

NOTES

CONTRACTUAL CAPACITY OF A WARD

When a guardian is appointed to manage the property of an adult, the ward is usually divested of power to contract. Any contract he attempts to enter after the appointment is generally considered void,¹ rather than merely voidable, regardless of his mental capacity. This strict rule does not apply to an adult incompetent for whom no guardian has been appointed. His right to avoid contracts (which, for the purposes of this note, will include contracts, deeds, and sales)² depends upon whether he was able at the time of the transaction to comprehend the significance of his actions.³ The stricter rule is applied to wards because the primary purpose of appointing a guard-

1. The following are jurisdictions which treat the subsequent contracts as void: ALA. CODE tit. 9, § 43 (1958); CAL. GEN. LAWS ANN. § 40 (Deering 1960); COLO. REV. STAT. ANN. § 71-1-21 (1960); CONN. GEN. STAT. REV. § 45-73 (1960); DEL. CODE ANN. tit. 12, § 3914 (1953); FLA. STAT. ANN. § 394.22(10) (1965); GA. CODE ANN. § 20-206 (1964); HAWAII REV. LAWS § 338-15 (1955); IDAHO CODE ANN. § 32-108 (1947); ILL. ANN. STAT. ch. 3, § 126 (Smith-Hurd 1961); IND. ANN. STAT. § 8-141 (1953); KY. REV. STAT. ANN. § 202.145 (1963); ME. REV. STAT. ANN. tit. 18, § 3604 (1964); MINN. STAT. ANN. § 525.543 (Supp. 1967); MO. REV. STAT. § 475.345 (1959); MONT. REV. CODES ANN. § 64-112 (1947); NEB. REV. STAT. § 38-304 (1960); NEV. REV. STAT. § 41.300 (1957); N.H. REV. STAT. ANN. § 462:27 (1955); N.J. STAT. ANN. § 3A:22-1 (1951); N.D. CENT. CODE ANN. § 14-01-03 (1960); OHIO REV. CODE ANN. § 2111.04 (Page 1966); OKLA. STAT. ANN. tit. 15, §§ 11, 22, 24 (1966); PA. STAT. ANN. tit. 50, § 3511 (Supp. 1967); R.I. GEN. LAWS § 33-15-13 (1956); S.D. CODE § 30.0803 (1939); VT. STAT. ANN. tit. 14, § 2689 (1959); WIS. STAT. ANN. § 319.215 (1958).

Traditionally, subsequent contracts are classified as either void or voidable. One recent case, however, would place the Maryland statute (MD. CODE ANN. art. 16, §§ 149-53 (1957)) in neither of these classifications. *Edmunds v. Equitable Sav. & Loan Ass'n*, 223 A.2d 630 (D.C. 1966). The court relied on the fact that the statute specifically stated that a ward is not necessarily of unsound mind and that this statute was enacted after the courts had ruled that only persons of unsound mind lack capacity to contract. The court also noted the conspicuous absence of any provision rendering all contracts by the ward void or indicating that the appointment of a conservator relieved the ward of his capacity to contract. All of this led the court to the conclusion that, in Maryland, the acts of an adult person for whom a guardian has been appointed are no less valid and enforceable. *Id.* at 632. The Maryland courts have not, as yet, interpreted their own statute. If the District of Columbia court's interpretation is accepted, this is a new type of statute which renders contracts neither void nor voidable and which raises no presumption as to the contractual capacity of a ward.

2. No distinction is made between contracts, deeds, and sales; since they are all consensual transactions, common principles apply and are dealt with in the term "contract."

3. Note, *Mental Illness and the Law of Contracts*, 57 MICH. L. REV. 1021 (1959).

ian is to protect the ward's property.⁴ The simplicity of the general rule is, as with all general rules, deceiving. It is the purpose of this note to examine in what situations a court will affirm the contractual acts of an adult ward despite the prior appointment of a guardian⁵ and to suggest a means of reducing the confusion and unfairness of the law in this area.

I. CIRCUMSTANCES UNDER WHICH A GUARDIAN WILL BE APPOINTED

The tests for determining when a guardian can be appointed are laid down either in state statutes or in the common law of the state. Many courts, in spite of these guidelines, have been reluctant to appoint guardians and thereby restrain the ward's liberty and right to control his property.⁶ Under the statutes and the common law, the test employed most often for the appointment of a guardian is the ability of the alleged incompetent to manage and preserve his property.⁷

In addition to this broad general criterion, statutes often incorporate several other tests. These include the ability of the person to cope with "designing persons,"⁸ and the likelihood that such persons will dissipate or lose his property.⁹ These tests may be used independently of the general test¹⁰ or in conjunction with it as an aid in determining when the person is incompetent to manage his property.¹¹ Even when the statute does not ex-

4. See *In re Cleveland*, 72 Conn. 340, 44 A. 476 (1899); *Emerick v. Emerick*, 83 Iowa 411, 49 N.W. 1017 (1891). This is true even though there are separate provisions for guardianship of the person and the estate. See, e.g., CAL. PROB. CODE §§ 1460-61 (Deering Supp. 1967); ILL. ANN. STAT. ch. 3, §§ 266, 271 (Smith-Hurd Supp. 1967). There appears to be no difference in the effect of subsequent contracts depending upon whether the guardian was appointed for the person or the estate. See, e.g., CONN. GEN. STAT. REV. § 45-73 (1960); MO. REV. STAT. § 475.345 (1959); WIS. STAT. ANN. § 319.215 (1958). The functions of a guardian have little relationship with the contractual capacity of the ward. The majority of the jurisdictions consider any act subsequent to the appointment void, regardless of the functions of the guardian.

5. In some states the term "committee," "conservator," or "curator" is used instead of "guardian." See *In re Hogan*, 135 Me. 249, 194 A. 854 (1937); *In re Evan's Estate*, 28 Wis. 2d 97, 135 N.W.2d 832 (1965). There is some justification for the distinction between guardianship and conservatorship. To some extent, they have been defined differently. See Lord, *Conservatorship v. Guardianship*, 33 L.A.B. BULL. 5 (Nov. 1957). But, for the purpose of this note, the term "guardian" will be used.

6. *In re Valentine's Guardianship*, 4 Utah 2d 335, 294 P.2d 696 (1956); *In re Reed*, 173 Wis. 628, 182 N.W. 329 (1929).

7. See, e.g., *In re Cleveland*, 72 Conn. 340, 44 A. 476 (1899); *Snyder v. Snyder*, 142 Ill. 60, 31 N.E. 303 (1892); *Olson v. Olson*, 242 Iowa 192, 46 N.W.2d 1 (1951); *Rhoads v. Rhoads*, 29 Ohio App. 449, 163 N.E. 724 (1927).

8. See, e.g., ARIZ. REV. STAT. ANN. § 14-861 (1956); DEL. CODE ANN. tit. 12, § 3914 (1953); ORE. REV. STAT. § 126.005 (1957).

9. See, e.g., DEL. CODE ANN. tit. 12, § 3914 (1953); FLA. STAT. ANN. § 394.22(1) (1960); PA. STAT. ANN. tit. 50, § 3102(3) (Supp. 1967).

10. See FLA. STAT. ANN. § 394.22(1) (1960).

11. See DEL. CODE ANN. tit. 12, § 3914 (1953).

pressly include these latter tests, the courts will often consider the results of such tests as evidence on the issue of whether the alleged incompetent is able to manage and preserve his property. The fact that one is unable to cope with unscrupulous persons with whom he is likely to come in contact will justify the appointment of a guardian under the "designing persons" provision or under the general test.¹² However, the disposition of one's property in a manner not approved by his family or not consonant with normal business practices is insufficient to justify the appointment of a guardian.¹³ None of the tests require a showing of insanity,¹⁴ although such a showing will support an appointment.¹⁵

Most statutes incorporate one or more of the above tests and attempt to list the type of deficiency or infirmity which will justify the appointment of a guardian. A typical statute is that of California which provides:

Any superior court to which application is made . . . may appoint a guardian for the person of an insane or an incompetent person, who is a resident of the State. As used in this division of this code, the phrase "incompetent person," "incompetent," or "mentally incompetent," shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.¹⁶

12. See *In re Coburn*, 165 Cal. 202, 131 P. 352 (1913); *In re Cassidy*, 95 Cal. App. 641, 273 P. 69 (1928); *In re Wolff's Guardianship*, 232 Minn. 144, 44 N.W.2d 465 (1950); *In re Guardianship of Bayer's Estate*, 101 Wash. 694, 172 P. 842 (1918).

13. See *In re Waite's Guardianship*, 14 Cal. 2d 727, 97 P. 2d 238 (1939); *Stevenson v. Peckham*, 322 Mass. 693, 79 N.E.2d 282 (1948). But see *In re Berge's Guardianship*, 165 Minn. 103, 205 N.W. 886 (1925).

14. See *In re Coburn*, 165 Cal. 202, 131 P. 352 (1913); *In re Green's Guardianship*, 125 Wash. 570, 216 P. 843 (1923); *In re Streiff*, 119 Wis. 566, 97 N.W. 189 (1903). It has been suggested that the terms used in guardianship statutes are objectionable and tend to stigmatize the incompetent (Lord, *supra* note 5; Note, *Guardianship in the Planned Estate*, 45 IOWA L. REV. 360, 368 (1960)) and, since many of these terms are nearly interchangeable, that the statutes ought simply to designate as incompetent any person who is mentally incapable of taking care of himself. Note, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 342. While admitting that the statutory terms are vague and lacking in definitional certainty, relying solely on the general test of guardianship creates additional problems. The general rule emphasizes the intellectual process and underestimates the significance of the emotional instability which is characteristic of certain forms of disorders. See Guttmacher & Weihofen, *Mental Incompetency*, 36 MINN. L. REV. 179 (1952). To limit the test solely to the general test would further emphasize the intellectual process and would destroy meaningful distinctions not only between insanity and incompetency (see Lord, *supra* note 5) but also the distinction between mental and physical incompetency. See *Anderson v. State*, 54 Ariz. 387, 96 P.2d 281 (1939).

15. See, e.g., *Willett v. Willett*, 333 Mass. 323, 130 N.E.2d 582 (1955); *Jones v. Maguire*, 221 Mass. 315, 108 N.E. 1073 (1915).

16. CAL. PROB. CODE § 1460 (Deering Supp. 1967).

Twenty-seven jurisdictions provide by statute for the appointment of a guardian when habitual drunkenness or narcotics addiction seriously impairs the individual's judgment.¹⁷ Ten jurisdictions provide for the appointment of guardians for spendthrifts.¹⁸ A spendthrift is defined as a person who by excessive drinking, gambling, idleness, or debauchery, has become incapable of managing his own affairs, or who spends or wastes his estate so as to expose himself or his family to want or suffering or his town to expense.¹⁹ That an individual is easily influenced, lacks understanding of the extent of his property,²⁰ or is an alcoholic and has associated with disreputable characters²¹ have been held sufficient grounds for the appointment of a guardian.

The jurisdictions are divided as to whether old age or other physical disabilities will justify the appointment of a guardian. One state has held that a statute establishing old age or physical disability as the only criteria for the appointment of a guardian contravened state constitutional provisions concerning the right to acquire, possess, and protect property.²² No state presently provides for the appointment of a guardian on the basis of physical disability or old age without an additional finding of inability to manage one's estate.²³ Twenty-four states provide for appointment in cases of old age or senility when such defects render the person unable to manage his property.²⁴ Eleven of these states also specifically provide for appointment

17. F. LINDMAN & D. McINTYRE, *THE MENTALLY DISABLED AND THE LAW* 239-51 (1961) (hereinafter cited as LINDMAN). In addition to those statutes cited in LINDMAN, see VT. STAT. ANN. tit. 14, § 2682 (Supp. 1967); WASH. REV. CODE § 11.88.010 (1967); WYO. STAT. ANN. § 3-29.1 (Supp. 1967).

18. ILL. ANN. STAT. ch. 3, § 113 (Smith-Hurd 1961); IOWA CODE ANN. § 633.552 (1964); ME. REV. STAT. ANN. tit. 18, § 3601(2) (1964); MINN. STAT. ANN. § 525.54 (1947); NEB. REV. STAT. § 38-302 (1960); N.H. REV. STAT. ANN. § 464:6 (1955); N.D. CENT. CODE ANN. § 30-10-02(3) (1960); R.I. GEN. LAWS § 33-15-8 (1956); VT. STAT. ANN. tit. 14, § 2682 (Supp. 1967); WIS. STAT. ANN. § 319.03 (1958).

19. See, e.g., N.H. REV. STAT. ANN. § 464:5 (1955).

20. *Modlich v. Jennings*, 244 Mass. 183, 138 N.E. 897 (1923).

21. *In re Buck*, 171 Minn. 227, 213 N.W. 898 (1927).

22. *Schafer v. Haller*, 108 Ohio St. 243, 140 N.E. 517 (1923); see 37 HARV. L. REV. 151 (1923).

23. See *Griffin v. Collins*, 122 Ga. 102, 49 S.E. 827 (1905); *Upton v. Bush*, 135 Ky. 102, 121 S.W. 1005 (1909); *In re Storick*, 64 Mich. 685, 31 N.W. 582 (1887); *Keiser v. Keiser*, 113 Neb. 645, 204 N.W. 394 (1925). But see *Loss v. Loss*, 25 Ill. 2d 515, 185 N.E.2d 228 (1962); *Silver v. Newcomer*, 80 Ind. App. 406, 140 N.E. 455 (1923).

24. ARIZ. REV. STAT. ANN. § 14-861 (1956); ARK. STAT. ANN. § 57-601 (Supp. 1967); CAL. PROB. CODE § 1460 (Deering Supp. 1967); COLO. REV. STAT. ANN. § 71-1-1 (1963); DEL. CODE ANN. tit. 12, § 3914(a) (Supp. 1966); FLA. STAT. ANN. § 744.03 (1964); ILL. ANN. STAT. ch. 3, § 112 (Smith-Hurd Supp. 1967); IND. ANN. STAT. § 8-101(c) (1953); KY. REV. STAT. ANN. § 387.010 (1963); MD. ANN. CODE art. 16, § 149 (1966); MASS. GEN. ANN. LAWS ch. 201, § 16 (1955); MINN. STAT. ANN. § 525.54 (1947); MO. REV. STAT. § 475.010 (1959); NEB. REV. STAT. § 38-201 (1959);

in cases of physical incapacity.²⁵ The majority of appellate cases upholding the appointment of a guardian due to physical incapacity have been cases in which the person is also old and there has, consequently, been a reduction of mental capacity.²⁶ The courts usually have not discussed the issues of mental and physical disability separately.²⁷ Normally, a physical ailment will not justify the appointment of a guardian unless it is such that the person has no control over his body functions and must remain bedridden.²⁸ In one case, however, a guardian was appointed for one who was deaf and dumb because he was unable to manage his affairs.²⁹

II. EFFECT OF THE APPOINTMENT OF A GUARDIAN

A. *Constructive Notice of Contractual Incapacity*

The proceeding to appoint a guardian, being *in rem* to fix status, serves, in most states, as constructive notice to those dealing with the ward of his contractual incapacity.³⁰ However, in eleven jurisdictions the proceeding will be considered as constructive notice only if the appointment is accompanied by filing of notice.³¹ Filing, when required, usually takes place in the court or county of adjudication, though four states have a central

NEV. REV. STAT. § 159.100 (1963); N.Y. MENTAL HYGIENE LAW § 100 (McKinney Supp. 1966); OHIO REV. CODE ANN. § 2111.01 (Page 1966); ORE. REV. STAT. § 126.006 (1965); PA. STAT. ANN. tit. 50, §§ 3101, 3102 (Supp. 1967); R.I. GEN. LAWS § 33-15-44 (1956); UTAH CODE ANN. §§ 75-13-19, -20 (1943); VA. CODE ANN. § 37-140 (1953); WASH. REV. CODE ANN. § 11.88.010 (1967); WYO. STAT. ANN. § 3-29.1 (1967).

25. COLO. REV. STAT. ANN. § 71-1-1 (1963); DEL. CODE ANN. tit. 12, § 3914(a) (Supp. 1966); FLA. STAT. ANN. § 744.03 (1964); ILL. ANN. STAT. ch. 3, § 112 (Smith-Hurd Supp. 1967); IND. ANN. STAT. § 8-101(c) (1953); KY. REV. STAT. ANN. § 387.010 (1963); MD. ANN. CODE art. 16, § 149 (1966); MASS. GEN. LAWS ANN. ch. 201, § 16 (1955); OHIO REV. CODE ANN. § 2111.01 (Page 1966); VA. CODE ANN. § 37-140 (1953); WYO. STAT. ANN. § 3-29.1 (1967).

26. *See, e.g., In re McConnell's Estate*, 26 Cal. App. 2d 102, 78 P.2d 1043 (1938); *In re Thoreson's Guardianship*, 72 N.D. 101, 4 N.W.2d 822 (1942); *Pruett v. Pruett*, 291 S.W.2d 354 (Tex. Civ. App. 1956).

27. *See, e.g., In re McConnell's Estate*, 26 Cal. App. 2d 102, 78 P.2d 1043 (1938); *In re Thoreson's Guardianship*, 72 N.D. 101, 4 N.W.2d 822 (1942); *Pruett v. Pruett*, 291 S.W.2d 354 (Tex. Civ. App. 1956).

28. *See, e.g., Loss v. Loss*, 25 Ill. 2d 515, 185 N.E.2d 228 (1962); *Silver v. Newcomer*, 80 Ind. App. 406, 140 N.E. 455 (1923); *Morse v. Slocum*, 192 Iowa 1080, 186 N.W. 22 (1922).

29. *In re Perrine*, 41 N.J. Eq. 409, 5 A. 579 (Ch. 1886).

30. *See, e.g., Hellman Commercial Trust & Sav. Bank v. Alden*, 206 Cal. 592, 275 P. 794 (1929); *Leggate v. Clark*, 111 Mass. 308 (1873); *Martello v. Cagliostro*, 122 Misc. 306, 202 N.Y.S. 703 (Sup. Ct. 1924); *Hinton v. Robinson*, 51 Tenn. App. 1, 364 S.W.2d 97 (1963).

31. *See* LINDMAN, at 239.

registration office.³² Whether or not a jurisdiction requires filing, the enforceability of contracts subsequently entered into by the ward does not depend on the other party receiving actual notice of the guardianship.

B. *Impact of Appointment on Subsequent Contracts of Ward*

1. *Void Rule*

With the exception of contracts for necessities,³³ if the statute under which the adjudication was had expressly or by implication declares the subsequent contracts of the incompetent void, theoretically, they are void regardless of whether the appointments are because of mental or physical incapacity.³⁴

a. rationale of the rule. A variety of reasons have been offered to justify statutes which declare the ward's subsequent contracts void. It is clear that the law aims to protect the person and property of one who is incapable of doing so himself.³⁵ The statutory voidness rule is said to be

32. MO. REV. STAT. § 475.140 (1956); N.H. REV. STAT. ANN. § 135.40 (1964); OHIO REV. CODE ANN. § 5123.29 (Page Supp. 1966); VA. CODE ANN. § 37-136.2 (Supp. 1966).

33. One common exception to the rule that the ward's contracts are void is created by statute. This exception concerns contracts for necessities. *See, e.g.*, ALA. CODE tit. 7, § 106 (1958). If the guardian has neglected or refused to provide necessities, the ward may be liable for those furnished to him by a third person. *See Belluci v. Foss*, 244 Mass. 401, 138 N.E. 551 (1923); *Bowman v. Bowman*, 96 S.W.2d 667 (Tex. Civ. App. 1936); *Linch v. Sanders*, 114 W. Va. 726, 173 S.E. 788 (1934). The courts have based the ward's liability on quasi-contract. Because a quasi-contract is implied by law, consent of the ward is unnecessary to its existence or enforceability. *Turpin's Adm'r v. Stringer*, 228 Ky. 32, 14 S.W.2d 189 (1929). Liability under quasi-contract is limited to actual or reasonable value of the necessities or the benefit received. *See, e.g.*, *Dean v. Estate of Atwood*, 221 Iowa 1388, 212 N.W. 371 (1927); *Carter v. Beckwith*, 128 N.Y. 312, 28 N.E. 582 (1891). *But see McCormick v. Littler*, 85 Ill. 62 (1877). Much discretion is left with the courts in determining what are necessities, but the term includes everything reasonably commensurate with the ward's normal maintainance and position in life. *Leonard v. Alexander*, 50 Cal. App. 2d 385, 122 P.2d 984 (1942) (attorney's fees); *Collins v. Marquette Trust Co.*, 187 Minn. 514, 246 N.W. 5 (1932) (attorney's fees); *McCully v. McCully*, 175 Miss. 876, 168 So. 608 (1936) (board, nursing, clothing, taxes on land); *In re Weightman's Estate*, 126 Pa. Super. 221, 190 A. 552 (1937) (medical and legal services).

34. *See Ure v. Ure*, 223 Ill. 454, 79 N.E. 153 (1906) (drunkard); *Waitt v. Badger*, 318 Mass. 101, 60 N.E.2d 375 (1945) (spendthrift); *Chandler v. Simmons*, 97 Mass. 508 (1867) (spendthrift); *Hughes v. Jones*, 116 N.Y. 67, 22 N.E. 446 (1889) (drunkard). *But see Jones v. Semple*, 91 Ala. 182, 8 So. 557 (1890). Such statutes have been interpreted as applicable even to contracts entered into prior to the appointment. *In re Thornton's Guardianship*, 243 Wis. 397, 10 N.W.2d 193 (1943). *Contra*, *Der Hagopian v. Eskandarian*, 396 Pa. 401, 153 A.2d 897 (1959); *see Stroudsburg Security Trust Co. v. Symonds*, 3 Monroe L. Rptr. 47 (Pa. C.P. 1941).

35. *Schultz v. Oldenburg*, 202 Minn. 237, 277 N.W. 918 (1938).

justified by convenience and necessity. It is argued that without such a provision the acts of the guardian and ward might conflict³⁶ and the guardian would be unable properly to discharge his duties.³⁷ It is also argued that this rule makes it unnecessary to relitigate the question of the capacity of the ward as to each transaction.³⁸ The effect of this rule has also been justified on the ground that any loss occasioned by void contracts is better borne by businessmen than the estate of the ward.³⁹

Besides convenience and necessity, the rule may be defended on traditional contract theory. The fundamental idea of a contract requires the assent of two minds. But "a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and . . . therefore, . . . cannot make a contract which may have any efficacy as such."⁴⁰ Many of the cases which have held the subsequent contract of a ward void have utilized this reasoning.⁴¹

b. exceptions. Realizing that a rule making void all subsequent contracts of a ward can produce injustice,⁴² many courts have avoided literal application of the statutes. In so doing, they have used a variety of arguments: that no reliable determination of incompetency was ever made; that, although a determination of incompetency was made at the time of appointment, the conditions or capacity of the ward may have changed; that the transaction was not the type which was meant to be rendered unenforceable by the guardianship proceeding; and that public policy warrants the enforcement of the contract.

The most frequent argument which the courts use in upholding the contracts of a ward is that there was no reliable determination of incompetency. Thus, a ward's contracts have been enforced when there was no specific finding at the statutory proceedings of his incapacity to manage his property. The appointment of a guardian for one mentally disabled without a finding of *non compos mentis* has been held not to render the contracts of the ward

36. *Martello v. Cogliostro*, 122 Misc. 306, 202 N.Y.S. 703 (Sup. Ct. 1924).

37. *Reeves v. Hunter*, 185 Iowa 958, 171 N.W. 567 (1919); *Johnson v. Johnson*, 214 Minn. 462, 8 N.W.2d 620 (1943).

38. *Leonard v. Leonard*, 30 Mass. (14 Pick.) 280 (1833).

39. *Gibson v. Soper*, 72 Mass. (6 Gray) 279 (1856).

40. *Dexter v. Hall* 82 U.S. (15 Wall.) 9 (1872). See also *Cook, Mental Deficiency and the English Law of Contract*, 21 COLUM. L. REV. 424 (1921); *Green, The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEXAS L. REV. 554, 555 (1943).

41. See, e.g., *Christian v. Waialua Agricultural Co.*, 93 F.2d 603 (9th Cir. 1937), *rev'd on other grounds*, 305 U.S. 91 (1938); *Bowman v. Wade*, 54 Ore. 347, 103 P. 72 (1909).

42. *Schultz v. Oldenburg*, 202 Minn. 237, 277 N.W. 918 (1938); *Thorpe v. Hanscom*, 64 Minn. 201, 66 N.W. 1 (1896).

void.⁴³ In states whose statutes authorize the appointment of a guardian for persons not of unsound mind,⁴⁴ it has been held that appointment is not an adjudication of mental incompetence unless there was a specific finding to that effect.⁴⁵ Courts have also held that when the guardian was appointed upon the ward's voluntary application, there being no determination of competence, the guardian is treated as a trustee or agent and the ward is not rendered incompetent to make contracts.⁴⁶ Several courts which adhere to the view that appointment without a finding of incompetence does not render subsequent contracts void have found support in the fact that statutory provisions limiting contractual capacity do not extend to persons of sound mind.⁴⁷ The fact that the ward is under guardianship in these jurisdictions does not prevent him from performing the acts of which he is in fact capable.⁴⁸

The courts will also look to the propriety of the adjudication to evade the express statutory language. If there has been a procedural defect in the adjudication of incompetency, as for example, when the ward has not been served with process,⁴⁹ the court may treat the situation as if there had been no guardian appointed.⁵⁰ If there has been an unauthorized and void issuance of letters of guardianship, no presumption is raised concerning the validity of subsequent contracts of the ward.⁵¹

Another argument frequently used by the courts is that, although a guardian was appointed and there was a finding of incapacity, the situation and the capacity of the ward have changed. Thus, courts will often determine whether there was a guardianship actually functioning at the time of the contract negotiations.⁵² In many states, the void rule takes the form of a

43. *Crary v. Goldsmith*, 322 Mich. 418, 34 N.W.2d 28 (1948); *In re Gabler's Estate*, 265 Wis. 31, 60 N.W.2d 342 (1953).

44. ARIZ. REV. STAT. ANN. § 14-861 (1956); CAL. PROB. CODE § 1460 (Deering Supp. 1967); DEL. CODE ANN. tit. 12, § 3914 (Supp. 1966); D.C. CODE ENCYC. § 21-1501 (1967); MD. ANN. CODE art. 16, § 149 (1966); MASS. GEN. LAWS ANN. ch. 201, § 16 (1955); N.M. STAT. ANN. § 32-2-1 (1953); UTAH CODE ANN. § 75-13-20 (1953); see *Edmunds v. Equitable Sav. & Loan Ass'n*, 223 A.2d 630 (D.C. 1966); *Carroll v. District Court*, 50 Mont. 428, 147 P. 612 (1915).

45. *Brisacher v. Tracy-Collins Trust Co.*, 277 F.2d 519 (10th Cir. 1960).

46. *In re Ridpath's Guardianship*, 231 Iowa 977, 2 N.W.2d 651 (1942).

47. *In re Sherrill's Estate*, 92 Ariz. 39, 373 P.2d 353 (1962); *In re Kappel's Guardianship*, 242 Iowa 1021, 47 N.W.2d 825 (1951).

48. *Brisacher v. Tracy-Collins Trust Co.*, 277 F.2d 519 (10th Cir. 1960); *In re Sherrill's Estate*, 92 Ariz. 39, 373 P.2d 353 (1962); *In re Kappel's Guardianship*, 242 Iowa 1021, 47 N.W.2d 825 (1951).

49. *Hinton v. Robinson*, 51 Tenn. App. 1, 364 S.W.2d 97 (1963).

50. *Id.* at 8, 364 S.W.2d at 100.

51. *Watson v. Banks*, 154 Ark. 396, 243 S.W. 844 (1922).

52. *Field v. Koonce*, 178 Ark. 862, 12 S.W.2d 772 (1929); *Nichols v. Clement Mortgage Co.*, 112 Okla. 155, 241 P. 167 (1925).

conclusive presumption of contractual incapacity accompanying the appointment of a guardian. This presumption continues until the person is adjudged competent in a subsequent adjudication⁵³ notwithstanding the fact that the contract was made during a lucid interval,⁵⁴ or that the ward was in fact competent.⁵⁵ These presumptions, however, should logically be applied only if the guardianship proceeding requires a finding of incapacity and there has been no subsequent change in the capacity of the ward. Thus, the courts have applied these presumptions only when the guardianship is an active one. The rules have no application when there is proof that the incompetency has ceased and that the guardianship, although not terminated, has been abandoned.⁵⁶

Many courts, admitting that the guardianship is conclusive of incompetence in ordinary business transactions, have avoided the statutory rule of voidness by using the argument that the act in question was not an ordinary business transaction. Contracts which are personal in nature are not considered ordinary business transactions and have been held to fall outside the statutory rule if the ward is competent to perform the act in question⁵⁷ and the contract does not immediately affect the estate.⁵⁸ On the basis of this reasoning wards have been able to acquire a new domicile,⁵⁹ enter a mar-

53. *See* National Life Ins. Co. v. Jayne, 132 F.2d 358 (10th Cir. 1942), *cert. denied*, 318 U.S. 761 (1943); Hellman Commercial Trust & Sav. Bank v. Alden, 206 Cal. 592, 275 P. 794 (1929). *But see* Rodgers v. Rodgers, 56 Kan. 483, 487, 43 P. 779, 781 (1895), in which it was held that "An adjudication of restoration by the probate court is not indispensable, but the presumption of continued insanity may be overcome by other evidence."

54. *Acacia Mut. Life Ins. Co. v. Jago*, 280 Mich. 360, 273 N.W. 599 (1937); *Coleman v. Farrar*, 112 Mo. 54, 20 S.W. 441 (1892).

55. *Topeka Water Supply Co. v. Root*, 56 Kan. 187, 42 P. 715 (1895); *Gibson v. Soper*, 72 Mass. (6 Gray) 279 (1856); *Moore v. Coleman*, 128 W. Va. 223, 36 S.E.2d 593 (1946).

56. *Field v. Koonce*, 178 Ark. 862, 12 S.W.2d 772 (1929); *Gibson v. Soper*, 72 Mass. (6 Gray) 279 (1856); *Thorpe v. Hanscom*, 64 Minn. 201, 66 N.W. 1 (1896); *Southern Tier Masonic Relief Ass'n v. Laudenbach*, 5 N.Y.S. 901 (Sup. Ct. 1889); *Nichols v. Clement Mortgage Co.*, 112 Okla. 155, 241 P. 167 (1925). *Contra*, *Kiehne v. Wessell*, 53 Mo. App. 667 (1893); *see* *Redden v. Baker*, 86 Ind. 191 (1882). It would appear that a guardian cannot give a blanket authorization to his ward to transact business as though he were competent, such authorization amounting to an abandonment. *Coleman v. Farrar*, 112 Mo. 54, 20 S.W. 441 (1892).

57. *Concord v. Rumney*, 45 N.H. 423 (1864); *see* Green, *Judicial Tests of Mental Incompetency*, 6 Mo. L. Rev. 141 (1941).

58. *Johnson v. Johnson*, 214 Minn. 462, 8 N.W.2d 620 (1943); *In re Bean's Estate*, 159 Wis. 67, 149 N.W. 745 (1914).

59. *Groseclose v. Rice*, 366 P.2d 465 (Okla. 1961). The statute provided that the ward could not change residence within the state without the guardian's approval, but the court held that the statute was inapplicable when the ward moved to a different state.

riage,⁶⁰ and make a valid will.⁶¹ A ward has been held capable of changing the beneficiary of his life insurance policy, because this was not a contractual act but more like the making of a will.⁶² All of these acts have been enforced in spite of contrary statutory language⁶³ and the fact that most of these acts are consensual and may ultimately affect the estate of the ward.

2. *Voidable Rule*

Some courts have held,⁶⁴ and some statutes provide,⁶⁵ that an adjudication of incompetency and appointment of a guardian is only prima facie evidence of the ward's incapacity to enter into a subsequent contract. It raises merely a rebuttable presumption to this effect.⁶⁶ Thus, in determining enforceability, the trier of fact considers both the existence and remoteness of such an adjudication, as well as all the other evidence in the case.⁶⁷ Even if incompetency is established, it renders the contract merely voidable⁶⁸ and, hence, subject to ratification by the guardian.⁶⁹ The theory which the courts have relied on in adopting this position is that the adjudication is only conclusive as of the time it is rendered and the parties can show that at a later time the contractual capacity of the ward has been restored.⁷⁰ "Theoretically this position may be sound since mental disorder, like any other illness, may have its ups and downs and may have disappeared entirely before the guardianship was terminated."⁷¹

60. *Payne v. Burdette*, 84 Mo. App. 332 (1900); *Banker v. Banker*, 63 N.Y. 409 (1875); *Weinberg v. Weinberg*, 255 App. Div. 366, 8 N.Y.S.2d 341 (1938); *Roether v. Roether*, 180 Wis. 24, 191 N.W. 576 (1923); see Annot., 28 A.L.R. 631 (1924).

61. *In re Bean's Estate*, 159 Wis. 67, 149 N.W. 745 (1914). *Contra*, *Sims v. Sims*, 121 N.C. 297, 28 S.E. 407 (1897). For a full discussion of the test of testamentary capacity, see Annot., 89 A.L.R.2d 1114 (1963).

62. *New York Life Ins. Co. v. Schlieper*, 284 Ill. App. 411, 2 N.E.2d 169 (1936).

63. *Groseclose v. Rice*, 366 P.2d 465 (Okla. 1961) (change in domicile); *Roether v. Roether*, 180 Wis. 24, 191 N.W. 576 (1923) (marriage); *In re Bean's Estate*, 159 Wis. 67, 149 N.W. 745 (1914) (will).

64. See, e.g., *Field v. Lucas*, 21 Ga. 447 (1857); *Turpin's Adm'r v. Stringer*, 228 Ky. 32, 14 S.W.2d 189 (1929); *Clark v. Trail*, 58 Ky. (1 Met.) 35 (1858).

65. See ORE. REV. STAT. § 126.280 (1967); TENN. CODE ANN. § 34.1014 (Supp. 1967). There is some question, however, as to the Tennessee statute, this section as yet not having been interpreted by the courts. Compare Note, *Mental Illness and the Law of Contracts*, 57 MICH. L. REV. 1020, 1083 (1959) (voidable), with Note, *Mental Illness and Contract Law*, 29 TENN. L. REV. 274, 277 (1962) (void).

66. *Deposit Guar. Bank & Trust Co. v. United States*, 48 F. Supp. 369 (D. Miss. 1943).

67. See *Lindberg v. Mutual Nat'l Bank*, 318 Ill. App. 195, 47 N.E.2d 551 (1943).

68. *Mason v. Graves*, 167 Ark. 678, 265 S.W. 667 (1924).

69. *Eagle v. Peterson*, 136 Ark. 72, 206 S.W. 55 (1918).

70. See *id.*; *Davenport v. Jenkins' Comm.*, 214 Ky. 716, 283 S.W. 1044 (1926).

71. *Green*, *supra* note 40, at 579.

III. CRITIQUE

A. *General Criticism*

Strict application of the rules accepted in most jurisdictions—that all contracts entered into by an individual for whom a guardian has been appointed are void, and that the guardianship proceedings are constructive notice of the ward's contractual incapacity—would in many situations result in obvious unfairness. The void rule and the constructive notice aspect of guardianship cases are unfair for several reasons. First, when a ward's incapacity is due to mental illness, he may lack contractual capacity only during an acute episode.⁷² Second, if a person does lack contractual capacity at the time of appointment, his condition may improve with the passage of time.⁷³ Third, even if a person lacks contractual capacity, his behavior may be "appropriate" and thus a reasonable second party would not suspect lack of competence.⁷⁴ The unfairness is particularly obvious when the other party entered into the transaction in good faith with no actual notice of the ward's incapacity or when the enforcement of the transaction would in no significant way diminish the estate. The cases suggest that the courts, aware of the unfairness in such results, frequently struggle to avoid strict application of the rules, often with strained results.⁷⁵ The problem could be greatly alleviated by revision of several aspects of guardianship law.

Many of the problems arise because guardianship is used for a variety of purposes, some of which bear no or only minimal relationship to the capacity of the ward to enter into legal transactions. In some of these situations the use of guardianship seems clearly inappropriate. Thus, the plight of a person who is only physically disabled should be handled by some process other than guardianship. Most appropriate, perhaps, would be a proceeding whereby a court, concluding that a prospective ward was not incapable of making decisions as to the use of his property but was in danger of losing his estate because of physical inability to manage it, could appoint an "agent."⁷⁶ Unlike a guardian, the agent would not substitute his

72. Note, *Mental Illness and the Law of Contracts*, 57 MICH. L. REV. 1020, 1083-88 (1959).

73. Green, *supra* note 40, at 579.

74. See LINDMAN, at 239-51; R. WHITE, *THE ABNORMAL PERSONALITY* 496 (1964); Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944).

75. See text accompanying notes 42-63 *supra*.

76. Note, *Guardianship in the Planned Estate*, 45 IOWA L. REV. 360, 367 (1960). These suggestions are accepted in a comment to the Model Probate Code. The comment states that "no matter how far a person may be incapacitated physically he can manage his property and care for himself by an agent or servants if his mind is unimpaired. If so he does not need a guardian." MODEL PROBATE CODE § 196, Comment (1946).

judgment for that of the ward in the management of the ward's property; rather, his duty would be to perform the physical acts required for management of the estate in accordance with the wishes of the ward. Obviously, the appointment of such an agent, unrelated to the ward's mental capacity to enter into legal transactions, should in no way affect the enforceability of transactions into which the ward himself enters.

Once the problem of the physically disabled is met, the determination of for whom a guardian should be appointed becomes difficult. Most troublesome are spendthrifts, alcoholics, and drug addicts. It seems likely that the decision to deprive such individuals of control over their property is based partly on a belief that their behavior indicates a mental condition which impairs their judgment.⁷⁷ It may be true, however, in these types of cases, that guardianship is also a method of controlling a type of conduct deemed socially undesirable without regard to the individual's mental condition.⁷⁸ For this reason, it is suggested that persons possessing these disorders should not be grouped with the mentally ill and deficient for purposes of guardianship.⁷⁹ An agency arrangement, with the agent subject to the whim of a person possessing these disorders, would obviously not present a viable solution to the problems presented in these types of cases. Probably the most satisfactory solution is to consider such illnesses as an indication of contractual incapacity and to treat the contracts as voidable in accordance with the principles to be discussed for mental incompetents.

The most appropriate way to attack the problems inherent in guardianship is to carefully redefine the criteria for the appointment of a guardian and the effects of such an appointment. The objective is to balance the social interests which justify depriving an individual of control of his property against the unfairness to third parties of denying the enforceability of contracts with those whom society has determined should be deprived of control over their estates.

B. *Suggested Criteria*

Statutes should require that prior to the appointment of a guardian, the court find that the ward fits into one of two categories. The first category would require that the prospective ward be shown to be unlikely to manage his estate in a manner reasonably calculated to assure continued ability to support himself and anyone for whose support he is legally responsible. This would be independent of mental capacity to contract. The category would include not only those whose anticipated dissipation would be caused

77. *Anderson v. State*, 54 Ariz. 387, 96 P.2d 281 (1939).

78. *Id.*

79. See LINDMAN, at 220.

by mental incapacity, but it would also encompass the "spendthrift" whose actions may be unrelated to any abnormal mental condition. Since the social interest protected by this category of wardship is preventing individuals from becoming social charges, there is no reason to restrict its use to those cases where the individual is suffering from a demonstrable mental incapacity.

The second category would be composed of those who fail to qualify in the first group, but who, by reason of lack of mental capacity, are likely to be taken unfair advantage of by others. The interest protected at the expense of the ward's freedom of action would be largely private: the right of those who will eventually receive the property through gift or inheritance to its preservation. To some extent, of course, social interests in discouraging unconscionable conduct of those who would take unfair advantage of an incompetent and in encouraging economically valuable use of resources are also vindicated. This category differs from the first in that it is the individual's mental incapacity that justifies state intervention—thus, the emphasis in its administration should be on a reliable determination of the prospective ward's capacity to contract.

C. *Suggested Change in Effect of Appointment*

1. *Constructive Notice*

Constructive notice is unfair in guardianship cases for several reasons. First, there is no way to make the status of the ward apparent to third persons. Second, present filing and publication requirements are inadequate and do little to alleviate the unfairness in guardianship cases. In over half the jurisdictions no filing whatsoever is required.⁸⁰ Even in jurisdictions in which filing and notice are required, such requirements are inadequate. For example, in one jurisdiction notice need only be given by posting in three public places.⁸¹ In addition, in most jurisdictions, filing is required only in that county or court in which the guardian has been appointed.⁸² In such jurisdictions, an innocent party who conscientiously attempts to ascertain whether a guardianship exists will have to make a complete investigation of the records of every county.⁸³

Several steps should be taken to improve the effectiveness of such techniques. Requiring newspaper publication of the adjudication of incom-

80. *Id.*

81. VT. STAT. ANN. tit. 14, § 2689 (1959).

82. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3704 (1953); KAN. GEN. STAT. ANN. § 59-2274 (1964); WIS. STAT. ANN. § 319.215 (Supp. 1967).

83. *See* Schultz v. Oldenberg, 202 Minn. 237, 277 N.W. 918 (1938).

petency along with a system of central registration⁸⁴ would reduce the difficulty of determining the ward's status. Of course, these suggestions do not present a substitute for actual notice. The substantive law should, therefore, make actual notice a determinative factor on the question of the enforceability of a ward's contract whenever this can be done without sacrificing important social interests.

2. *Validity of Contracts*

Since the two criteria suggested above for appointment of a guardian represent significantly different social interests, the effect of the appointment on subsequent contracts of the ward should depend to some extent upon in which category the ward has been placed.

Where the guardian has been appointed because the ward is within the first category, the most appropriate rule would be that the guardian has the right to avoid transactions of the ward. The purpose of the appointment is the protection of the social interest in preserving the estate, thereby preventing the person from becoming a public burden. A guardian would not have been appointed except upon a showing of specific danger to that social interest. Therefore, it would seem justifiable to permit the guardian to avoid contracts which he, in his discretion, believes are disadvantageous to the estate, despite occasional unfairness to persons who have, in good faith, entered into such transactions with the ward.

When the appointing court has found that the ward is within the second category, however, a different approach might well be taken. Here, the estate being large enough to account for the needs of the ward during his lifetime, the social interest being protected is of significantly less weight. While the proceeding will have established as a fact that the individual lacked contractual capacity at the time of appointment of a guardian, it is possible that the incapacity will not remain constant. The less important social interest plus the unreliability of the prior determination of incapacity should require that an individual who has in good faith, *i.e.*, without actual notice of the guardianship, contracted with the ward have the right to a *de novo* determination of the ward's contractual capacity at the time of the transaction and, if the ward was in fact competent, to enforcement of the contract.

If the court finds that the ward lacked contractual capacity at the time of the transaction, the guardian should be permitted to avoid the obligation

84. Only four jurisdictions have installed a system of central registration, and one of these pertains only to incompetents who have been hospitalized. Two other states have attempted to mitigate the problem of notice by requiring newspaper publication of the incompetency adjudication. LINDMAN, at 226.

if he can show that a reasonable man, with the information available to the ward, would not have entered into the transaction. The fact that the transaction subsequently proved disadvantageous would be evidence of, but not conclusive as to, whether the guardian could avoid it. Giving recognition to the good faith of the other party seems to require that the guardian at least establish that enforcement of the obligation would in some way endanger the interests on the basis of which the guardian was appointed.

If the court finds that the other party entered into the transaction in bad faith—if he had actual notice of the guardianship, for example—the guardian should be permitted to avoid the transaction without an inquiry into either contractual capacity or damage to the estate. The social interest in preventing individuals from dealing with a ward when they are aware of the guardian's existence would justify this result.

There is a danger, of course, that requiring *de novo* investigations will lead to a significant increase in litigation. This, together with the fact that if the substantive changes suggested above have been effectively implemented the original proceeding will have included a thorough investigation of the ward's capacity, seems to justify raising presumptions that the ward, if under active guardianship, lacks contractual capacity and that the transaction is void. By placing on the third party the burden of producing evidence of the ward's capacity and the transaction's fairness, frivolous litigation will be discouraged and there will be more assurance that the court asked to determine the issues will have before it sufficient evidence on which to base its decision.

Under most present statutes, the contract of a person for whom a guardian has been appointed is theoretically void, without regard to the good faith of the second party or to whether the contract is beneficial to the estate.⁸⁵ Because of the unfairness which would result from a literal application of the theoretical rule, however, courts have developed a number of exceptions. But the confusion caused by the lack of a theoretical basis for the general rule as well as the exceptions suggests that the entire statutory scheme could valuably be revised. If the approach suggested in this note were adopted, such factors as the ward's actual contractual capacity, the good faith of the party with whom the ward dealt, the effect of the contract on the estate, and the reason for the appointment of the guardian, would be properly considered in the determination of the enforceability of contracts of the ward. The results achieved would be equitable not only to the estate of the ward but also to innocent parties with whom the ward contracts.

85. See, e.g., *In re O'Donnell's Estate*, 85 Cal. App. 2d 1, 192 P.2d 94 (1948); *Evans v. York*, 195 S.W.2d 902 (Mo. 1946). *Contra*, *In re Nelson's Estate*, 329 Ill. App. 243, 67 N.E.2d 698 (1946). See also Virtue, *Restitution from the Mentally Infirm*, 26 N.Y.U.L. Rev. 132, 141-42 (1951).