *Id.* Grace executed the second will in the same month in which the conservatorship petition was filed. *Id.* She also executed a codicil to the second will after the conservatorship petition was filed. *Id.*

214. *Id.* at 166–67.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 167.

219. *Id.*

220. *Id.*

paragraph, incorporated into the resulting court order,<sup>221</sup> that declared Grace's newest will "null and void and of no effect upon [her] demise."<sup>222</sup>

Nevertheless, when Grace died the following year,<sup>223</sup> a petition was filed to admit the post-conservatorship will to probate.<sup>224</sup> When the beneficiary of the first will objected,<sup>225</sup> the court ruled that the conservatorship order depriving Grace of the unfettered ability to make testamentary devises was subject to review and vacation.<sup>226</sup> The court found Grace to be "competent and of sound mind" when she executed the most recent will,<sup>227</sup> and thus admitted the will to probate.<sup>228</sup>

On appeal, the state supreme court began its analysis by emphasizing two provisions of its conservatorship statutes.<sup>229</sup> First, the court noted that a conservatorship court has all the powers the individual would have "except the power to make a will."<sup>230</sup> Second, the court noted that an order determining that an individual requires the appointment of a conservator or other protective order "has no effect on the capacity of the protected person."<sup>231</sup> From these provisions, the court concluded that courts have no authority to make a will *or prevent the making of a will*.<sup>232</sup> Moreover, it matters not that opposing parties stipulate to the invalidity of a post-conservatorship will and that the stipulation is incorporated into the court order,<sup>233</sup> because "[p]rovisions of judgments by consent which are *beyond the jurisdiction of the court* are not validated by the fact that the parties or their counsel consent to the judgment."<sup>234</sup>

The statutory language construed in *In re Estate of Anderson* is the same as that found in Prior Article 5 of the UPC.<sup>235</sup> The court noted further that the statutes reflect the acknowledgment that a will is ambulatory, speaking only at the testator's death.<sup>236</sup> A conservatorship order denying the conservatee the ability to make a will is a nullity; only when the testator dies can her will be challenged.<sup>237</sup> At that time it can then be set

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* The opinion does not indicate who filed the petition, but presumably it was one of the beneficiaries of the most recent will, which appeared to favor the beneficiary of Grace's second will at the expense of the beneficiary of the earlier joint will.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 168.

230. *Id.*

231. *Id.*

232. *Id.* at 169 (emphasis added) (noting that court holds no "veto power" over testator's will-making ability). Other courts have made this observation. *See, e.g.,* Cerny v. First Nat'l Bank of Arizona (*In re Estate of Kidd*), 479 P.2d 697, 699 (Ariz. 1971) (stating that "[t]he power to make a will is a power that belongs to the testator and is not subject to a veto power of the courts").

233. *In re Estate of Anderson*, 671 P.2d at 168–69.

234. *Id.* (emphasis added) (quoting 47 Am. Jur. 2d *Judgments* § 1080, et seq).

235. *See supra* note 192 and accompanying text for a discussion of the language of Prior Article 5 of UPC.

236. *In re Estate of Anderson*, 671 P.2d at 169.

237. *Id.*

aside on the grounds of lack of capacity, fraud, undue influence, or coercion.<sup>238</sup> In the case, because the probate court had already determined that Grace satisfied the requirements for will making, her post-conservatorship will was valid despite the conservatorship orders.<sup>239</sup>

*b. The Revised UPC*

The UPC conservatorship provisions evolved through the years,<sup>240</sup> often changing to incorporate principles brought about by the conservatorship reform movement.<sup>241</sup> Some changes, however, evolved separate and apart from general developments in the reform movement. For example, the language from the Prior UPC denying the conservatorship court the power to make a will is not a part of the Revised UPC.<sup>242</sup> Instead, in a remarkable departure from the history of wills law<sup>243</sup> and borrowing from modern statutory developments in California and South Dakota,<sup>244</sup> the Revised UPC explicitly gives the court the power to approve a will proposed by the conservator for the conservatee.<sup>245</sup>

Under the statute, before approving a conservator's plan to make, amend, or revoke the protected person's will, the court "shall consider primarily the decision that the [conservatee] would have made, to the extent that the decision can be ascertained."<sup>246</sup> Although substituted judgment is the primary gauge by which the court

238. *Id.*

239. *Id.* Specifically, the trial court found that she was "competent" when she executed the will and was not unduly influenced at that time. *Id.* The state supreme court noted that those two concerns were the only ones implicated in the case.

240. See UNIF. PROBATE CODE Rev. Art. V Prefatory Note (amended 2010), 8(III) U.L.A. 17–20 (2013) (discussing significant developments in 1980s and early 1990s that led to 1997 revision of guardianship and conservatorship statutes).

241. See *id.* (noting that Revised Article V emphasizes limited guardianship and limited conservatorship concepts throughout).

242. Compare UNIF. PROBATE CODE § 5-407 (Prior Art. V), 8(III) U.L.A. 208–09 (2013) (withholding from the court the power to make a will for the conservatee in statute entitled "Permissible Court Orders"), with UNIF. PROBATE CODE § 5-411 (Rev. Art. V), 8(III) U.L.A. 97–98 (permitting court to authorize conservator to make will for conservatee).

243. See, e.g., RESTATEMENT (THIRD) OF PROPERTY: WILLS & DONATIVE TRANSFERS § 8.1 cmt. k (2003) (noting that "[c]ourts have doubted that they have the power to authorize the conservator or guardian to make, amend, or revoke a will for the protected person unless a statute expressly authorizes that power" and that "[s]uch a power is now expressly authorized in § 5-411"). Comment k also notes that the original UPC "expressly precluded the court from authorizing the execution of a will by the conservator for a protected person." *Id.* See also Andrea B. Carroll, *Reviving Proxy Marriage*, 76 BROOK. L. REV. 455, 481 (2011) (noting that it was historically "impossible to create a valid will by proxy" citing Roman law "back to the sixth century" and stating that while "[a]gency theory was well recognized in both early Roman and English law[,] it simply was not applied in the wills context") (footnote omitted).

244. See UNIF. PROBATE CODE § 5-411 cmt. (Rev. Art. V) 8(III) U.L.A. 98 (noting that will provision is taken from California and South Dakota statutes); see also CAL. PROB. CODE § 2580(b)(13) (West 2014) (permitting conservator to file petition for court approval to make a will for conservatee); CAL. PROB. CODE § 6100.5(c) (West 2014) (recognizing judicial authority to authorize conservator to make will for conservatee); CAL. PROB. CODE § 6110(c) (West 2014) (noting that conservator can execute valid will for conservatee if conservator has court approval); S.D. CODIFIED LAWS § 29A-5-420(8) (2004) (permitting conservator to make will for conservatee if so authorized by court).

245. UNIF. PROBATE CODE § 5-411(a)(7), (b) (Rev. Art. V), 8(III) U.L.A. 97–98 (2013).

246. *Id.* § 5-411(c). Since a person whose assets receive protection under the UPC is not necessarily

should evaluate the conservator's proposal,<sup>247</sup> the statute contains other considerations for the court.<sup>248</sup>

In most states now recognizing it, the proxy will-making power appears to be used sparingly.<sup>249</sup> Although the Revised UPC, like its predecessor, provides that the appointment of a conservator is not a determination of incapacity,<sup>250</sup> one might assume that courts and conservators will most often employ the proxy will-making power when the conservatee appears to lack testamentary capacity. The statute, however, does not limit application to that scenario,<sup>251</sup> and the Revised UPC does not require the conservatee to undergo a mental assessment before the conservator presents the petition to make the proxy will.<sup>252</sup> Thus, the court can apparently approve of the proxy will even when the conservatee clearly possesses testamentary capacity.<sup>253</sup> In essence, in this setting the conservator may be doing what the conservatee could do for herself. As such, the conservator may be acting not only as her conservator, but also as an implied agent whose proposed plan the conservatee explicitly ratifies.<sup>254</sup>

The provisions of the Revised UPC increase the likelihood that a conservatee will die with an up-to-date will that reflects her wishes and serves her best interest.<sup>255</sup> Consistent with that goal, the statute contains no indication that a conservatorship court may issue an order depriving the conservatee of will-making ability.<sup>256</sup>

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placed under a conservatorship, the UPC uses the term "protected person" throughout Part 4 of Article V. The author has substituted the term "conservatee" in most of the text of this Article.

247. *See id.* (noting court's duty to consider "primarily" the decision the conservatee would have made).

248. *See id.* § 5-411(e)(1)–(7) (listing factors such as person's life expectancy, existing estate plan, eligibility for governmental assistance, financial needs, and previous pattern of giving).

249. California appears to have the most opinions in the realm of proxy will-making by conservator. *See, e.g.,* *Murphy v. Murphy*, 78 Cal. Rptr. 3d 784, 794–96 (Ct. App. 2008) (discussing conservator petition and substituted judgment order authorizing conservator to execute pour-over will). A number of the California opinions are not officially published, although they are available online.

250. *Compare* UNIF. PROBATE CODE § 5-409(d) (Rev. Art. V), 8(III) U.L.A. 95 (2013) (stating that "[t]he appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person"), *with* UNIF. PROBATE CODE § 5-407(d) (Prior Art. V), 8(III) U.L.A. 208–10 (2013) (stating that "[a] determination that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person").

251. *See, e.g.,* *Murphy*, 78 Cal. Rptr. 3d at 795 (noting that conservator's petition for substituted judgment order to execute pour-over will for conservatee stated that conservatee had testamentary capacity and that petition request reflected conservatee's intent).

252. *See* UNIF. PROBATE CODE § 5-411 (Rev. Art. V), 8(III) U.L.A. 97–98 (2013) (containing no language requiring formal judicial assessment of conservatee's capabilities).

253. *See id.* (allowing the court to permit proxy wills without an assessment of the conservatee's mental health); *see also* *Murphy*, 78 Cal. Rptr. 3d at 795 (discussing substituted judgment order that was issued in response to conservator's petition to execute new will for conservatee on the grounds it comported with conservatee's intent, despite conservator's concession that conservatee possessed testamentary capacity).

254. *See id.*

255. *See* UNIF. PROBATE CODE § 5-411(a)(7), (b) (Rev. Art. V), 8(III) U.L.A. 97–98 (2013). By requiring that the court consider primarily the decision that the conservatee would have made, along with other factors that are ordinarily considered in estate planning, the statute seems consistent with modern principles of conservatorship reform even as it departs from the history of wills law. *See supra* note 243 and accompanying text for a discussion of the impermissibility of proxy will-making in wills law.

256. *Cf.* Michelle M. Sheidenberger, Comment, *Administration of Estates; Trusts and Wills*, 27 PAC. L.J. 364, 369 n.35 (1996) (observing that statute does not prevent conservatee herself from making a new will

## 2. Non-UPC State Provisions

### a. *Explicit Statutory Language*

In contrast to the UPC statutes previously discussed, statutes in some states explicitly deviate from the rule that a conservatorship proceeding itself has no effect on a conservatee's testamentary capacity.<sup>257</sup> In New Jersey<sup>258</sup> and Oklahoma,<sup>259</sup> for example, by statute the appointment of a conservator deprives the conservatee of unfettered will-making ability. These statutory restrictions apply to conservatees as a class, and thus are unlike judicial orders from other states that purport to be based on an assessment of the abilities of the individual conservatee.<sup>260</sup>

The New Jersey statute provides that a person's property shall pass through intestacy if he dies with only a will executed *after* commencement of the proceedings in which he was adjudicated incapacitated and *before* an adjudication returning him "to competency."<sup>261</sup> In the 1977 opinion *In re Estate of Bechtold*,<sup>262</sup> a conservatee executed his only will after being adjudicated a "mental incompetent."<sup>263</sup> Upon his death, his will beneficiary sought to probate the will and requested a hearing to prove his testamentary capacity.<sup>264</sup> The court concluded that the opportunity to prove the conservatee's testamentary capacity was foreclosed by the statute.<sup>265</sup> Because he had not been adjudicated competent before making his only will, he died intestate.<sup>266</sup>

The court summarily dismissed the will beneficiary's assertion that such a construction of the statute would violate the Equal Protection Clause of the

inconsistent with the one made by the conservator or from amending or revoking a will made by the conservator).

257. See *supra* note 12 and accompanying text for the general rule that has been described as practically universal and see *infra* notes 261–68 and accompanying text for a discussion of the deviation from the general rule.

258. See *infra* notes 261–68 and accompanying text for a discussion of the New Jersey statute and case law interpreting it.

259. See *infra* notes 269–75 and accompanying text for a discussion of the Oklahoma statute and case law interpreting it.

260. See *infra* Part III.D.2.b for a discussion of judicial orders that conclude that the particular conservatee before the court has no further will-making ability.

261. N.J. STAT. ANN. § 3B:12-27 (West 2014).

262. 376 A.2d 211 (N.J. Super. Ct. Ch. Div. 1977). The testator was a ward under New Jersey guardianship law. For the sake of consistency in the text, the author has referred to the testator as a conservatee. The statute at issue in *Bechtold* was the predecessor statute to the current statute, Title 3B, Chapter 12-27 of the New Jersey Statutes Annotated. The language of the two statutes is almost identical. See *In re Estate of Frisch*, 594 A.2d 1367, 1372 (N.J. Super. Ct. Law Div. 1991) (noting "almost identical language" of the two statutes).

263. *In re Estate of Bechtold*, 376 A.2d at 212.

264. *Id.* at 212–214. His sister was his guardian. *Id.* at 212.

265. *Id.* at 214.

266. *Id.* The ward argued that the adjudication of incompetency created only a rebuttable presumption of incapacity to execute a will, citing cases under a predecessor statute. *Id.* at 213. The court rejected this argument, stating that "it seems clear that the draftsmen [of the statute in question] were cognizant of the earlier cases." *Id.* at 214. The court further noted that with the statute the state legislature "established a cut-off point after which any litigation as to a deceased incompetent's testamentary capacity is barred." *Id.* But see *infra* note 278 for potential doubt raised by another New Jersey court whether the *Bechtold* interpretation of the statute is correct.

Constitution.<sup>267</sup> The court stated that the legislature establishes statutory requirements for admissibility of a will and had “exercised its prerogative to bar litigation of issues which are difficult, if not impossible, to prove.”<sup>268</sup>

An Oklahoma statute provides that “when any person subject to a guardianship or conservatorship shall dispose of such estate by will, such will must be subscribed and acknowledged *in the presence of a judge* of the district court.”<sup>269</sup>

In the 1987 opinion *In re Estate of Lahr*,<sup>270</sup> a conservatee executed a codicil to her pre-conservatorship will without appearing before a judge as contemplated in the statute.<sup>271</sup> Upon the conservatee’s death, the trial court refused to probate the codicil in light of the conservatee’s failure to comply with the statute.<sup>272</sup> On appeal, proponents of the codicil argued that the statute violated state equal protection principles, since it treats conservatees differently from others who wish to make a will.<sup>273</sup> The Supreme Court of Oklahoma upheld the statute,<sup>274</sup> finding that the classification bears a rational relationship to the legitimate state purpose of protecting vulnerable conservatees from “the pressures and influences of others.”<sup>275</sup>

Since the time of the New Jersey and Oklahoma opinions discussed above, increasing numbers of individuals have developed advance plans to avoid conservatorship should they become unable to manage their assets in the future. Notably, such individuals have executed trust agreements and the even more popular and less costly durable power of attorney.<sup>276</sup> Although these individuals may lack precisely the same management skills as conservatees, under New Jersey and Oklahoma statutes, only conservatees have statutory restrictions placed on their will-making ability.<sup>277</sup> Thus, one might question whether today state courts would so easily dispense with an equal protection challenge.<sup>278</sup>

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267. *In re Estate of Bechtold*, 376 A.2d at 214.

268. *Id.*

269. OKLA. STAT. ANN. tit. 84, § 41(B) (West 2014) (emphasis added). Most conservatorship statutes that permit a conservator to make, amend, or revoke a will for conservatee are not cross-referenced in the state will execution statutes. See Ralph C. Brashier, *The Ghostwritten Will*, 93 B.U. L. REV. 1803, 1828 nn.160–61 (2013) (noting that UPC drafters decided against amending will execution statutes when they developed conservatorship provision allowing conservator to execute will for conservatee; suggesting that better approach would be to amend will execution statute to ensure that lawyers are aware of this new development). In contrast, the Oklahoma statute is found in the will execution provisions of the state code. See tit. 84, § 41 (providing for “Persons who may make a will -- Persons subject to guardianship or conservatorship” among will execution statutes).

270. *Urban v. Urban (In re Estate of Lahr)*, 744 P.2d 1267 (Okla. 1987).

271. *In re Estate of Lahr*, 744 P.2d at 1268.

272. *Id.*

273. *Id.* at 1268–69.

274. *Id.* at 1270.

275. *Id.* at 1269.

276. See *supra* notes 36–39 and accompanying text for a discussion of the use of durable powers of attorney and trusts as a hedge against conservatorship.

277. See *supra* notes 261–75 and accompanying text for a discussion of the requirements in New Jersey and Oklahoma for will execution by conservatee.

278. Although *Bechtold* appears to be the only reported opinion directly interpreting the New Jersey statute when a conservatee executes a will without having obtained a judicial determination of “competency,” another case casts at least some doubt on *Bechtold*’s literal application of the statute. In *In re Estate of Frisch*, the court declared the conservatee to be competent. 594 A.2d 1367, 1372 (N.J. Super. Law Div. 1991). The

These statutes appear to exist in blithe ignorance of, or blatant opposition to, the modern conservatorship principles mandating that the state impose upon conservatees the least restrictive alternative<sup>279</sup> and maximize autonomy consistent with ability.<sup>280</sup> Moreover, any requirement that the conservatee appear again before the judge before executing a new will seems to assume that such appearance will be quickly and readily available.<sup>281</sup> In fact, as discerning courts in other jurisdictions have noted, the individuals who have the strongest interest in preventing the conservatee from making the will may be the very individuals upon whom the conservatee would have to rely for obtaining an appearance.<sup>282</sup> Often this group of individuals will include the conservator. These individuals have every incentive to delay scheduling such an appearance, to ignore the conservatee's requests altogether, and to allow the conservatee to execute her will without obtaining such approval or an adjudication of competency, secure in the knowledge that without the judicial approval or competency decree the will is necessarily invalid.<sup>283</sup>

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court noted, despite the *Bechtold* holding, that the test for mental competency to manage one's affairs is "somewhat more demanding" than that for testamentary capacity. *Id.* The court also noted that the author of a state bar journal article predating *Bechtold* had concluded that the New Jersey statute only creates a rebuttable presumption of testamentary incapacity. *Id.* at 1373. The court ultimately concluded that it did not have to concern itself with the question of testamentary capacity under the statute, since it had determined that the individual in question was now "competent." *Id.*

279. Despite the probate statute discussed in the text, the Oklahoma guardianship and conservatorship statutes themselves use progressive language and principles. *See, e.g.*, OKLA. STAT. ANN. tit. 30, § 1-111(13) (West 2014) (defining "[l]east restrictive dispositional alternative" as "the form of assistance that least interferes with the legal ability of an incapacitated or partially incapacitated person to act in his own behalf"). Rather incongruous with the probate statute is section 1-111(22), which defines a "[p]artially incapacitated person." That subsection further provides as follows:

A finding that an individual is a partially incapacitated person shall not constitute a finding of legal incompetence. A partially incapacitated person shall be legally competent in all areas other than the area or areas specified by the court in its dispositional or subsequent orders. Such person shall retain all legal rights and abilities other than those expressly limited or curtailed in said orders.

OKLA. STAT. ANN. tit. 30, § 1-111(22) (West 2014).

280. *See supra* Part II.A for a discussion of modern principles of conservatorship law following reform movement.

281. *See supra* notes 261–75 and accompanying text for a discussion of judicial orders requiring the conservatee to appear before the court before executing a new will. Wills executed shortly before the testator's death, while he is confined in his last illness to a hospital room or his home, are common and important. As a practical matter, the New Jersey and Oklahoma statutes make such wills unavailable to conservatees.

282. Almost two hundred years ago the Massachusetts Supreme Judicial Court expressed this concern. In *Stone v. Damon*, the contestants argued that an adjudicated "lunatic" under guardianship could not execute a will until the decree was reversed. 12 Mass. (3 Tyng) 488, 488–89 (1815). The court disagreed, stating as follows:

If a lunatic should be restored to his reason, and become perfectly capable of devising his estate, it would be a cruel and unnecessary addition to his misfortune, to deprive him of that right, and to set aside his will, because he happened to die before he could apply to the probate court for a reversal of the decree; or because those who might be interested in avoiding his will should, by appealing, or other means of delay, prevent the reversal of the decree before his death.

*Id.* at 489 (emphasis added).

283. One should note that, in an unreported opinion, a Connecticut court refused to apply the New Jersey statute. *Oehler v. Olson*, No. CV030083327, 2005 WL 758038, at \*3 (Conn. Super. Ct. Feb. 28, 2005). The court had to determine whether to apply the New Jersey statute when a woman who had been adjudicated "incompetent" in New Jersey died in Connecticut with a will she executed there without having obtained an

*b. Ambiguous Statutory Language*

Appellate courts in non-UPC states whose statutes do not explicitly address a conservatee's will-making ability have also examined the conservatee's power to execute a will.<sup>284</sup> In essence, one of two questions has arisen in these states.<sup>285</sup> The first question is whether the statutory language itself implicitly indicates that the conservatee is without will-making power once a conservator is appointed.<sup>286</sup> The second question is whether the statutory language implicitly permits a judge to specify in the order that the conservatee is without will-making power once a conservator is appointed.<sup>287</sup> The first question was the subject of appellate court exploration in Florida and Alabama. More recently, the second question was at issue before appellate courts in Missouri and Tennessee.

In the Alabama and Florida cases, the state statutory language was identical. It provided that “the [conservatee] shall be wholly incapable of making any contract or gift whatever, or *any instrument in writing*, of legal force and effect, except after leave of court is granted . . . .”<sup>288</sup> The courts construed that language in completely different ways.

In *Skelton v. Davis*,<sup>289</sup> an opinion from 1961, a Florida testatrix named her children as beneficiaries of her will.<sup>290</sup> After the execution of that will, two of the testatrix's daughters filed a successful petition to have a conservator appointed for her.<sup>291</sup> After “prayerful deliberation,” the testatrix disinherited the two petitioners but

adjudication of “competency” from a New Jersey court. *Id.* at \*1. The court ultimately concluded that Connecticut probate law should apply. *Id.* at \*5. Among the factors the court considered in determining the applicable substantive law, the court noted that Connecticut had significant interest in applying its own laws regarding testamentary capacity. *Id.* at \*3. The court also stated that Connecticut's “strong public policy” to permit a person under a conservatorship to execute a will

reflects a considered view that the autonomy and decision-making of an incapacitated person, even one who requires a conservator, with respect to the disposition of her estate should not be subject to any per se rule and should be adjudicated on a case-by-case basis. Application of [New Jersey's statute] would undermine, not further, Connecticut's public policy.

*Id.*

284. In some cases, the language is clear. *See, e.g., Jenckes v. Court of Probate*, 2 R.I. 255, 256–57 (1852) (concluding that statutory language making invalid ward's “contracts, bargains and conveyances” did not apply to ward's devises; thus, ward could execute valid will).

285. *See infra* notes 288–317 and accompanying text for a discussion of cases deciding whether a state statute implicitly deprives a conservatee of will-making ability and cases deciding whether a judge may deny a conservatee of will-making ability.

286. *See infra* notes 288–318 and accompanying text for a discussion of cases from Florida and Alabama.

287. *See infra* notes 319–38 and accompanying text for a discussion of cases from Missouri and Tennessee.

288. *See Barnes v. Willis*, 497 So. 2d 90, 92 (Ala. 1986) (providing statutory language, but apparently with a typographical error: the phrase “of gift” should be “or gift” (quoting ALA. CODE § 26-7A-7 (1975)); *Skelton v. Davis*, 133 So. 2d 432, 435 (Fla. Dist. Ct. App. 1961) (providing statutory language (quoting FLA. STAT. ANN. § 747.11 (West 2014))). The statute then existing in both states spoke in terms of wards, curators, and curatorships. To create less confusion for the reader, the text substitutes the modern terms conservatee, conservators, and conservatorships.

289. 133 So. 2d 432 at 434.

290. *Skelton*, 133 So. 2d at 434.

291. *Id.* at 433.

included her other living children in her new will.<sup>292</sup> When their mother died, the petitioners contended that the statutory language quoted in the preceding paragraph made their mother's later will invalid, since she had not complied with the statute and obtained court permission to execute the will.<sup>293</sup>

The district court of appeals began its analysis by noting both the "highly valuable"<sup>294</sup> right of devising property and the policy of upholding wills "wherever possible."<sup>295</sup> It stated that "wholly and unreasonable and ill founded prejudice against a child . . . is not of itself a ground for invalidating a testator's will."<sup>296</sup> Most importantly, the court emphasized that testamentary capacity is *judged solely at the time of will execution*, a principle so "irrefragable" that "no authority need be cited."<sup>297</sup>

The court also observed that the statutory language in question contained no reference to Florida's will execution statute,<sup>298</sup> which required only that a testator be eighteen years old and of sound mind.<sup>299</sup> Moreover, the court noted that the test for appointment of a conservator differs from the test to determine whether one has a "sound mind" for will execution,<sup>300</sup> pointing out that the threshold for establishing that a testator has a sound mind for will execution purposes is quite low.<sup>301</sup> In fact, even a "lunatic" may draft a valid will.<sup>302</sup>

The court stated that the primary role of a conservator is to preserve and dispose of the conservatee's property during the conservatee's life,<sup>303</sup> whereas the primary role of will statutes is to preserve and dispose of the testator's property after death.<sup>304</sup> To rule that the conservatorship statute trumped the will execution statute would be to substantially alter the "sound mind" requirement of the latter statute without express legislative direction to do so, and the court was unwilling to infer that the legislature intended such a substantial alteration to the well-established particularities of the sound mind requirement.<sup>305</sup> Thus, the court concluded that the conservatorship statute stating that the ward may not execute an "instrument in writing" did not prevent the ward from executing the will in question.<sup>306</sup>

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292. *Id.* at 434.

293. *Id.*

294. *Id.* at 435.

295. *Id.*

296. *Id.* (noting also that "people may hate their relatives for bad reasons without being deprived of testamentary power").

297. *Id.* (emphasis added).

298. *Id.* at 436.

299. *Id.* at 435.

300. *Id.* at 437.

301. *Id.* at 435 (describing requirements for "sound mind"). See also *supra* notes 51–54 and accompanying text for a discussion of the general requirements for testamentary capacity.

302. *Skelton*, 133 So. 2d at 436.

303. *Id.* at 437.

304. *Id.*

305. *Id.* at 436–37 ("To hold otherwise, would result in the application of loose judicial construction by means of implication which both the language of the statute and the reason for its enactment do not call for.").

306. *Id.* at 437. Earlier in the opinion, the court cited cases from California, Oklahoma, Rhode Island, and Virginia in which courts had interpreted similar conservatorship or guardianship statutes in a way that would not interfere with the probate test for "sound mind." *Id.* at 436. *Cf. In re Hoffman's Estate*, 58 A. 665, 665–67 (Pa. 1904) (interpreting statute providing that after conservatorship decree "said person shall be wholly

In *Barnes v. Willis*,<sup>307</sup> a 1986 opinion, the Supreme Court of Alabama interpreted identical statutory language and concluded that such language does apply to a person under a conservatorship.<sup>308</sup> In the case, the testator's pre-conservatorship will left most of his estate to his heirs.<sup>309</sup> Following the imposition of the conservatorship, he executed a will leaving most of his estate to his sister, who had also recently been appointed as replacement conservator.<sup>310</sup> When both wills were presented to probate upon the testator's death, the lower court ruled in favor of the pre-conservatorship will because the subsequent will was executed without first obtaining the necessary permission of the court.<sup>311</sup>

In a terse analysis, the court observed that a will is clearly included in the phrase "any instrument in writing."<sup>312</sup> The court opined that will making by an incapacitated person "presents a ripe opportunity for 'designing persons' to take advantage" of that person<sup>313</sup> and that the legislature has the authority to determine when will making requires court protection.<sup>314</sup> The court rejected the *Skelton* analysis,<sup>315</sup> concluding that such statutory limitation in a conservatorship statute does not fundamentally modify the "sound mind" test for testamentary capacity, but rather only changes the timing at which the test is applied.<sup>316</sup> For an incapacitated person, such a statutory restriction means that testamentary capacity must be determined in a conservatorship hearing, rather than in a will contest.<sup>317</sup>

Subsequent to these decisions, Alabama and Florida modernized their statutes, eliminating the language at issue in the preceding cases.<sup>318</sup> No reported opinions have

incapable of making any contract or gift whatever or any instrument in writing"; concluding that a will is an instrument in writing, but that statute only creates a rebuttable presumption against testamentary capacity) (internal quotation marks omitted).

In *Allen v. Worrall* (*In re Worrall's Estate*), the court construed a statute that originally stated as follows:

After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. *But if actually restored to capacity, he may make a will, though his restoration is not thus determined.*

127 P.2d 593, 594 (Cal. Dist. Ct. App. 1942) (quoting Cal. Civ. Code § 40 (1872)) (emphasis omitted) (internal quotation marks omitted). In 1878, however, the italicized language was removed by amendment. The court rejected the argument that in removing the italicized language, the legislature intended to make adjudicated incapacitated person unable to execute wills. *Id.* The court noted the probate code requirements for will execution and pointed out that even an insane person may make a valid will during a lucid interval. *Id.*

307. 497 So. 2d 90 (Ala. 1986).

308. *Barnes*, 497 So. 2d at 92–93.

309. *Id.* at 91.

310. *Id.*

311. *Id.* at 92–93.

312. *Id.* at 92 (emphasis added) (quoting ALA. CODE § 26-7A-7 (1975)).

313. *Id.* (quoting ALA. CODE § 26-7A-1 (1975)).

314. *Id.*

315. *Id.* See *supra* notes 289–306 and accompanying text for a discussion of the *Skelton* holding and rationale.

316. *Barnes*, 497 So. 2d at 92.

317. *Id.*

318. Interestingly, Alabama statutory law is now similar to that of the 1969 UPC, giving the conservatorship court "all the powers over the estate and business affairs which the person could exercise if present and not under disability, *except the power to make a will.*" ALA. CODE § 26-2A-136(b)(3) (2014)

addressed the question of statutory or judicial restrictions on post-conservatorship wills in either state under their current statutes.

In 1995, in *In re Nelson*,<sup>319</sup> an order from a Missouri conservatorship court provided that the octogenarian conservatee no longer had the right to make testamentary transfers.<sup>320</sup> The Missouri Court of Appeals, however, ruled that the lower court had engaged in “an erroneous application of the law” in attempting to remove the conservatee’s will-making power.<sup>321</sup> Noting only that a conservatee may still possess testamentary capacity, the appellate court reversed the restriction of the lower court.<sup>322</sup>

In 2011, proponents of a conservatee’s will asked a Tennessee appellate court to conclude that the conservatorship judge acted without authority in entering an explicit ruling that purported to deprive the conservatee of will-making ability.<sup>323</sup> The Tennessee conservatorship statute provides that “[t]he rights the court may remove may include . . . the right to . . . execute instruments.”<sup>324</sup> In *In re Estate of Rinehart*, the octogenarian conservatee had executed a will prior to the imposition of the conservatorship.<sup>325</sup> The 2006 court order imposing the conservatorship stated that among the rights transferred from the conservatee to the conservator were “the right to execute instruments, deeds, notes, powers of attorney, wills, proxies, or any other legal documents.”<sup>326</sup> Nevertheless, the conservatee subsequently executed a holographic will.<sup>327</sup>

When the conservatee died three years later, both wills were submitted for probate.<sup>328</sup> Because of the conservatorship order that had removed the conservatee’s right to make a will, the probate court granted a motion to dismiss the holographic will.<sup>329</sup>

On appeal, the proponent of the holographic will argued, in essence, that the conservatorship order removing the conservatee’s right to make a will was void because it exceeded the judge’s authority.<sup>330</sup> The appellate court, however, analyzed

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(emphasis added). For a discussion of judicial interpretation of this statute, see *supra* Part III.D.1.a.

319. *Nelson v. Nelson (In re Nelson)*, 891 S.W.2d 181 (Mo. Ct. App. 1995).

320. *In re Nelson*, 891 S.W.2d at 187.

321. *Id.* at 188.

322. *Id.*

323. *In re Estate of Rinehart*, 363 S.W.3d 186, 187–88 (Tenn. Ct. App. 2011).

324. *Id.* at 188 n.3 (excerpting TENN. CODE ANN. § 34-3-104(8)) (West 2013).

325. *Id.* at 187.

326. *Id.* (emphasis added). It is clear that the judge intended to deprive the conservatee of will-making authority. The issue on appeal concerned the validity of this deprivation. Assuming the judge had the power to constrain will-making by the conservatee, however, it is extremely doubtful that Tennessee law would permit a court to order a blanket transfer of the will-making power from the conservatee to the conservator, exercisable whenever the conservator deems proper. Even under the most modern conservatorship statutes, a conservator who wishes to execute a will on behalf of the conservatee must obtain explicit court approval, and the court must take into account specific factors before issuing an order. See *supra* Part III.D.1.b for a discussion of the modern UPC statute that permits conservator to make, amend, or revoke will of conservatee if conservator first obtains judicial approval.

327. *In re Estate of Rinehart*, 363 S.W.3d at 187.

328. *Id.*

329. *Id.* at 187–88.

330. *Id.* at 188.

the case only on procedural grounds.<sup>331</sup> It stated that because the conservatorship order itself was entered more than thirty days before the appeal was filed, the order was final; thus, because the proponent did not file the appeal in a timely manner, the appellate court had no jurisdiction to review it.<sup>332</sup>

The court further observed that the conservatorship court had subject matter jurisdiction over the conservatorship proceeding and had authority to issue the order granting the conservatorship.<sup>333</sup> Concerning the will proponent's allegation that the *particular part* of the order removing the conservatee's will-making power exceeded the conservatorship court's statutory authority, the appellate court concluded that the allegation "simply does not rise to the level of error required to be successful on collateral attack."<sup>334</sup> The court concluded that it was precluded from ruling on the substantive issue.<sup>335</sup>

Whether a conservatorship court has the authority to remove a conservatee's will-making power thus remains a question unanswered by the appellate courts of Tennessee.<sup>336</sup> Nevertheless, a leading legal encyclopedia<sup>337</sup> now makes a blanket pronouncement that judges may issue conservatorship orders restricting the conservatee's power to make a will, citing only *In re Estate of Rinehart* in support of the proposition.<sup>338</sup>

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331. *Id.* at 188–91.

332. *Id.* at 190.

333. *Id.*

334. *Id.* at 190–91. The facts of a somewhat analogous case led a Maryland appellate court to a different conclusion. In *Ritter v. Ritter*, a lower court was faced with two children bickering over conflicting powers of attorney executed by their father, Eugene. 689 A.2d 101, 101–03 (Md. Ct. Spec. App. 1997). In a September 1993 hearing, the lower court found that Eugene was mentally incompetent as of December 1992 and that any "instrument entered into thereafter" was of no legal effect. *Id.* at 103. Following Eugene's death in November 1993, Eugene's son came forward to probate Eugene's will of September 1992; Eugene's daughter came forward with a will he executed in July 1993. *Id.* At a hearing concerning the wills, the judge by oral ruling granted summary judgment for the son on the ground of estoppel by judgment in light of the 1992 finding of fact. *Id.* In 1997, the Special Court of Appeals reversed, noting that the 1993 ruling involved no testimony concerning Eugene's capacity at the date of the July 1993 will; instead, the testimony concerned Eugene's capacity to execute a power of attorney. *Id.* at 106. *See also id.* at 104 (quoting the actual order from the 1993 hearing stating that "no other [p]owers of [a]ttorney, revocations, or ancillary documents are valid or effective"). The court observed that a finding of incompetency is not equivalent to a finding of lack of testamentary capacity. *Id.* at 104.

335. *In re Estate of Rinehart*, 363 S.W.3d at 191.

336. Ironically, the appellate decision in *Rinehart* means that the conservatee or those representing her interests must appeal the conservatorship order denying her will-making power within thirty days. If she must return to court to fight the order, it may be simpler just to appear before the conservatorship court again and seek permission when she wishes to execute a new will. In either event, as a practical matter the possibility of returning to court in any fashion may depend upon whether the conservator is willing to allow the conservatee to return to court, particularly if the conservator is the only person closely involved in the conservatee's day-to-day life. *See supra* note 64 and accompanying text which note that almost two hundred years ago, the Massachusetts Supreme Judicial Court observed the "cruel and unnecessary . . . misfortune" that might result if those interested in preventing the ward from executing a new will could do so simply by delaying his appearance before the court.

337. 79 AM. JUR. 2D *Wills* § 56 (2d ed. updated 2014)

338. *See id.* (stating that "[a]n order entered in conservatorship, however, may expressly remove an individual's right to make a will"). The discussion does not mention cases that hold that a conservatorship court has no veto power over the will-making ability of a conservatee. *See supra* notes 207–234 and

### 3. Presumptions and Inferences

The preceding discussion examined statutory and judicial hurdles that some states place before a conservatee who wants to make a will.<sup>339</sup> Before leaving this discussion of state approaches, one should note that a number of states place a different and far less onerous restriction on the probate of a will executed by a conservatee.<sup>340</sup>

When a will submitted for probate is shown to be duly executed, courts today typically begin with a presumption that the testator had capacity at the time of execution.<sup>341</sup> This is true in many states even when the testator was under a conservatorship at the time of will execution.<sup>342</sup> In a number of states, however, courts reverse the presumption and instead begin with a presumption of testamentary incapacity if the testator executed the will while under a conservatorship.<sup>343</sup> A few

accompanying text for a discussion of the Utah case.

339. See *supra* Part III.D for a review of statutes and judicial orders concerning a conservatee's will-making power.

340. See *infra* notes 343–48 and accompanying text for a discussion of the presumption and inferences in will contests when a will was executed by a conservatee.

341. See, e.g., *Breeden v. Stone* (*In re Estate of Breeden*), 992 P.2d 1167, 1170 (Colo. 2000) (noting that proof of due execution imposes upon contestant the burden of demonstrating lack of capacity of the testator). Some courts retain this presumption even when the will in question was executed by a conservatee while under a conservatorship. See, e.g., *Silva v. Miramon* (*In re Estate of Silva*), 462 P.2d 792, 796 (Ariz. 1969) (observing that presumption of capacity exists even though decedent had “been adjudicated incompetent to handle his affairs”); *Miller v. Fischer* (*In re Estate of Oliver*), 934 P.2d 144, 148 (Kan. Ct. App. 1997) (presuming capacity of testator under conservatorship). Despite—or perhaps because of—Oklahoma's restrictive statute that requires conservatees to execute their wills before a judge, Oklahoma courts appear to presume such a will is valid. See, e.g., *Adams v. Idleman* (*In re Estate of Adams*), 101 P.3d 344, 346 (Okla. Civ. App. 2004) (noting Oklahoma's “long standing rule of law . . . ‘that a presumption of want of testamentary capacity does not arise from the fact that the maker of a will may have been under guardianship at the time of the making of the will’”) (quoting *In re Nitey's Estate*, 53 P.2d 215, 217 (Okla. 1935)).

342. See *supra* note 341 for (noting cases that maintain a presumption of capacity even when a testator is under conservatorship at the time of a will execution).

343. See, e.g., *Fowler v. Fowler*, 294 So. 2d 156, 158 (Ala. 1974) (citing *Houston v. Grigsby*, 116 So. 686, 688 (Ala. 1928)) (stating that the proponent had the burden of establishing testamentary capacity); *Boyd v. Cooper* (*In re Estate of Supplee*), 247 So. 2d 488, 490 (Fla. Dist. Ct. App. 1971) (“[A]n incompetency adjudication creates a presumption of lack of testamentary capacity as to any will thereafter executed during the continuance of such adjudication.”); *In re Am. Bd. of Comm'rs for Foreign Missions*, 66 A. 215, 226–27 (Me. 1906) (discussing presumption of testamentary incapacity); *Nelson v. Nelson* (*In re Nelson*), 891 S.W.2d 181, 188 (Mo. Ct. App. 1995) (noting statutory presumption of testamentary incapacity); *In re Will of Maynard*, 307 S.E.2d 416, 426–27 (N.C. Ct. App. 1983) (noting presumption of lack of testamentary capacity following imposition of guardianship); *Taylor v. Garinger*, 507 N.E.2d 406, 408 (Ohio Ct. App. 1986) (citing *Kennedy v. Walcutt*, 161 N.E. 336, 336–37 (Ohio 1928), *overruled by* *Krischbaum v. Dillon*, 567 N.E.2d 1291, 1297 & n.9 (Ohio 1991)) (discussing rebuttable presumption of testamentary incapacity); *In re Estate of Lanning*, 200 A.2d 392, 396 (Pa. 1964) (noting that burden of proving capacity shifts to proponent when testator had been adjudicated incompetent prior to will execution); *cf.* *Montes Family v. Carter* (*In re Estate of Loupe*), 878 P.2d 1168, 1172–73 (Utah Ct. App. 1994) (concluding that incompetency rating by Veterans Administration and resulting guardianship and conservatorships at least initially neutralized presumption of testamentary capacity; thus, proponent had burden to show by preponderance of the evidence that protected person had testamentary capacity). Some courts have noted that, at most, an inference of incapacity arises when the testator is under a conservatorship at the time he executes his will. *Van Gorp v. Smith* (*Estate of Mann*), 229 Cal. Rptr. 225, 230–31 (Ct. App. 1986) (discussing inference of testamentary incapacity).

The existence of a presumption may depend on the kind of conservatorship. See, e.g., *In re Estate of Springer*, 110 N.W.2d 380, 388 (Iowa 1961) (citing *Olsson v. Pierson*, 25 N.W.2d 357, 360 (Iowa 1946)) (finding no presumption of testamentary incapacity where the testatrix was under a voluntary guardianship);

courts have indicated that such a will begins with only an inference that the testator lacked testamentary capacity.<sup>344</sup>

A rebuttable presumption or inference of testamentary incapacity attached to the will executed by a conservatee places an initial burden on will proponents that they would not otherwise face in a probate proceeding.<sup>345</sup> Nevertheless, the proponents have the opportunity to present and prove that the will executed during the conservatorship reflects the wishes of a testator who met the requirements to execute a valid will.<sup>346</sup> In contrast, statutory restrictions and judicial orders concerning a conservatee's *will-making power* often result in an extremely high, often insurmountable bar to probate of a will executed during the conservatorship;<sup>347</sup> this is so even if, by all objective accounts, the conservatee undoubtedly possessed testamentary capacity when she executed that will.<sup>348</sup>

#### IV. CONCLUSION

Will making is an act of great importance to the individual and to society. The right to devise is not one that a state should whittle away from any citizen, even when—perhaps *especially* when—that citizen is old and infirm.<sup>349</sup> The elderly are particularly likely to value the right to devise their assets to benefit those individuals and things they hold most dear. Reported case law repeatedly demonstrates that even when elders require assistance in managing their assets and are placed under conservatorship, they often know precisely how they want those assets to pass at death and can execute perfectly valid wills. Yet statutes and judicial orders in some states now curtail the conservatee's will-making power. As the ranks of the elderly in conservatorship increase in the coming years, we can expect to see more conservatorship petitioners seek to prevent the conservatee from executing a will. This

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Whipple v. N. Wyo. Cmty. Coll. Found. of Sheridan (*In re Estate of Roosa*), 753 P.2d 1028, 1037 (Wyo. 1988) (concluding that guardianship created under the Uniform Veterans' Guardianship Act "does not result in any presumption of insanity or lack of testamentary capacity, a conclusion that is supported by authority elsewhere" (citing *Morse v. Caldwell*, 191 S.E. 479, 484 (Ga. Ct. App. 1937); M.L. Cross, Annotation, *Constitutionality, Construction, and Effect of the Uniform Veterans' Guardianship Act*, 173 A.L.R. 1061, 1077–78 (1948))).

Although most presumptions or inferences concerning the testamentary capacity of a conservatee are created by courts, occasionally a state statute may address the matter. *See, e.g.*, LA. CIV. CODE ANN. art. 1482(C) (2009) ("A limited interdict, with respect to property under the authority of the curator . . . is presumed to lack capacity to make or revoke a disposition *mortis causa*.").

344. *See, e.g.*, *Estate of Mann*, 229 Cal. Rptr. at 230–31 (discussing inference of testamentary incapacity).

345. *See, e.g.*, *In re Nelson*, 891 S.W.2d at 188 (Mo. Ct. App. 1995) (noting that because a conservatee is presumed to lack testamentary capacity, the proponent of a conservatee's will must show that conservatee possessed capacity when she executed the will).

346. *See supra* note 343 and accompanying text for cases that engage in rebuttable presumption of testamentary incapacity when testator is under conservatorship at the time he executes his will.

347. *See supra* notes 261–68 and accompanying text for a discussion of the New Jersey statute and judicial opinions interpreting statute.

348. *See supra* notes 261–83 and accompanying text for an interpretation of the New Jersey and Oklahoma statutes.

349. "The preservation of the privilege of making one's own will brings to the old and helpless a consideration which might not otherwise always be extended to them, and should not be whittled away." *Tabb v. Willis*, 156 S.E.556 565 (Va. 1931).

Article has shown that legislative and judicial restrictions on a conservatee's will-making power are unnecessary and improper.

Judicial orders removing a conservatee's will-making ability harken back to the bad old days of conservatorship law when judges sat like kings upon their thrones, removing the conservatee's rights as they deemed proper with little or no regard for the wishes of the conservatee, the enhancement of her autonomy, and the preservation of her sense of dignity and self-worth. As social policy, legislative and judicial restrictions that deny the conservatee's will-making ability violate a fundamental principle of conservatorship reform: state intervention should always take the least restrictive form necessary to promote the conservatee's best interest. Statutes and orders that prospectively deprive the conservatee of will-making ability also violate a fundamental principle of wills law: the proper time for gauging testamentary capacity and will validity is the time of will execution.

Perhaps equally disturbing, these crystal ball rulings and statutes apply only to conservatees and not to some people who are similarly situated or in a worse position. Principals of durable powers of attorney and beneficiaries of self-settled property-management trusts remain free to devise even when they are clearly incapable of managing their assets. More remarkably, conservatees may have their will-making rights impaired when state statutes and judicial opinions continue to recognize that the proverbial "lunatic" may execute a valid will in a lucid interval.

The real impetus behind restrictions on a conservatee's will-making ability is not legislative or judicial concern that the conservatee will fail to meet the requirements for executing a valid will, but rather concern that the conservatee will use his will-making power to execute an "unwise" will. But what is an unwise will? Most often, conservatorship petitioners will view as unwise any later will that reduces the benefits they expect to receive under the conservatee's existing estate plan. Yet even if the petitioners' concern is less self-interested, why should the conservatee be treated more harshly—and more condescendingly—than other testators (of greater or lesser testamentary capacity) who execute valid wills that some or perhaps all observers would consider unwise, unreasonable, or unfair? And why should expectant heirs or beneficiaries under a conservatee's pre-conservatorship will obtain a virtual lock on the distribution of the conservatee's probate estate while she is still living?

Instead of implicitly granting a guaranteed inheritance to a conservatee's heirs or will beneficiaries under a pre-conservatorship will, legislatures and judges should take a hands-off approach concerning the conservatee's prospective will-making ability. In any event, statutes and judicial orders removing the conservatee's will-making ability are unnecessary and improper because better, less-intrusive options exist. Chief among those options is the will contest, which has always been available to heirs and beneficiaries under a testator's earlier will who seek to declare the testator's later will invalid.

Throughout our lives, our capabilities and capacities change. Sometimes they change rapidly in old age, but even then they often exist along a wide-ranging spectrum. We may be unable to manage our assets and yet know how we want to devise them. Testamentary capacity may be ephemeral; all that the law requires, however, is that it exists when the testator signs the will. By recognizing this historical principle and applying it to conservatees just as to everyone else, states would

demonstrate respect not only for wills law, but also for the goal of modern conservatorship reform: to serve and respect the best interest of the individual.