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Guardian and Ward -- Estate Planning -- Gifts by Guardian from Estate of Incompetent Ward

Willis Padgett Whichard

mitting such evidence in criminal cases.[64] It hardly seems that courts are significantly hindered in their search for the truth by such rules. And, if exclusion is to continue to be the rule in criminal cases, there is little logic in not extending it to civil litigation as well.[65]

CHARLES B. ROBSON, JR.

Guardian and Ward—Estate Planning—Gifts by Guardian from Estate of Incompetent Ward

Petitioner in *In re Trusteeship of Kenan*,[1] as trustee of the person and estate of an incompetent ward, sought authority, pursuant to legislative enactments,[2] to make gifts from the ward's income;[3] to make gifts from the principal of the ward's estate;[4] and, with regard to an inter vivos trust created by the incompetent, to surrender a reserved right of revocation and to make charitable gifts of the income therefrom which had been reserved to the incompetent for her lifetime.[5] On the first appeal,[6] the lower court orders[7] granting the requested authority were reversed by the North Carolina Supreme Court on the ground that the lower court's finding that the incompetent, if competent and heeding sound advice, would make the gifts was not supported by the evidence. Petitioner, apparently having relied solely on the statutes in his initial pleadings, was given leave to obtain permission to amend his petitions to al-

[64] N.Y. CODE CRIM. PROC. § 813-a; N.Y. CONST. art. I, § 12. See People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406, *cert. denied*, 371 U.S. 877 (1962).

[65] With sponsorship of the Bar Association of the City of New York, a commission to review and make recommendations on all aspects of the antiquated New York divorce laws has been proposed to the 1965 New York Legislature. Editorial, N.Y. Times, Feb. 11, 1965, p. 38, col. 2. If such a commission is established, it would be well for it to consider as a part of its task the evidentiary implications of these laws as they are illustrated by the *Sackler* case.

[1] 261 N.C. 1, 134 S.E.2d 85 (1963); 262 N.C. 627, 138 S.E.2d 547 (1964).

[2] N.C. GEN. STAT. §§ 35-29.1 to -29.16 (Supp. 1963).

[3] See N.C. GEN. STAT. §§ 35-29.1 to -29.4 (Supp. 1963).

[4] See N.C. GEN. STAT. §§ 35-29.5 to -29.10 (Supp. 1963).

[5] See N.C. GEN. STAT. §§ 35-29.11 to -29.16 (Supp. 1963).

[6] *In re* Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1963).

[7] Three separate proceedings took place in the superior court—one relating to gifts from income, another to gifts from principal, and the last to surrendering the right to revoke the trust and the lifetime income interest. Thus, three orders were issued below, and the proceedings were consolidated for purposes of appeal.

lege that the authority he sought was something which the incompetent would do, if competent, and to offer evidence to establish the truth of his allegations. On the second appeal,[8] a divided supreme court found the evidence adequate to support the lower court's findings of fact that the incompetent would have made the gifts and affirmed the judgments granting the trustee authority to make them on her behalf.

The *Kenan* litigation involves the rule that the estate of an incompetent may, with the approval of the court having jurisdiction,[9] be applied for the benefit of those whom the incompetent probably would have aided if of sound mind. The rule apparently finds its first expression in the old leading English case of *Ex parte Whitbread*.[10] There, a niece of the incompetent petitioned for an allowance from the surplus income of the incompetent's estate. In considering the petition, Lord Eldon set forth the following directive which subsequent cases have pursued: "[T]he Court, looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for . . . [the applicant]."[11]

This doctrine does not apply, however, to the most frequent class of applications—those by persons to whom the incompetent owes a legal duty of support.[12] Thus allowances have been made for husbands,[13] wives,[14] and minor children[15] of incompetents, not on the

[8] *In re* Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

[9] In North Carolina jurisdiction over the affairs of incompetents is vested in the clerks of superior courts. N.C. GEN. STAT. § 33-1 (Supp. 1963).

[10] 2 Mer. 99, 35 Eng. Rep. 878 (Ch. 1816). A reporter's note to *Ex parte* Whitbread refers to the earlier case of *In re* Cotton, but this case is apparently unreported. See Thompson & Hale, *The Surplus Income of a Lunatic*, 8 HARV. L. REV. 472, 474 (1895).

[11] 2 Mer. at 102, 35 Eng. Rep. at 879.

[12] The allowance to provide support for dependents of the incompetent person does not involve the so-called doctrine of substitution of judgment. That doctrine is called into being, in those jurisdictions wherein it is recognized, when the court is asked to make an allowance out of the incompetent's estate to persons for whom he is not bound to provide. *In re* Beilstein, 145 Ohio St. 397, 404, 62 N.E.2d 205, 208 (1945) (concurring opinion).

[13] *In re* DeNisson, 197 Wash. 265, 84 P.2d 1024 (1938) (husband indigent; family expenses chargeable against husband or wife); Edwards v. Abrey, 2 Phill. Ch. 37, 41 Eng. Rep. 855 (1846) (surplus after maintaining incompetent wife to be paid to husband).

[14] Booth v. Cottingham, 126 Ind. 431, 26 N.E. 84 (1891); Hallett v. Hallett, 8 Ind. App. 305, 34 N.E. 740 (1893); Tiffany v. Worthington, 96 Iowa 560, 65 N.W. 817 (1896); Thomasson v. Thomasson, 310 Ky. 234,

theory that the incompetent would have provided for them if sane, but because his disability does not alter the incompetent's legal duty to support his family, if able.[16] Where the applicant is an adult child, however, rather rigid adherence to requiring a finding that the incompetent himself would have made the gift has prevailed.[17] Exceptions to this requirement have been made where the adult child was incapacitated and unable to provide for himself.[18] In cases involving adopted children[19] and stepchildren[20] a finding that the incompetent would have made the gift has likewise been required, though courts have allowed grants for illegitimate children without specifying that the requirement be met.[21]

Allowances from the incompetent's estate have not been limited to members of his immediate family, however, and it is in making

219 S.W.2d 957 (1949); Pearl v. McDowell, 26 Ky. 658 (1830); *In re* Leech, 45 La. Ann. 194, 12 So. 126 (1893); *In re* Stewart, 22 Atl. 122 (N.J. Eq. 1891); *In re* Wilder, 174 Misc. 244, 20 N.Y.S.2d 69 (Sup. Ct. 1940); *In re* Taylor, 9 Paige 611 (N.Y. 1842); Snowdon v. Scranton-Lackawanna Trust Co., 46 Pa. D. & C. 418 (C.P. 1942) (wife's funeral expenses); *In re* Miegocki, 34 Luzerne Leg. Reg. Rep. 257 (Pa. C.P. 1940).

[15] Goskins v. Security-First Nat'l Bank, 30 Cal. App. 2d 409, 86 P.2d 681 (1939); Brackett v. Glaze, 72 Ga. App. 314, 33 S.E.2d 733 (1945); Hallett v. Hallett, *supra* note 14; *In re* Leech, *supra* note 14; Marsh v. Scott, 63 A.2d 275 (N.J. Super. 1949); *In re* Wilder, *supra* note 14; Cartwright v. Juvenile Court, 172 Tenn. 626, 113 S.W.2d 754 (1938); Foster v. Marchant, 1 Vern. 263, 23 Eng. Rep. 457 (Ch. 1684).

[16] Where the incompetent father's entire estate consisted of a railroad relief pension, all of which was required for the father's needs, the court exercised its discretion to deny an allowance for the support and education of the father's minor child. *In re* Henderson, 45 Pa. D. & C. 359 (C.P. 1942). See also Dutch v. Marvin, 72 Iowa 663, 34 N.W. 465 (1887); *In re* Bell, 56 N.Y.S.2d 257 (Sup. Ct. 1945); Sedar's Estate, 29 Pa. D. & C. 680 (C.P. 1937); *Ex parte* Weinrich, 20 Pa. Dist. 1070 (C.P. 1910).

[17] *In re* Schwartz, 27 Del. Ch. 223, 34 A.2d 275 (Ch. 1943); Citizens State Bank v. Shanklin, 174 Mo. App. 639, 161 S.W. 341 (1913); *In re* Beilstein, 145 Ohio St. 397, 62 N.E.2d 205 (1945); *In re* Hare, 26 Pa. D. & C. 553 (C.P. 1935); Farmer v. Farmer, 78 Tenn. 309 (1882) (requisite intent found).

[18] *In re* Hall, 19 Ill. App. 295 (1885); Sheneman v. Manring, 152 Kan. 780, 107 P.2d 741 (1940); Paglia's Estate, 25 Pa. D. & C. 316 (C.P. 1936) (burial expenses of tubercular daughter paid from incompetent mother's estate). It can be argued that this is not an exception to the rule at all, but rather that these are regarded as circumstances under which the incompetent would make the allowance.

[19] *In re* Heeney, 2 Barb. Ch. 326 (N.Y. 1847).

[20] *In re* Willoughby, 11 Paige 257 (N.Y. Ch. 1844).

[21] Halsey's Appeal, 120 Pa. 209, 13 Atl. 934 (1888); *Ex parte* Haycock, 5 Russ. Ch. 154, 38 Eng. Rep. 985 (1828). "What if this family was illegitimate? The children, at least, were those of Siegfried, and could not be turned out to starve just because they were bastards." Halsey's Appeal, *supra* at 214, 13 Atl. at 936.

grants to others that the *Whitbread* doctrine is most often applied.[22] Courts have made allowances to the incompetent's parents,[23] grandchildren,[24] brothers and sisters,[25] brothers and sisters of the half blood,[26] nieces and nephews,[27] and cousins.[28] While these rela-

[22] The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a farther distance than grand-children—to brothers and other collateral kindred; and if we get to the principle, we find that it is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.

Ex parte Whitbread, 2 Mer. 99, 103, 35 Eng. Rep. 878, 879 (Ch. 1816). Where the *Whitbread* doctrine has been rejected, it has generally been on the ground that the state statute governing the powers of the court over the property of an incompetent was restrictive and did not permit a general application of the rule. See, *e.g.*, Kelly v. Scott, 215 Md. 530, 137 A.2d 704 (1957); Binney v. Rhode Island Hosp. Trust Co., 43 R.I. 222, 110 Atl. 615 (1920); Lewis v. Moody, 149 Tenn. 687, 261 S.W. 673 (1923).

[23] Gamble v. Leva, 212 Ala. 155, 102 So. 120 (1924); *Ex parte* Phillips, 130 Miss. 682, 94 So. 840 (1923); State *ex rel.* Kemp v. Arnold, 234 Mo. App. 154, 113 S.W.2d 143 (1938); O'Connor's Estate, 6 Pa. D. & C. 789 (C. P. 1925); *In re* Bala, 36 Luzerne Leg. Reg. Rep. 268 (Pa. C.P. 1941) (for mother's funeral); Seley v. Howell, 115 Tex. 583, 285 S.W. 815 (1926); *In re* Strozyk, 156 Wash. 233, 286 Pac. 646 (1930) (for expenses while visiting incompetent). Allowances for parents were denied in Lewis v. Moody, 149 Tenn. 687, 261 S.W. 673 (1923) (not within statute); *In re* Heck, 225 Wis. 636, 275 N.W. 520 (1937) (not within statute); and *In re* Booth, 22 L.T.R. 249 (Eq. 1854) (no allowance for past maintenance). One English case granted an allowance for a monument which the lunatic had contracted to have erected to his grandmother. *In re* Dyce Sombre, 10 L.T.R. 362 (Eq. 1848).

[24] *In re* Schley, 107 N.Y.S.2d 884 (Sup. Ct. 1951).

[25] Farwell v. Commissioner, 38 F.2d 791 (2d Cir. 1930); *In re* Buckley's Estate, 330 Mich. 102, 47 N.W.2d 33 (1951); *In re* Carson, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962); *In re* Battin, 171 Misc. 145, 11 N.Y.S.2d 891 (Sup. Ct. 1939); *In re* Calasantra, 154 Misc. 493, 278 N.Y. Supp. 263 (Chautauqua County Ct. 1935); *In re* Gilbert, 3 Abb. N. Cas. 222 (N.Y. 1876); *In re* Heeney, 2 Barb. Ch. 326 (N.Y. 1847). Allowances for brothers or sisters were denied in Stephens v. Marshall, 23 Hun 641 (N.Y. Sup. Ct. 1881); Monds v. Dugger, 144 S.W.2d 761 (Tenn. 1940); and *In re* Clark, 2 Phill. Ch. 292, 41 Eng. Rep. 951 (Ch. 1847).

> So, where a large property devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former; upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars.

Ex parte Whitbread, 2 Mer. 99, 102, 35 Eng. Rep. 878, 879 (Ch. 1816).

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

[27] *In re* Brice's Guardianship, 233 Iowa 183, 8 N.W.2d 576 (1943); *In re*

tives have been the most frequent beneficiaries, they have not been the only ones. Grants have been made to elderly persons whom the incompetent formerly had supported,[29] to a retired servant,[30] and to a former paramour.[31] And, though sometimes limited to those which the incompetent had been in the habit of making,[32] charitable gifts have also been allowed.[33]

While the general posture of the case law is undoubtedly to the effect that the court will do for the incompetent what it finds the incompetent himself would have done,[34] the rule probably should have been that the court will do what it would have been wise and prudent for the incompetent to have done.[35] At first blush the language of *Ex parte Whitbread* seems to indicate that the former is the rule, for the case says the court looks at "what it is likely the Lunatic himself would do, if he were in a capacity to act . . . ."[36] But closer scrutiny indicates otherwise, for it also

Ginsberg, 267 App. Div. 995, 48 N.Y.S.2d 240 (1944); *In re* Fleming, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940); *In re* Farmers' Loan & Trust Co., *supra* note 26; Hambleton's Appeal, 102 Pa. 50 (1883); *In re* Creagh, 1 Drury & Wal. 323 (1888); *In re* Sparrow, L.R. 20 Ch. 320 (1882); *In re* Blair, 1 Myl. & C. 300, 40 Eng. Rep. 390 (Ch. 1836). An allowance was denied when the incompetent's nephew wanted it for the purpose of augmenting an idle and luxurious life. *In re* Kernochan, 84 Misc. 565, 146 N.Y. Supp. 1026 (Sup. Ct. 1914). See also *In re* Johnson, 111 N.J. Eq. 268, 162 Atl. 96 (1932); Lewis v. Moody, 149 Tenn. 687, 261 S.W. 673 (1923).

[28] *In re* Flagler, 248 N.Y. 415, 162 N.E. 471 (1928); *In re* Darling, 39 Ch. D. 208 (1888); *In re* Frost, L.R. 5 Ch. 699 (1870). Where the incompetent had not even known of the existence of a cousin in distressing circumstances, and no grounds existed for inferring an intention to aid him, the application was denied. *In re* Evans, 21 Ch. D. 297 (1882). See also Fixico v. Ming, 176 Okla. 358, 55 P.2d 1027 (1936).

[29] *In re* Heeney, 2 Barb. Ch. 326 (N.Y. 1847).

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

[31] *In re* Parry, 7 L.T.R. 77 (Eq. 1846).

[32] *In re* Heeney, 2 Barb. Ch. 326 (N.Y. 1847).

[33] See *In re* Hall's Guardianship, 31 Cal. 2d 157, 187 P.2d 396 (1947); *In re* Brice's Guardianship, 233 Iowa 183, 8 N.W.2d 576 (1943); Citizens State Bank v. Shanklin, 174 Mo. App. 639, 161 S.W. 341 (1913); *In re* Heeney, *supra* note 32; *In re* Strickland, L.R. 6 Ch. 226 (1871).

[34] See, *e.g.*, *In re* Brice's Guardianship, *supra* note 33; Ford v. Security Nat'l Bank, 249 N.C. 141, 105 S.E.2d 421 (1958); *In re* the Earl of Carysfort, Craig & Ph. 76, 41 Eng. Rep. 418 (Ch. 1840). "The controlling principle is that the court will act with reference to the incompetent and for his benefit as he would probably have acted if sane." *In re* Brice's Guardianship, *supra* note 33 at 189, 8 N.W.2d at 580.

[35] See Thompson & Hale, *supra* note 10, at 473-74, 479-80; Note, 9 VILL. L. REV. 522 (1964).

[36] 2 Mer. at 102, 35 Eng. Rep. at 879.

says that "what . . . would be beneficial to . . . [the lunatic] should be done"[37] and that the court should apply the property as it thinks "it would have been wise and prudent in the Lunatic himself to apply it."[38] To allow the guardian to do for the lunatic what would be wise for the lunatic himself to do is certainly more consonant with the universal duty of the guardian to manage the ward's estate prudently.[39] Thus, it seems that in applying the *Whitbread* doctrine the courts often have imposed a burden upon the guardian which that opinion never envisaged[40] and one which may conflict with the normal obligations of guardianship.

Although the *Whitbread* doctrine was recognized in North Carolina in an early case,[41] the court there indicated a disinclination to follow it. A rule that the dependents of an incompetent would be provided for before creditors or others could share in his estate became well established in North Carolina,[42] but the court indicated that it would not extend the bounty to collateral relations and married children of the lunatic.[43] Statutes[44] passed in 1854, however, in effect provided for a limited application of the *Whitbread* doctrine by allowing advancements from surplus income to be made to designated relatives of the incompetent. In a recent case,[45] where the applicants were adult children of the incompetent whom the court could not have aided under the old North Carolina view,[46] the court expressed its interpretation of the statutes in language reminiscent of *Whitbread:* "If their father were mentally

[37] *Ibid.*

[38] *Id.* at 103, 35 Eng. Rep. at 879.

[39] See Fratcher, *Powers and Duties of Guardians of Property,* 45 IOWA L. REV. 264 (1960). "A guardian of property has power and, ordinarily, a duty to collect and take possession of the assets of his ward including land and personal property, manage them prudently, and protect them from deterioration or loss." *Id.* at 292, 294 (citing statutes and cases from numerous jurisdictions).

[40] For a more thorough critique, see Note, 9 VILL. L. REV. 522 (1964).

[41] Brooks v. Brooks, 25 N.C. 389 (1843).

[42] Read v. Turner, 200 N.C. 773, 158 S.E. 475 (1931); Lemley v. Ellis, 146 N.C. 221, 59 S.E. 683 (1907); *In re* Hybart, 119 N.C. 359, 25 S.E. 963 (1896); Adams v. Thomas, 81 N.C. 296 (1879); *In re* Latham, 39 N.C. 231 (1846).

[43] Brooks v. Brooks, 25 N.C. 389, 391 (1843).

[44] N.C. GEN. STAT. §§ 35-20 to -29 (1950).

[45] Ford v. Security Nat'l Bank, 249 N.C. 141, 105 S.E.2d 421 (1958).

[46] "[O]ur courts may not be authorized to extend the allowance . . . to advancements to married children, as is done in England." Brooks v. Brooks, 25 N.C. 389, 391 (1843).

competent, would he not aid them? If so, the court has the authority to use his money for that purpose."[47]

The *Kenan* litigation represents a response to further statutory developments in North Carolina, designed to authorize charitable gifts for estate planning purposes rather than to aid individual beneficiaries. Statutes passed by the 1963 General Assembly specifically authorized the guardian or trustee of an incompetent, under specified circumstances and with the approval of the resident judge of the superior court, to make gifts from income[48] or principal[49] for religious, charitable, educational, and other purposes, and to surrender the right to revoke a trust created by the incompetent and make a gift of the reserved life estate.[50] Although the statutes do not contain the old requirement that the court, before authorizing the gifts, must find that the incompetent, if sane, would have made them, on the first appeal of the instant case[51] the supreme court insisted that this requirement must be met.[52] The majority thought that to authorize the gifts merely because the guardian and the court believed they should be made, though it was not what the lunatic had done or would have done, would amount to a taking of property in derogation of the lunatic's constitutional rights.[53] A pungent dissent argued that the only taking was of the right of the trustee to do with the estate what the General Assembly had authorized him to do.[54]

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[47] Ford v. Security Nat'l Bank, 249 N.C. 141, 144, 105 S.E.2d 421, 424 (1958).

[48] N.C. GEN. STAT. §§ 35-29.1 to -29.4 (Supp. 1963).

[49] N.C. GEN. STAT. §§ 35-29.5 to -29.10 (Supp. 1963).

[50] N.C. GEN. STAT. §§ 35-29.11 to -29.16 (Supp. 1963).

[51] *In re* Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1963).

[52] "A court may authorize a fiduciary to make a gift of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, at a hearing of which interested parties have notice, that the lunatic, if then of sound mind, would make the gift." *Id.* at 9, 134 S.E.2d at 91.

[53] *Id.* at 9, 134 S.E.2d at 91.

[54] The plantive language of Justice Higgins's closing paragraphs merits quotation:

> The trustee seeks to follow . . . sound business practices, but the Court says this is taking private property. To my single-track mind the only thing taken is the right of the trustee, acting for his beneficiary, to do with this vast estate what the General Assembly of North Carolina authorized him to do. The relatives in this public spirited family who are *sui juris* appear to have joined in the trustee's requests. The authority to follow the plan has been authorized by 170 of the people's representatives in session on Halifax street. It is now set aside by a majority of the seven on Morgan.
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> This decision will haunt us. I vote to affirm.

Id. at 17, 134 S.E.2d at 97.

Because the court required a finding as to what the incompetent would have done, the entire thrust of the case on remand[55] was toward establishing that the incompetent, if competent, would have made the gifts. Confronted with persuasive evidence presented in the trial court on both sides, the supreme court again divided. A majority found sufficient basis upon which to affirm the order granting the petition in a showing that: (1) it was wise and prudent to make the gifts; (2) the action was consistent with the trustee's powers and duties under the North Carolina statutes; (3) the natural objects of the incompetent's bounty would recommend to her that she take the action; (4) her trustee would explain the facts to her, if she were competent, and recommend that she make the gifts; (5) others of her kin would so recommend; (6) several tax and estate planning experts would advise her to take the action; and (7) her brother, whose advice she had always taken on business matters, would have advised her to make the gifts, and he believed she would have followed his advice. Equally convincing, however, are the factors compelling the dissent, viz.: (1) the incompetent's charitable gifts for the eight years prior to declaration of incompetency had amounted to only 8,160 dollars annually; (2) the largest single donation the incompetent had ever made was 25,000 dollars, though she was often solicited for much larger contributions; (3) there was no evidence she had ever considered donating to several of the institutions to which gifts were now recommended; (4) the incompetent had provided for certain charities in her will, thus showing those causes to which she wished to contribute and the amounts; (5) her will provided that anyone contesting or trying to change its provisions in any way would forfeit his interest thereunder; and (6) the incompetent had taken no steps toward making large charitable gifts, although she was, in the dissenting judge's opinion, fully aware of the impact of taxes, and also aware that donations to charity would mean an actual outlay of only a small portion of the gifts.[56]

[55] See the report of the second appeal, *In re* Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

[56] The dissenting judge seems to base this statement on the notion that a "financial expert and long-time friend" had informed her regarding these matters. The testimony of this "expert" indicates otherwise. See Record, vol. 1, pp. 237-47, especially pp. 239-42, *In re* Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964). The following statement seems emphatically to discredit such a notion:

I did not advise Mrs. Kenan in matters relating to estate planning,

When the evidence in *Kenan* that the incompetent would have made the gifts is contrasted to that in *In re duPont,*[57] a recent case in point, its tenuousness is accentuated. In *duPont,* the proposed distributees were also the takers under the incompetent's will,[58] and the gifts thus would in no way alter the incompetent's testamentary scheme apart from acceleration.[59] The incompetent was a businessman of great experience and responsibility, was sophisticated in the ways of taxation, and had previously made large gifts to members of his family.[60] Even more important, the incompetent had stated by letter after executing his will his intention to dispose of his property by lifetime gifts so as to reduce his estate to a stated amount.[61] Other documents indicated his concern for the most advantageous distribution and his apparent knowledge of the tax considerations involved.[62] Thus, there were not only acts and circumstances meriting inference of an intent to make the gifts, but also the incompetent's written declaration of his express resolution so to do.[63]

Seldom indeed, however, will there be evidence so favorable as that in *duPont,* and to make allowances on evidence no greater than that in *Kenan* is not unprecedented. In *City Bank Farmers Trust Co. v. McGowan*[64] substantial gifts had been allowed to a daughter,

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nor did I advise her in matters relating to the disposition of her property by Will or by gift. Estate planning was not a part of my duties, and I have never held myself out to be an estate planner to Mrs. Kenan or to anyone else.

Record, vol. 1, p. 240.

[57] 194 A.2d 309 (Del. Ch. 1963); 52 CALIF. L. REV. 192 (1964); 24 MD. L. REV. 332 (1964); 62 MICH. L. REV. 1471 (1964); 112 U. PA. L. REV. 1083 (1964).

[58] 194 A.2d at 310.

[59] In *Kenan,* by contrast, the vast majority of the proffered distributees were completely omitted from the terms of the will.

[60] 194 A.2d at 311.

[61] *Ibid.*

[62] *Ibid.*

[63] The only unfavorable circumstance was that the incompetent never executed his proposed plan. The court thought it a reasonable inference, however, that he deferred the making of the gifts because of the DuPont-General Motors anti-trust action which was pending from 1949 to 1962. To have made the gifts might have been to lend support to the government's contention that the incompetent and others had pursued a course of conduct designed to keep control of the DuPont Company in the family. *Id.* at 312.

[64] 43 F. Supp. 790 (W.D.N.Y. 1942), *aff'd,* 142 F.2d 599 (2d Cir. 1944), *modified,* 323 U.S. 594 (1945). See also City Bank Farmers Trust Co. v. Hoey, 23 F. Supp. 831 (S.D.N.Y. 1938). The cited cases are tax cases arising from New York Supreme Court proceedings of January 14, 1927,

to grandchildren, and to collateral heirs of the incompetent. Aside from an annual pittance to one, the incompetent had never made nor indicated any intention to make sizable allowances for the benefit of the collateral relatives or the grandchildren.[65] While she had made annual allowances to her daughters, the gifts authorized by the court far exceeded any the incompetent had ever made.[66] No need sufficient to prompt an altered pattern of giving by the incompetent was shown on behalf of any of the applicants.[67] In short, so deficient were data indicating that the incompetent would have made the gifts, that Judge Learned Hand concluded that the incompetent would have so acted only with the prospect of imminent incompetency before her, for

> the judges had *no evidence whatever* from her past conduct for supposing that . . . she would have given away every year to her daughter, her grandchildren and her brother and sisters, more than $160,000 out of the $250,000 which remained to her after paying her taxes and expenses. The allowances she had theretofore made did not remotely approach such figures.[68]

In *Kenan,* as in the *duPont* and *City Bank Farmers Trust Co.* cases, the object of making the gifts was not to meet any needs of the applicants, but solely to effectuate a sound estate plan. Reduction of the incompetent's taxable estate and a concomitant increase in the amount available for the ultimate distributees was the common purpose. While the greatest savings ensue if the gifts escape the estate tax and are taxed solely under the usually lower rates of the gift tax,[69] substantial savings will nonetheless result even if the gifts should be held to have been made in contemplation of death[70] and their amount restored to the gross estate for estate tax purposes. In such a case the gift tax paid is available as a credit against the estate tax,[71] and more importantly, the amount of

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and June 3, 1932, involving gifts from the estate of an incompetent ward. The facts before the state court are adequately set forth in the reports of the tax cases, and the discussion here is based thereon.

[65] 43 F. Supp. at 794.

[66] *Ibid.*

[67] *Ibid.*

[68] City Bank Farmers Trust Co. v. McGowan, 142 F.2d 599, 601 (1944). (Emphasis added.)

[69] *Cf.* INT. REV. CODE OF 1954, §§ 2011, 2502.

[70] INT. REV. CODE OF 1954, § 2035.

[71] INT. REV. CODE OF 1954, § 2012.

the gift tax is not itself restored to the gross estate.[72] As a result, the making of the gifts would occasion a minimal savings of sixteen million dollars in *duPont*[73] and over four and one half million dollars in the proceeding regarding the trust in *Kenan*.[74]

While the holding on the second appeal in *Kenan* made possible execution of the proffered estate plan, the first appeal leaves the law of North Carolina in an untenable state. To persist in requiring a finding that the incompetent himself would have made the gifts is to deny that sound estate planning is in itself sufficient reason to authorize the guardian to act.[75] Such tenacity seems inconsistent with the original requirements of *Ex parte Whitbread*[76] and defies sound policy and reasoning. The guardian is charged with managing the assets of his ward prudently and protecting them from deterioration and loss.[77] By refusing to allow him to do for the ward what any reasonable man of property would do for himself, *i.e.*, plan his estate, the court frustrates the guardian's attempt to perform this duty. Indeed, absent the finding that the ward would have so acted, it positively insures his failure.

Moreover, in many cases, if not most, it will be quite impossible for the court to divine just what the incompetent, when confronted with extant tax laws, would do. The question thus becomes largely one of policy, of deciding whether or not to do for the incompetent

[72] See Record, vol. 1, p. 317, *In re* Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

[73] 194 A.2d at 311.

[74] See Brief for Appellee, pp. 36-38, *In re* Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964); Record, vol. 2, pp. 314-17.

[75] A Pennsylvania court has held that tax avoidance is not a sufficient motive to justify distributing the incompetent's assets before his death. Bullock Estate, 10 Pa. D. & C.2d 682 (Orphans' Ct. 1957). But a New York court has held that to make distributions for the purpose of saving taxes and administration expenses is within the broad equity powers of the court. *In re* Carson, 241 N.Y.S.2d 288 (Sup. Ct. 1962).

> Such conclusion is fortified not alone by the savings which can be effected but by the further consideration that to do otherwise would result in a loss to the two principal objects of the decedent's bounty and a gain only to the executors in the form of increased commissions and the respective federal and state governments in the form of increased taxes.
>
> To do otherwise would lead to a result increasing estate costs to a point hardly consistent with our modern concept of estate planning for tax and other legitimate estate benefits.

Id. at 290.

[76] See text accompanying notes 34-40 *supra*.

[77] Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 292-94 (1960). See also Note, 52 CALIF. L. REV. 192, 194 (1964).

that which the best interest of his estate dictates. In such circumstances no good reason exists for not resolving the inquiry in favor of a statutory interpretation allowing the soundest estate planning. Indeed, this is but to pursue the familiar legal standard of "the reasonably prudent man under the circumstances," and some courts have based distributions on this theory.[78] Supporting argument can be made that there is a pervasive tax avoidance motive in all persons of property[79] and that such may readily be imputed to the incompetent. Indeed, to presume otherwise is to impute a preference that one's property go to the government rather than to the natural or declared objects of his bounty—an unlikely predilection at best—and to effect a blatant discrimination against the heirs of incompetents. It thus seems the sounder policy to allow guardians wide discretion in planning their wards' estates, especially where, as in *Kenan,* there has been a finding that the ward will never recover competency.[80]

To allow such discretion within prescribed bounds seems precisely what the North Carolina legislature has attempted to do. The 1963 statutes[81] are so designed as to be applicable only to fortunes sufficiently substantial that estate planning is indispensable to their preservation. Moreover, the permission to make gifts is so circumscribed by conditions precedent that not only is harm to the estate highly unlikely, but benefit is virtually assured. Conjecture is inevitably involved in the common law approach of finding what the incompetent would have done under the circumstances. The statutory pattern, by contrast, posits an objective standard. When the prescribed conditions are met, legislative purpose as well as sound policy seems to demand a presumption that the incompetent would then have made the gifts. Precedent for such a construction may be found in the intestacy statutes,[82] which are presumed to reflect the wishes of a decedent who has left no will, no finding of actual intent being required. By reinvoking the requirement of finding what the

[78] *E.g.,* Potter v. Berry, 53 N.J. Eq. 151, 32 Atl. 259 (Ct. Err. & App. 1895); *In re* Bond, 198 Misc. 256, 98 N.Y.S.2d 81 (Sup. Ct. 1950); *In re* Fleming's Estate, 173 Misc. 851, 19 N.Y.S.2d 234 (Sup. Ct. 1940); Hambleton's Appeal, 102 Pa. 50 (1883); *Ex parte* Whitbread, 2 Mer. 99, 35 Eng. Rep. 878 (Ch. 1816).

[79] See Note, 52 CALIF. L. REV. 192, 196 (1964).

[80] *In re* Trusteeship of Kenan, 261 N.C. 1, 6-7, 134 S.E.2d 85, 89 (1963).

[81] N.C. GEN. STAT. §§ 35-29.1 to -29.16 (Supp. 1963).

[82] N.C. GEN. STAT. §§ 29-1 to -30 (Supp. 1961).

incompetent would have done, the court seems to have modified the legislative intent as well as to have rejected the sounder policy approach.

WILLIS PADGETT WHICHARD

Practice and Procedure—Review of Order Remanding to State Court —Tactical Windfall Under the Civil Rights Act of 1964

Title IX of the Civil Rights Act of 1964[1] institutes a procedure unique in present trial practice.[2] When a case, removed to the United States district court under section 1443 of title 28, is ordered remanded to the state court, that order may now be reviewed "by appeal or otherwise."[3] This amendment of the former rule exempting all orders to remand from review makes it possible for the defendant who alleges that a question of civil rights is involved to delay trial on the merits until the whole arsenal of federal review weapons has been exhausted. Extensive use of this delaying tactic may lead to a narrowing of the scope of review of these remand orders by legislative action or judicial interpretation.[4]

[1] 78 Stat. 266, 28 U.S.C.A. § 1447(d) (Supp. 1964).

[2] Unique as a practical matter; the United States may appeal from an order of remand in cases relating to lands of the five Civilized Tribes of Oklahoma. Act of Aug. 4, 1947, ch. 458, § 3(c), 61 Stat. 732. Professor Moore calls this a "minor statutory exception." 1A MOORE, FEDERAL PRACTICE ¶ 0.169 [2.-1], at 1452 (2d ed. 1961) [hereinafter cited as MOORE]. The description seems appropriate.

[3] Civil Rights Act of 1964 § 901, 78 Stat. 266, 28 U.S.C.A. § 1447(d) (Supp. 1964).

[4] Textual discussion here will be limited to the practical implications of section 901; no attempt will be made to justify or condemn it. Congressional debate on the merits of the amendment is summarized to exemplify the legislative intent behind the provision:

Experience over a period of eighty years has demonstrated the wisdom of making the decision of the judge of the U. S. District Court final in removal proceedings. This amendment would give to the civil rights litigant alone a right to appeal the remand order. This is an attempt to by-pass the state and district courts. The removal process is simple, and once the petition is filed the case is automatically removed. This deprives the state court of all powers of process and of the power to enter any order while the case is pending in the federal courts. [*But cf.* 28 U. S. C. § 1450 (1958).] Allowing appeal from removal orders upsets the delicate balance of power between the state and federal courts. 110 CONG. REC. 2769 (1964) (remarks of Representative Tuck).

The first removal statute in the field of civil rights was enacted shortly after the Civil War for the purpose of giving justice in civil rights cases.