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# Guardians:

## A Research Note

by LAWRENCE M. FRIEDMAN\*, JOANNA L. GROSSMAN\*\*  
AND CHRIS GUTHRIE\*\*\*

The legal system has its flamboyant side—its show trials and its headline cases. It also has its routine, workhorse side. Both aspects of the system are undoubtedly important to our society; the quiet daily grind, however, may be, in the long run, and in the aggregate, more significant.

Guardianship is among the least-noticed, least-discussed institutions of the working legal system. For the most part, guardianship is an arrangement that concerns minors who come into a bit of property, or (at times) a lot of it. Guardianship is also an arrangement for managing the affairs of those deemed insane or incompetent. In guardianship proceedings, courts (exercising the *parens patriae* power of the state) appoint “substitute parents”<sup>1</sup> for “wards” who are insane, incompetent, or simply too young, and who have no one to care for them or their property. Like conservators, trustees, executors, and administrators of estates, guardians are fiduciaries to their wards.

Guardianship goes back quite far in legal history; it has been a feature of American law since the colonial period.<sup>2</sup> Something like guardianship is a necessity in a system that recognizes private ownership of property, while dividing the world into those who are, and those who are not, *sui juris*—that is, fully capable of acting on their own. The boundaries between these two domains can be quite indistinct. Defining who is insane or incompetent can be especially problematic because these categories are socially and culturally variable.<sup>3</sup> Most people committed in 1900, for example, would hardly be considered insane today; they were simply misfits or deviants.<sup>4</sup> “Incompetents” were generally older people, beginning to slip, who were committed by their children.

By contrast, the necessity of guardianship for minors presents no

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1. HASSELTINE BYRD TAYLOR, *LAW OF GUARDIAN AND WARD* 3 (1935) (hereinafter cited as “TAYLOR”).

2. Statutory guardianships emerged in England in 1660, 12 Charles II, c. 24 (1660), though the institution itself is much older. The colony of Massachusetts had a guardianship law on its books as early as 1641. COLONIAL LAWS OF MASSACHUSETTS 1 (1672).

3. See, e.g., RICHARD W. FOX, *SO FAR DISORDERED IN MIND: INSANITY IN CALIFORNIA, 1870-1930* (1978) (hereinafter cited as “FOX”); THOMAS SCHEFF, *BEING MENTALLY ILL: A SOCIOLOGICAL THEORY* (1966).

4. *Id.*

tough question—a child either is or is not a minor. The statutes are quite clear-cut.<sup>5</sup> One can, of course, argue over the age at which a person is or ought to be considered responsible. Nonetheless, it is clear that if a newborn baby inherits a fortune outright, *something* has to be done about managing or taking care of the property. As a 19th-century treatise put it, young children do not “possess that quality of will power which constitutes the essential element of property,” and parents do not automatically possess the power to control their children’s property.<sup>6</sup> A need for guardianship can arise, then, even where wards have two living, healthy parents;<sup>7</sup> however, as we shall see, minor wards tended to be orphans or (more commonly) half-orphans.<sup>8</sup>

Since the system was introduced to American law in the 1600s, thousands and thousands of guardianships have been established, managed, and closed. It is disconcerting to find that almost nothing has been written about guardianship arrangements and how they worked in different periods; what little there is has been mainly doctrinal.<sup>9</sup> This research note flows out of a modest effort to document some basic facts about the guardianship system at work in one place and at one time (Alameda County, California, 1900).

*Alameda County.* The county in question, located on the east side of

5. The age of majority is now 18 for both males and females. See CAL. CIV. CODE §25 (Deering 1993) (“Minors are all persons under 18 years of age”). The statute of 1872 provided that men became adults at 21, women at 18, CAL. CIV. CODE §25; this was amended in 1971 to equalize the standard.

6. There is thus a “conclusive presumption of law” that they are “incompetent to manage their affairs;” and it is obvious . . . that the dispositive quality of mind lacking . . . must be supplied from without, to enable them in any wise to enjoy or be benefitted by that which belongs to them.” J.G. WOERNER, *A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP* 1-2 (1897) (hereinafter cited as “WOERNER”).

7. The guardians of such a child would, of course, be the parents themselves. Parents, unless unfit, were entitled to guardianship as against “strangers.” In many states, the father had preference over the mother. See TAYLOR, at 32 (“In thirty-nine states, laws had in 1930 been passed to the effect that the mother shall enjoy equal rights with the father in the guardianship of their children, during their joint lives. Some of these states, nevertheless, place greater limitations on her parental authority than on that of the father . . . in nine states the father is still the sole guardian unless declared incompetent by judicial action.”)

8. See text accompanying notes 44-45, *infra*. Sometimes guardianship was not a matter of money or property at all. Under Indiana law, for example, if a child had no parents and no one to care for the child, the local court could “commit such child to the care and custody of the guardians of the poor of the said county.” Burns Ind. Stats. 1908, ch. 3099, p. 1352.

9. See, e.g., Lawrence A. Frolick, *Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 600 (1981) (proposing the abolition of guardianships of the person and estate); Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEM. STUDY. 235 (1983) (describing the emergence of “judicial patriarchy” in domestic relations law in the nineteenth century). Winsor C. Schmidt, *Quantitative Information About the Quality of the Guardianship System: Toward the Next Generation of Guardianship Research*, 10 PROBATE L.J. 61 (1990) describes contemporary research into guardianships and conservatorships. We are unaware of any articles using historical records to illustrate how guardianship law worked in practice.

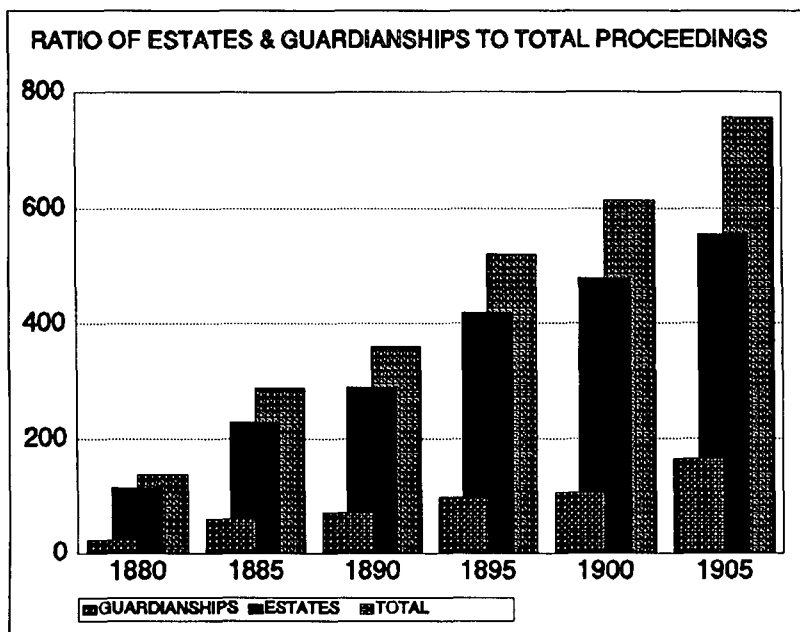


Figure 1

Source: Register of Actions

San Francisco Bay, is both urban and suburban. In 1900, the Bay Area was the hub of California's economy and its main population center; southern California, the modern giant, lay sleeping in its adobe backwaters. Alameda County (established in 1853) was, and is, a kind of stepchild;<sup>10</sup> the great city of northern California was San Francisco, clearly visible across the Bay. Alameda County, however, had its own mini-metropolis, Oakland, which was already a prominent port and railroad city when it became the county seat in 1873.<sup>11</sup> In 1900, it had a population of 66,960, comprising slightly more than half of the total population of the county, 130,197.<sup>12</sup>

The Superior Court, which sat in Oakland, was the basic trial court of the county; it had jurisdiction over civil, criminal, and probate actions. The probate docket consisted mostly of estates of the dead, but guardianships also figured prominently. Estate proceedings and guardianships

10. *Birth of Alameda County*, OAKLAND TRIBUNE, May 22, 1960, in Richard N. Schellens Collection, 1 Alameda County, pt. 1.

11. *Robust Infant*, OAKLAND TRIBUNE, May 22, 1960, in Richard N. Schellens Collection, 1 Alameda County, pt. 1 (by 1873, Alameda County had the largest population in California with the exception of the county of San Francisco.)

12. LAWRENCE M. FRIEDMAN & ROBERT M. PERCIVAL, *THE ROOTS OF JUSTICE* 21, table 2.1 (1981).

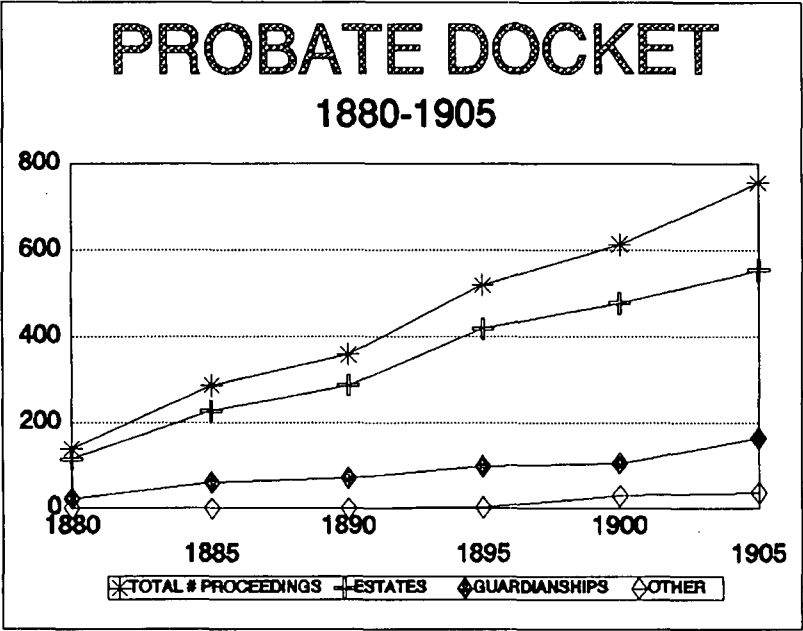


Figure 2

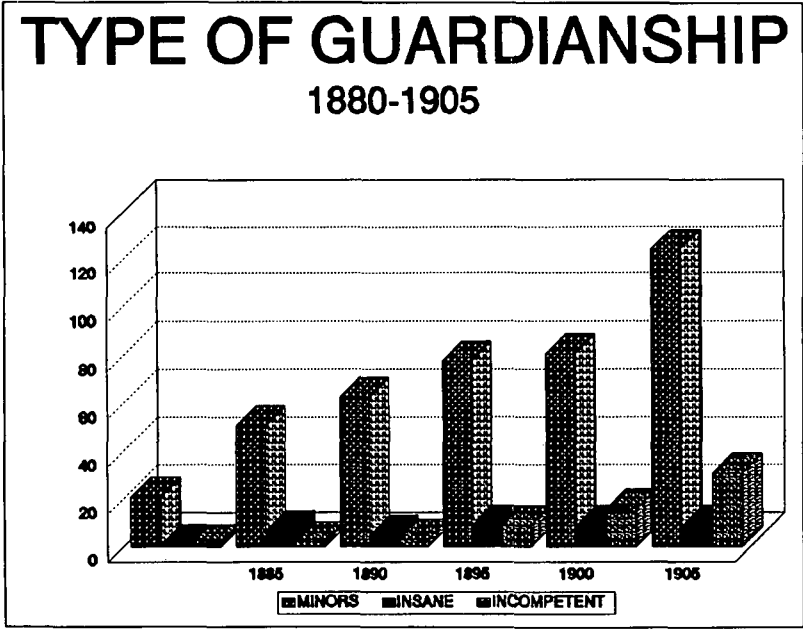


Figure 3

dominated the probate docket from 1800 and 1905, accounting for more than 95% of the probate actions heard by the court (see Figure 1).

During this period, the number of guardianships grew steadily, as did the number of estate proceedings (see Figure 2). Indeed, both outpaced population growth. Population grew from 62,976 to 130,197 between 1800 and 1900, an increase of 106 percent. But guardianships and estates increased 316 and 361 percent, respectively, during the same period. Throughout this period, the ratio of guardianships of minors to other types of guardianships remained fairly constant—a six-to-one ratio on average (see Figure 3). Moreover, the percentage of the docket comprised of guardianships also did not vary much. Thus, we selected 1900, a typical year, to examine more closely. In 1900, the court heard 614 probate actions. Of these, 478 were estate proceedings and 107 were guardianship proceedings. The remaining 30 were miscellaneous actions, including petitions to confirm title to real property, to restore an insane person to capacity, and to terminate life estates.

Ninety-seven of the 107 guardianship proceedings in 1900 were initial filings. Seven of these files were unusable, because the papers were missing or were perhaps never there. This left us with 90 relatively complete case files containing guardianship petitions filed in 1900. In the vast majority of these, the wards were minors.

### The Laws of Guardianship

In 1900, as now, California law authorized the probate court to appoint “guardians”<sup>13</sup> to manage the affairs of “wards.”<sup>14</sup> There were two kinds of guardianship: guardianship of the person—responsibility for the custody and care of the actual, physical human being—and guardianship of the estate—responsibility for managing the money and property of the ward.<sup>15</sup> Most of the time the two roles were joined; in Alameda County, nearly 80% of the petitioners asked to be appointed guardians both of the person and the estate.

Under California law, guardians were appointed for one of three types of wards: “minors” (incompetent because of their youth);<sup>16</sup> “insane” persons (incompetent because of an “unsound mind”);<sup>17</sup> and “mentally incompetent” persons (incompetent because of old age or disease).<sup>18</sup> Of

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13. “A guardian is a person appointed to take care of the person or property of another.” CAL. CIV. CODE, § 236 (Deering 1899).

14. “The person over whom or over whose property a guardian is appointed is called his ward.” CAL. CIV. CODE, § 237 (Deering 1899).

15. *Id.* at § 239.

16. CAL. CODE OF CIV. P., Chapter XIV, Art. I (Deering 1897).

17. *Id.* at Art. II, § 1763.

18. *Id.* at § 1767 (“any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived by or imposed upon by artful or designing persons.”).

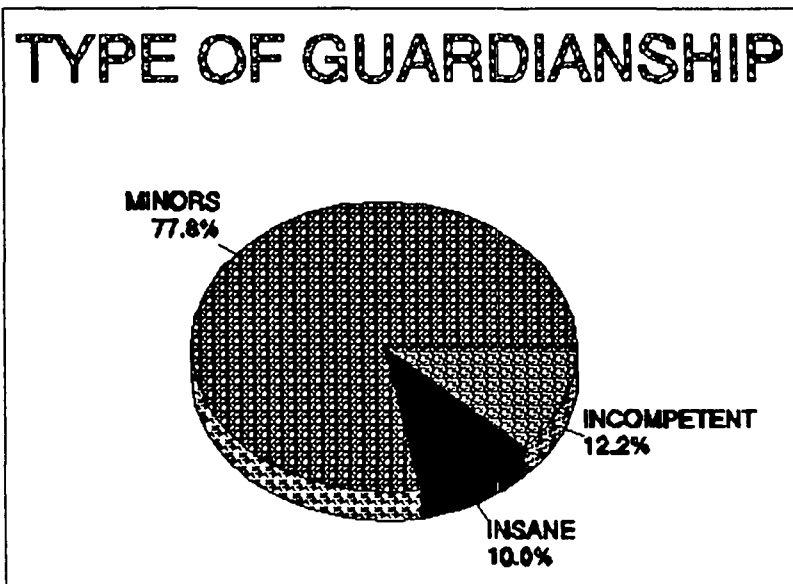


Figure 4

the 90 petitions during the year, 70 were for guardianships of minors (77.8%), nine for "insane" persons (10%); and 11 for incompetents (12.2%) (see Figure 4, above).

The legal road to guardianship was not a particularly rocky one, though the statute did require guardians to take a number of steps before they could secure letters of guardianship. First, a petition had to be filed;<sup>19</sup> notice was then given to the prospective caretakers as well as to any relatives living in the county.<sup>20</sup> If approved, an order of guardianship was then filed by the court, followed a few days later by letters of guardianship, which officially appointed the guardian. It was rare for anyone to contest a petition; this happened in only seven of the 90 cases (7.8%) These occasional protests were not usually successful; in 1900, the Superior Court denied only three petitions.

Once appointed by the court, the guardian had a fiduciary obligation toward the ward.<sup>21</sup> This phrase dragged with it a long train of legal consequences; in essence, the guardian had a duty to act *for* the ward, rather than for himself. The fiduciary was bound by a network for rules about financial accounting, investment restrictions, and the like. In theory, the guardian was at all times subject to supervision by the court, which would ensure that guardians (like other fiduciaries) lived up to their duties. The

19. CAL. CODE OF CIV. P., Ch. XIV, Art. I, § 1747 (Deering 1897).

20. *Id.*

21. CAL. CIV. CODE, § 246 (Deering 1899).

law required guardians to submit annual accountings and to document money coming in and going out.<sup>22</sup> The guardian had to get permission from the court before he could do anything drastic, such as selling the ward's property;<sup>23</sup> the law was particularly finicky about sales of real estate.<sup>24</sup> A guardian also needed the court's say-so before terminating the relationship with his or her ward.<sup>25</sup>

Notwithstanding the rigid statutory rules, the files suggest that supervision was actually quite loose and that guardianship proceedings were pretty much rubber-stamp affairs. On average, the process—from the filing to the order of guardianship—took about three weeks. Guardianships of minors took the least time to process, a little more than two and one-half weeks; for guardianship of incompetents, the process lasted about four weeks. Guardianship was a humdrum, low-visibility matter; if there were problems, the rather dry pages of the records failed to reveal them. Nevertheless, these records do contain valuable information on guardians, wards, and the property at stake. Collectively, these bits of information shed light on one way society provided care—or failed to provide care—for legal incompetents and their property at the turn of the century.<sup>26</sup>

### The Guardians

Guardianship was, as one might expect, a family affair. For minors, fifty-one of the 71 guardians (71.8%) and the most commonly appointed guardians, were the wards' own mothers.

A word is in order about the rights of mothers. The California law of 1850 made the father guardian of his children; the mother was entitled to act as a guardian only if the father was dead; and her entitlement, in the

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22. See, e.g., CAL. CODE OF CIV. P., Chapter XIV, Art. I, § 1754 (Deering 1897).

23. CAL. CODE OF CIV. P., Ch. XIV, Art. III, § 1770.

24. Under the original (English) rule, a guardian was not supposed to convert real estate into personalty. WOERNER, *op cit.*, ch 9, pp. 225ff. This rule was modified in the states by statute, although some statutes narrowed it more than others. In Indiana, the law was expressed in fairly broad terms: a Court could order sale when necessary "for the education, support, or payment of the just debt of any minor . . . or whenever the real estate of such minor is suffering unavoidable waste, or a better investment of the value thereof can be made." REV. STATS. IND. 1881, § 2528, p. 492. See *Nesbit v. Miller*, 125 Indiana 107 (1890). Kentucky, by contrast, gave guardians very little freedom in this area, never allowing them to sell the wards property, and only allowing property to be leased under a narrow band of circumstances. See KENT. REV. STAT. § 2030 (1899).

25. See, e.g., CAL. CIV. CODE, § 257 (Deering 1899). Most guardianships of minors came to an end fairly automatically—that is, the ward grew up and attained majority. See text accompanying notes 82-83. Under the statute, if a female ward married, the guardianship automatically terminated.

26. During this era, other means of providing care for minors included adoption, apprenticeship, foster care, and placement in orphanages. See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 156-58 (1994) (hereinafter cited as "MASON").



statute, was qualified by the phrase "while she remains unmarried."<sup>28</sup> Moreover, it was the father who had the right to appoint a guardian in his last will.<sup>29</sup> Women's rights advocates fought for women's equal guardianship rights<sup>30</sup> and, over the course of the nineteenth century, mothers gained relative to fathers in the custody and guardianship arena. By 1900, parents were equally entitled to custody.<sup>31</sup> In fact, "other things being equal, if the child be of tender years, it should be given to the mother."<sup>32</sup> The father's preference remained only if the child was of an "age to require education and preparation for labor or business."<sup>33</sup>

This change at least *appeared* to be a step toward equality between husbands and wives, a blow against "patriarchy."<sup>34</sup> In the late-nineteenth century, of course, married women's property acts were passed, removing some of the classic disabilities of married women.<sup>35</sup> The change in custody and guardianship law for minors seems of a piece with this develop-

27. In the seventy files in which the wards were minors, there were 71, rather than 70, petitioners; one couple petitioned jointly for guardianship.

28. STATUTES OF CALIFORNIA, Chapter 115, § 5 (January 8, 1850) ("The father of the minor, if living, and in case of his decease the mother while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the guardianship of the minor.").

29. STATUTES OF CALIFORNIA, Chapter 115, § 10 (January 8, 1850) ("The father of every legitimate child which is a minor, may, by his last will in writing, appoint a guardian or guardians for his minor children, whether born at the time of marking such will or afterwards, to continue during the minority of such child, or for any less time . . ."). If the father was dead, the mother could similarly "dispose" of custody by will. CALIFORNIA CIVIL CODE, § 246 (Deering 1899). cf. REV. STATS. ILL, 1891, ch 64, § 5, p. 767. Under this statute, the father may by will "dispose of the custody and tuition" of a minor child; but "no such will shall take effect to deprive the mother, during her life, of custody and tuition of the child, without her consent, if she be a fit and competent person."

30. See, e.g., ALICE L. PARK, WOMEN UNDER CALIFORNIA LAWS (1910) (listing equal guardianship rights among suffrage, jury service, and equal pay as primary objectives of the women's movement), *microformed on CATHERINE GOUGER (WAUGH) MCCULLOCH PAPERS, 1862-1945, Series VI, Reel 13.*

31. CAL. CODE OF CIV. P., Ch. XIV, Art. I, § 1751 (Deering 1897) ("The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child . . ."). This was certainly not the law in all states: see, for example ARK. STATS. 1904 (Kirby), ch. 76, § 3757, p. 855: ". . . the father while living . . . shall be the natural guardian of [the] . . . children."

32. CAL. CIV. CODE, § 246 (Deering 1899).

33. *Id.*

34. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA 24-27, 244-47 (1985).

35. There is a sizeable literature on this subject. See, e.g., NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); PEGGY RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION (1980); Richard H. Chused, *Married Women's Property Law, 1800-1850*, 71 GEORGETOWN L.J. 1359 (1983). While California did not have a Married Women's Property Act *per se*, the legislature adopted a community property system in 1852 that incorporated the main elements of such acts in other states. See CAL. CIV. CODE §§ 60-74 (1852).

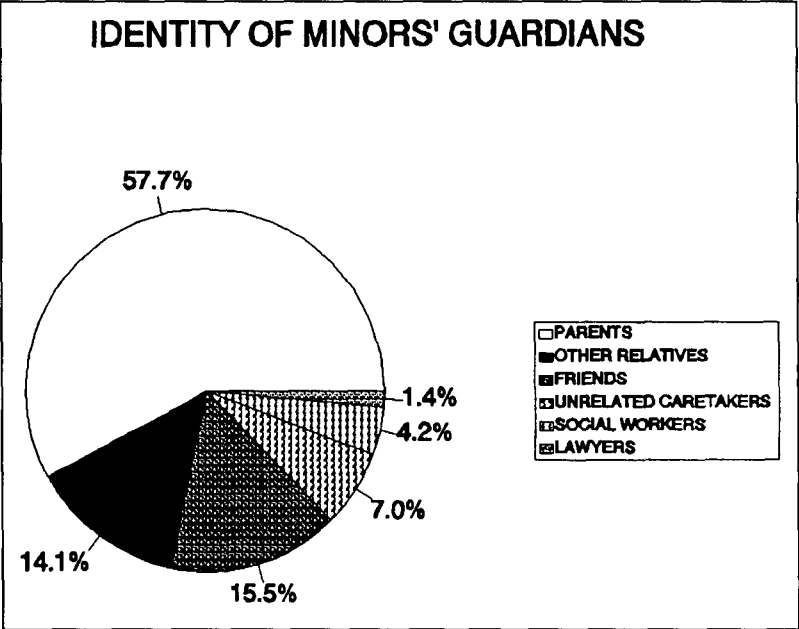


Figure 5

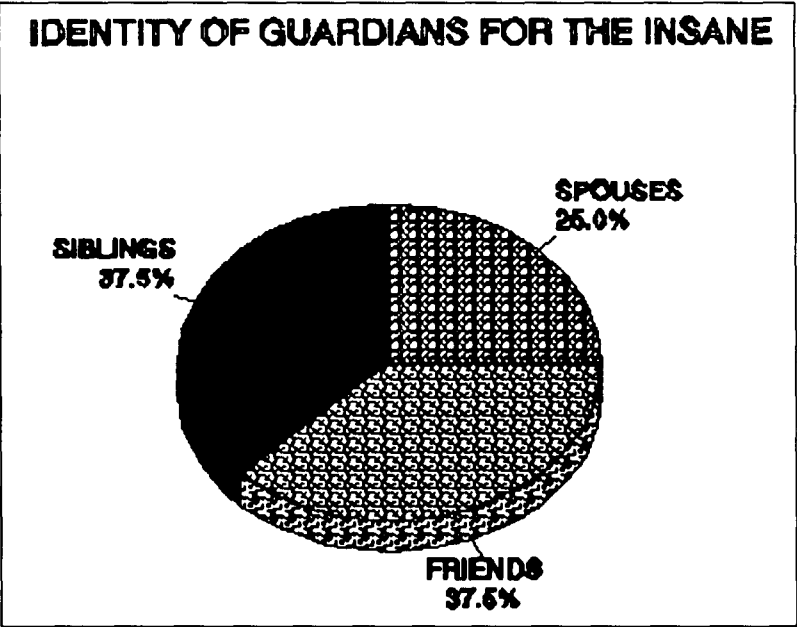


Figure 6

ment. Moreover, it was part and parcel of the democratization of divorce. Early in the century, divorce was rare and was largely confined to the elites: well-to-do fathers, who could afford servants. Later in the century, divorce broadened out in society;<sup>36</sup> it became available to a larger, middle class mass unable to hire servants.<sup>37</sup> As it did, divorce law came to reflect the fact that it was the rare father who wanted to care physically for a child—feed it, change it, blow its nose, and rock it to sleep. Custody law reflected the fact that women were the actual caregivers in ordinary families. They were the ones who coped with children of “tender years.” Hence, the law magnanimously gave preference to mothers; very few fathers raised any objections.<sup>38</sup>

With respect to minors whose mothers were unavailable or uninterested, the other relatives who petitioned for guardianship of minors were a mixed lot: brothers or sisters, grandmothers, aunts, uncles, and cousins (see Figure 5). Self-titled “friends” petitioned for guardianship in eleven cases; caretakers who were not friends or relatives in three cases,<sup>39</sup> and representatives of charity organizations in four cases. In one rather unusual case, the petitioner was a local lawyer.<sup>40</sup>

The guardians appointed to care for insane persons differed from the guardians of minors; they were almost as likely to be “friends” as family members. The family member petitioners tended to be siblings or spouses rather than parents (see Figure 6). Also, in contrast to the guardians of minors, most of those petitioning for guardianship of an insane ward (77.8%) were male.

The guardians of incompetent persons were divided similarly—about half were family members, half “friends” (see Figure 7). Half of the family petitioners in incompetence cases were the children of the ward, reflecting the advanced age of the incompetent wards. Here, too, 80% of the guardians were male.<sup>41</sup>

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36. On the history of divorce, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 179-84, 535-40 (2d ed. 1985); MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* (1972); GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* (1991); Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 ORE. L. REV. 649 (1984); CHRIS P. GUTHRIE & JOANNA L. GROSSMAN, *LOVE IN THE TIME OF SCROFULA: DIVORCE IN SAN MATEO COUNTY, 1890-1900* (unpublished manuscript).

37. ROBERT GRISWOLD, *VICTORIAN ILLUSIONS AND EVERYDAY REALITIES: DIVORCE IN CALIFORNIA, 1850-1890* p. 24-29 (1987); Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEG. STUDS. 61 (1976).

38. See generally MASON, at 64-68 (1994).

39. We are using the term “caretakers” to refer to all people who were not family or professionals who were, at the time of the petition, the *de facto* “substitute parents” of the prospective wards.

40. Docket #6823.

41. Compare Friedman & Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 279 (1988) (finding that two-thirds of the wards in conservatorships were women).

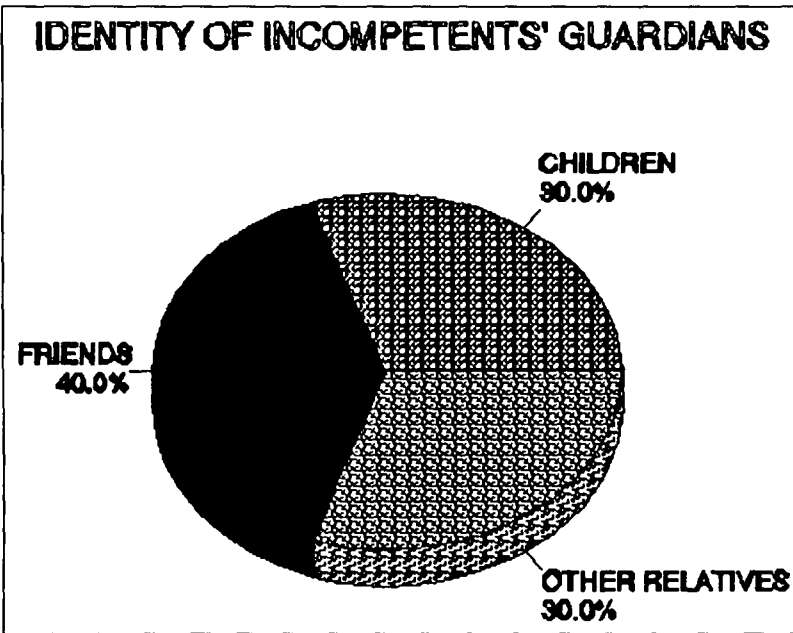


Figure 7

### Minor Wards

Seventy-one petitioners filed for guardianship of 125 minors. Most of them sought guardianship of a single minor, but in 16 cases there were two minors (siblings, of course), and in 12 cases three or more—including one case involving seven brothers and sisters. Not surprisingly, half of the wards were boys, half girls. Of the 123 minors whose ages we were able to pinpoint, 22 were under age six (17.9%), 38 were between six and ten (30.9%), 33 between 11 and 15 (26.8%), and 30 over age 15 (24.4%).

Under California law (and in everyday life), parents were *de facto* "guardians" of their children, that is, they managed their lives, fed them, clothed them, and housed them.<sup>42</sup> To put it another (and rather stilted) way, in the ordinary family, the parents filled the role of "guardians of the person" of their children. Property was another matter.<sup>43</sup> Under California law, a child could own assets, but not manage them. Nor could parents

42. CAL. CODE OF CIV. P., Ch. XIV, Art. I, § 1751 (Deering 1897) ("The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child . . .").

43. CAL. CIV. CODE, § 202 (Deering 1899) ("The parent, as such, has no control over the property of the child.").

manage assets belonging to their children.<sup>44</sup> In most families, most of the time, this was no problem because the children owned nothing. Guardianship was invoked only when children came into money.

Not surprisingly, it was typically a parent or family member who filed for guardianship in order to manage a child's money. Death of one or both parents (or a prior guardian) triggered 44 of the 70 petitions (62.9%). Generally, one of the parents—usually the father—had died, leaving a small inheritance, or life insurance proceeds. Occasionally, minors inherited from other relatives or friends; this prompted guardianship petitions in 10 of the 70 cases (14.3%).

There is little reason to be suspicious of these petitioners. Practically speaking, the law forced the petitioners' hands. There was no other legitimate way to manage or control property of minors. And even though the guardian had only the power to manage the ward's money, assuming that role put the guardian in a position lawfully to make decisions about how the money was spent, but practically to abuse the court's grant of power if he was so inclined. Perhaps because of the largely unfettered opportunity guardians had to abuse their power, the occasional file reeks of greed. Luiza Campostrini, an eight-year-old girl, whose mother was long dead, living in an orphanage. When she inherited \$1,400 from her grandfather, her father's paternal instincts were suddenly aroused. He removed Luiza from the orphanage and petitioned the court for appointment as her guardian; the court obliged on March 19, 1900.<sup>45</sup>

Guardianship was not always about money management. In eight cases, family members or others sought to gain control of minors who were neglected, abandoned, or mistreated by their parents. Margaret Rutter, for example, had a grandson, Richard, who was abandoned by his divorced parents; she petitioned to be appointed guardian.<sup>46</sup> Along the same lines, W.E. Watkins filed a petition to gain control of his four-year-old daughter, Hazel; the mother, Mae, "associated with evil, lewd and immoral persons, and has no government or control over said child, and is wholly unfit to have charge or control of *any* child."<sup>47</sup> After Watkins filed this petition, he went home to find that his "wife had fled, taking the child with her."<sup>48</sup> Although the court issued an order restraining Mae from leaving town, she simply vanished. The story had a happy ending of sorts: while visiting in San Francisco three and a half months later, Watkins "(sorts across his wife and child. He took the little one in his arms and carried her home with him." On the promise that he would provide, as he

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44. CAL. CIV. CODE, § 242 (Deering 1899) ("No person, whether a parent or otherwise, has any power as guardian of property, except by appointment as herein after provided.").

45. Docket #6686. See also *Court Notes*, OAKLAND TRIBUNE, March 8, 1900, at 4.

46. Docket #6982.

47. Petition, Docket #6819.

48. *Took Her Child and Fled From City*, OAKLAND TRIBUNE, June 5, 1900, at 5.

always had, "a suitable home," the court appointed him Hazel's guardian.<sup>49</sup>

In a small number of interesting cases, "child savers" applied for guardianship of abandoned or neglected children. Katharine Felton,<sup>50</sup> Superintendent of the Associated Charities of the City of Oakland, for example, asked the court to be named guardian of Ottillie Hunter, 14, a neglected child who had been under the care of Felton's organization; her petition was granted.<sup>51</sup> Felton, who has been called the "conscience of the city,"<sup>52</sup> left her mark on the Bay Area. Among other things, she established The Children's Agency of San Francisco, an organization responsible for investigating homes into which children were placed.<sup>53</sup>

But social conscience varies with the times; not all of what Felton did seems quite so benign today. Consider the case of Julia Smith, 11. Julia's father was blind. On March 17, 1900, Felton filed a petition, asking for guardianship of little Julia. The child was "without proper care and attention," she claimed, and "unless properly guarded and cared for, [she would be] deprived of obtaining the necessary education as well as the necessary care and discipline."<sup>54</sup> This was one of the rare cases in which the petition did not go uncontested. The father, Abraham Schmidt,<sup>55</sup> objected, claiming that his daughter had been "taken away from him without his consent."<sup>56</sup> But apparently, a blind father, and a family dependent on charity, made Felton's petition irresistible. The court named Felton guardian on March 27, 1900.<sup>57</sup>

Most petitions for the guardianship of minors were approved. Of the 68 petitions for which we know the result, 66 were granted; one was dismissed on the motion of the would-be guardian. The court denied only a single petition.<sup>58</sup>

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49. *Watkins Wins Contest for Custody of Child*, OAKLAND TRIBUNE, September 25, 1900, at 6.

50. For a biography of Katharine Felton, see JEAN BURTON, *KATHARINE FELTON AND HER SOCIAL WORK IN SAN FRANCISCO* (1947) (hereinafter cited as "BURTON").

51. Docket #6876. See also *Asks Guardianship of Two Young Girls*, OAKLAND TRIBUNE, July 13, 1900, at 2.

52. BURTON, *supra* note 50, at 1 (referring to San Francisco).

53. *Id.* at 48-49.

54. Docket #6708.

55. One wonders whether it was Schmidt or the agency that "Americanized" the child's name.

56. *Does Not Want to Lose His Daughter*, OAKLAND TRIBUNE, March 19, 1900, at 4.

57. Docket #6708. See also *Schmidt Wants Daughter Returned*, OAKLAND TRIBUNE, April 6, 1900, at 4. ("Abraham Schmidt, who resides at 654 Jackson Street, says his daughter has been taken away from him without his consent, and that he wants to have her returned. Schmidt is the father of the girl who was recently placed under the guardianship of Miss Felton of the Association Charities.")

58. Docket #6875.

### Insane Wards

The wards in insanity cases were, not surprisingly, a more variable group than the minors. Obviously, there was a greater range in age; the women were all older than 18, and all the men older than 21. Proportionally, more of the insane wards were male—two-thirds compared with one-half in the cases of minors. And, of course, insane wards met somebody's—presumably the court's—definition of insanity.

We say "presumably" because there is good reason to question concepts of insanity in the late nineteenth and early twentieth centuries, on both legal and medical grounds. In these cases, someone—usually a relative, sometimes a doctor or police officer<sup>59</sup>—petitioned the court to declare a person insane and authorize commitment to an asylum. A proceeding followed, consisting of an examination and determination by a doctor, a hearing before the judge, and approval or disapproval—almost always approval—of the doctor's decision.<sup>60</sup> Once a judgment of insanity and order of commitment were entered, removal to an asylum followed.

Two-thirds of insane wards in our study were institutionalized (see Figure 8). What kind of care wards received is unclear. Asylum administrators, of course, painted a rosy picture. The Superintendent of Agnews State Hospital confidently asserted that patients received the best of care: "if any acute condition exists requiring medicines, special bath, or electrotherapeutics it is immediately ordered." If a patient became "violent or excited," the Hospital would use "mild remedies," such as a "bowl of hot milk or a warm bath;" "stronger hypnotics" would be avoided.<sup>61</sup>

Newspapers painted a different picture of asylum life. Frank Cuniff, a ward who was committed in 1900,<sup>62</sup> committed suicide while a

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59. In his examination of civil commitment petitions filed in San Francisco County, California from 1906-1916, Richard Fox found that 53.5% of petitioners were relatives of the alleged insane person, 18.7% doctors, and 13.4% police officers. FOX, *supra* note 3, at 85, table 3.

60. On legal requirements regarding determinations of insanity and civil commitment, see CAL. CODE OF CIV. P., Ch. XIV, Art. II, § 1763 (Deering 1897); CAL. CIV. CODE, § 258 (Deering 1899); and STATUTES OF CALIFORNIA, Chapter CCXXVII, Article III (1897).

According to Fox, an average of 86% of those "charged" with insanity in San Francisco County from 1886-1892 were deemed insane and committed. FOX, at 49. From 1893-1913, an average of 68% were found insane and committed. *Id.* at 51.

61. F.M. Sponogle, *Medical Superintendent's Report, Report of the Agnews State Hospital*, in FIRST BIENNIAL REPORT OF THE STATE COMMISSION IN LUNACY 124 (1899). Not all asylums adhered to this set of treatment principles. One melancholia patient, according to the TRIBUNE, was "committed to the Stockton hospital, and during his stay at the institution he hardly uttered a word. After being hypnotized twice, he laughed and chatted with his mother, and the improvement was so marked that Medical Superintendent Clark permitted him to go home." *Insanity Cured by Hypnotism*, OAKLAND TRIBUNE, August 24, 1900, at 4.

62. Docket #6709.

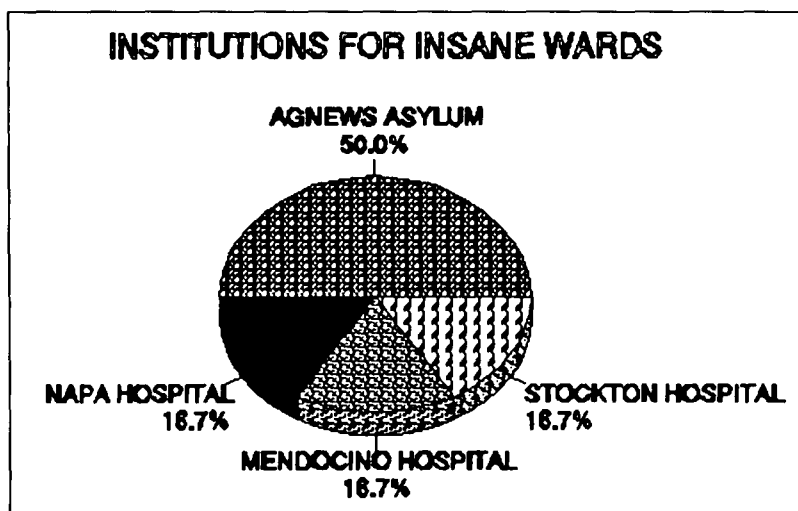


Figure 8

patient at Agnews State Hospital; he “tied one end of a handkerchief around his neck and fastening the other end to a banister, swung over. He was past resuscitation when discovered by the attendants.”<sup>63</sup> Another inmate, George Morss, called an “aged madman” by the *Tribune*, also died at Agnews, though not by his own hand. Rather, he was “boiled . . . to death.”<sup>64</sup> According to the *Tribune*, “Morss was placed in the bathtub at 5 o’clock by the keeper, who turned on the hot water and left the room. The old man was helpless and when Allen [the keeper] remembered the patient, he had been so severely burned that he died a few hours later.”<sup>65</sup> Morss’ death, and the suicide of another Agnews patient, prompted the Board of Managers of Agnews to conduct an investigation into the care received by patients in the asylum.<sup>66</sup>

Some petitioners no doubt acted out of a genuine desire to help a ward who desperately needed care or assistance. Some wanted the wards’ money in order to pay asylum bills. At times, the motive may have been to gain control of an estate even though the money had to be spent, if at all, on the ward. Some petitioners were afraid that their unfortunate relative might squander his money, and a firm hand was needed. This too might arise out of genuine worry and compassion, or because heirs were afraid an expectancy might dribble away.

63. Frank A. Cuniff Commits Suicide, OAKLAND TRIBUNE, April 4, 1900, at 3.

64. Agnews Deaths Investigated, OAKLAND TRIBUNE, July 11, 1900, at 5.

65. Aged Madman Dies in a Bath, OAKLAND TRIBUNE, July 10, 1900, at 8.

66. See Agnews Death Investigated, *supra* note 64.



Most persons deemed insane at the turn of the century “were odd, peculiar, or simply immoral individuals,” rather than truly deranged.<sup>67</sup> Fox, who studied the civil commitment process, found that “socially inappropriate behavior” rather than anything that we would consider “insane” was at the base of six out of ten commitments.<sup>68</sup> Newspaper accounts confirm this finding; they report cases in which insanity is imputed on grounds of forgetfulness, religious fervor, bewilderment, and other behavior that does not seem, at least on the surface, truly insane.<sup>69</sup> It was the exceptional case where behavior was so bizarre as to warrant this label: James Patrick Martin, for instance, was a man who “cast aside the food of ordinary mortals to feed upon the grass of the fields,” and was committed as a consequence.<sup>70</sup>

### Incompetent Wards

The six male and five female “incompetent” wards shared many characteristics with the insane wards. They too were usually institutionalized (63.6%) (see Figure 9). Incompetent wards were not, in legal contemplation, insane.<sup>71</sup> But they were supposedly incapable of managing their affairs. The statute made specific reference to age, and incompetent wards were, in fact, older than other wards. Their own children were frequently the petitioners. These estates were relatively large; all guardianships for the incompetent terminated with the death of the ward (as compared to 20% of the guardianships for the insane and none of the minors).

Here too, petitioners often needed legal power to pay asylum bills and manage wards’ property. Here too, they were afraid the wards would squander their money or fall prey to “artful” and “deceiving” persons. At times, the petitioners themselves were a bit artful and deceiving. Henry Peterman, for example, petitioned to be named his mother’s guardian; he claimed that she could not manage her affairs. He was appointed guardian, but in 1902, all five of Henry’s brothers and sisters urged the court to dismiss him; supposedly, he had on blown away \$50,000 of their mother’s money one occasion, and \$20,000 on another.<sup>72</sup>

The adventures of Horace Philbrook, an attorney disbarred for ethical problems, were recounted in Oakland newspapers for months in

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67. FOX, at 148.

68. FOX, at 151.

69. See, e.g., *Peculiar Case of Insane Patient*, OAKLAND TRIBUNE, May 5, 1900, at 3 (J.J. McCormick was committed to the Napa Insane Asylum because he seemed bewildered and “simply appears to forget things.”).

70. *Sent to the Insane Asylum*, OAKLAND TRIBUNE, June 6, 1900, at 2.

71. CAL. CODE OF CIV. P., Ch. XIV, Art. II (Deering 1897) (“any person who, *though not insane*. . .”) [emphasis added].

72. Docket #7075. See also *Guardian is Wanted for Mrs. Peterman*, OAKLAND TRIBUNE, December 13, 1900, at 1.

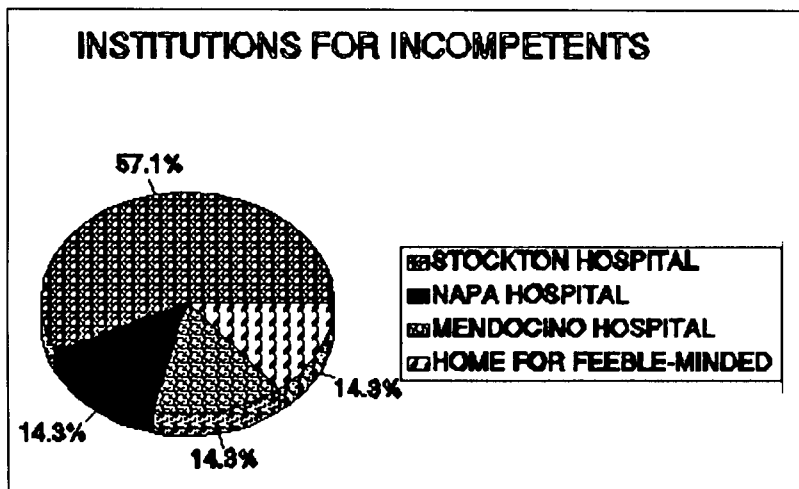


Figure 9

1900.<sup>75</sup> Philbrook petitioned on June 19, 1900 for guardianship of James Merritt, an alleged incompetent—who, it happens, was heir to part of a \$2.2 million estate left by his mother.<sup>74</sup> Philbrook claimed that “James P. Merritt is likely to be and is in imminent danger of being within a short time stripped of all his property and left destitute unless a guardian of his person and his estate is appointed.”<sup>75</sup> Merritt disagreed, charging Philbrook with extortion:

Philbrook is financially irresponsible and insolvent . . . by reason of unsoundness of mind and infirmity of temper is incapable of properly performing the duties of a guardian of the person or estate of *any* person . . . Philbrook in presenting this said petition to be appointed guardian is not seeking to promote the interests of the said James P. Merritt; but is maliciously and vindictively seeking to annoy, harass, and extort money from him.<sup>76</sup>

This was one of the rare cases in which the court actually denied a petition for guardianship.<sup>77</sup> It seems likely that greed was a factor in cases of

73. See, e.g., *Guardian is Asked for J.P. Merritt*, OAKLAND TRIBUNE, June 19, 1900, at 8; *Philbrook Has Uphill Fight*, OAKLAND TRIBUNE, July 10, 1900, at 2; *Philbrook Scored in Open Court*, OAKLAND TRIBUNE, July 31, 1900, at 5; *Attorney Philbrook Exposed*, OAKLAND TRIBUNE, Sept. 13, 1900, at 8; *Merritt Case Drags Very Slowly*, OAKLAND TRIBUNE, Sept. 13, 1900, at 2; *J.P. Merritt is Not Incompetent*, OAKLAND TRIBUNE, Nov. 22, 1900, at 6.

74. Docket #6842.

75. Docket #6842.

76. Docket #6842.

77. Philbrook also petitioned for guardianship of James Merritt's minor children. Docket #6823. Not surprisingly, James and James' ex-wife objected to Philbrook's petition. His petition was ultimately denied, and another guardian selected. See *Hill is the Guardian of Merritts*, OAKLAND TRIBUNE, September 12, 1900, at 1.

incompetence more often than in other classes of cases. Incompetents tended to be old, and perhaps easier to manipulate; age, weakness, and money were a lethal combination. Fox, writing about civil commitment proceedings, felt it was perhaps not too "cynical" to suggest that "children and others with a financial stake in family property may sometimes have had an interest in recommending confinement of an elder relative, who would at that point be subject to guardianship proceedings and loss of the right to hold property."<sup>78</sup>

### Dollars and Cents

Property was, as we have seen, at the heart of most petitions for guardianship filed in 1900. There is a fair amount of reported case-law on guardianship; virtually all of it, not surprisingly, deals with property management. Not surprisingly, the case-law sheds almost no light on the inner workings of guardianship, on the human side of this institution.

Conversely, the case files do not tell us much about the management side of guardianship. Often it was hard or impossible to tell what the minor owned from the few surviving scraps of paper. In those cases where we could attach actual dollar values to assets, the minors in 1900 possessed, on average, real property worth \$1,853.85, personal property worth \$912.35, and \$2,828.63 in cash. The total estate of the average minor ward was \$2,699.65 at the time the guardianship petition was filed. This was not a trivial amount; in 1900, the typical factory worker made under \$500 a year.<sup>79</sup> Translations to 1990's dollars are always tricky and inexact, but in current dollars, the average minor's estate was worth about \$43,000, if we use standard price deflators,<sup>80</sup> or roughly \$120,000 if we use the ratio of estate size to average annual earnings of workers.<sup>81</sup> In most cases, the source of the money, as we have pointed out, was inheritance or insurance proceeds on the death of a parent.

Did guardians do a good job of managing the estates of their minor wards? There is no way we can tell. In only 12 cases do files reveal information that allows us to compare beginning and ending values of estates.

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78. FOX, at 95.

79. See U.S. BUREAU OF THE CENSUS: HISTORICAL STATISTICS OF THE U.S. COLONIAL TIMES TO 1970 (1976). The average annual earnings of workers across all industries equaled \$438; the average farmer earned \$247 per year, the average non-farm worker earned \$490.

80. To estimate the implicit price deflator used to make this calculation, see CONSUMER PRICE INDEX DETAIL REPORT, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS (Dec. 1993); U.S. BUREAU OF THE CENSUS: HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1970 (1976); STATISTICAL ABSTRACT OF THE UNITED STATES (113th ed. 1993).

81. To estimate the implicit wage deflator used to make this calculation, see U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS (Dec. 1993); U.S. BUREAU OF THE CENSUS: HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1970 (1976).

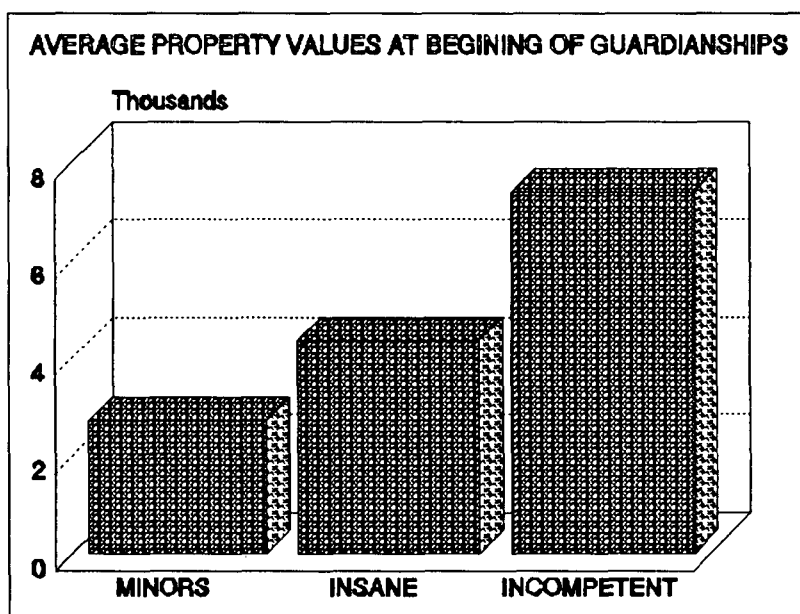


Figure 10

In four instances, the estate grew; in eight, it shrank. The four lucky minors' estates increased between 6.2% and 292.8% over the life of the guardianship, while eight minors' estates decreased in value between 12.4% and 61.5%, with an average decline of 31.7% over the course of the guardianship. This does not necessarily mean these estates were mismanaged; only that the guardians spent more than they took in. Under standard legal doctrine, at that time, guardians were not allowed to dip into the capital of the ward—at least not without court permission. But this rule was gradually relaxed.<sup>82</sup> The strict rule suited only very rich wards—"heirs" of big "estates." The descent of the law into the middle-class mass changed legal doctrine, here, too in a fundamental way. For a child with a small amount of money—money which could hardly be called "capital" or an "estate"—encroachment might be exactly what a good guardian should do, and was forced to do.

Predictably, insane wards had more money than minors at the outset of their guardianship. The average insane ward possessed real property in the amount of \$5,750, personal property in the amount of \$137.50,

82. On this point, see G.W. FIELD, *THE LEGAL RELATIONS OF INFANTS* (1888), § 123, p. 118. The trend was away from an older, stricter rule, toward a rule that "guardians will be protected by the court in necessary, proper and economical disbursements made for the benefit of the ward, though made without an order of the court, and although they tread upon the capital or *corpus* of the estate."

\$2,228.32 in cash, and a total estate value of \$4,359.07 at the time the petition was filed, roughly \$1100 more than the average minor ward. What little information we have about estate values at the end of the road suggests that as many wards saw their estates shrink as grow. Guardians of insane persons seemed to spend more than guardians of minors, even though guardianships of the insane tended to last fewer years.

Incompetents possessed notably more money than other wards. The average incompetent possessed real property in the amount of \$18,250, personal property in the amount of \$375, \$4,388.36 in cash, and a total estate value of \$7,398.98 at the time the guardianship petition was filed. This was \$3,039.91 more than the average insane ward, and \$4,203.77 more than the average minor. But the files for incompetents are few in number, and the ending value of the estate is known for only three. In all three, the estates shrank, but it would be hard to draw any valuable inference from such a small sample.

### Termination of Guardianships

From beginning to end, the average guardianship lasted slightly more than seven and one-half years. Guardianships of minors lasted longer than any of the others, nearly ten years on average. Most guardianships of minors ran their natural course and ended for a rather obvious reason: the minors reached the age of majority, 18 for girls, 21 for boys.<sup>83</sup> Guardianships of the insane lasted over five years on average. Two of the nine guardianships ended because the ward was "cured;" these two wards successfully petitioned for an order restoring them to capacity.<sup>84</sup> In two other cases, the guardian died, and in one case it was the ward that died. Guardianships of incompetents lasted a very short time, less than two and one-half years on average. All incompetent guardianships for which information was available ended with the death of the ward.

### Conclusion

The guardianship files, for minors at any rate, are not terribly revealing; there are few surprises for the researcher. The files are relatively scant and tight-lipped. It is certainly possible that some guardians beat their wards unmercifully, and that others dipped their fingers into the till; but if so, there is no way for us to tell from these records.

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83. CAL. CIV. CODE, § 25 (1897).

84. See, CAL. CODE OF CIV. P., Ch. XIV, Art. II, § 1766

Any person who has been a relative of such person within the third degree, or any friend, may apply, by petition to the superior court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined . . . . If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person, if such person be not a minor, shall cease.

Guardianship law itself is not without interest. There is little doubt that guardianship became more "middle class" as the 19th century progressed. This made its mark on doctrine and on statutory texts. It lay behind changes in custody law and in laws relating to investment and management by guardians. The rules about eating into capital, or about the sale of real estate, bear witness to this development. It would be interesting to compare 1900 wards demographically with wards of 1850, or 1800. That data, unfortunately, is not before us.

The evidence of the files, then, is fairly bland and taciturn. Nonetheless, like the dog that did not bark, the evidence, such as it is, tells a story in the midst of its silence. Then, as now, guardianship was a low-visibility system, which seemed to work well enough for most purposes, at least for minors. What were those purposes? Guardianship was supposed to protect children with money, and also to protect that money; more importantly, perhaps, guardianship was a vehicle for unfreezing property—making it available to the market. The silence of the files also suggests that the institution was not particularly controversial. In an age when many children had to face the death of a parent, the social importance of this rather cumbersome legal tool should not be underrated. For incompetents and the insane, the institution of guardianship was less straightforward and more controversial. Here, however, the numbers are very small in our study, and it is hard to draw firm conclusions. More research on these files and their background is badly needed.