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tends to promote substantial justice in the jurisdiction by increasing the probability of correct convictions, and rejects the type of formal justice which may support incorrect convictions.

Some would no doubt counter that the state should have its chance to exact the appropriate punishment. If new and different evidence is presented at the second trial, the opinion of a judge or a jury as to what punishment the defendant deserved might change. This is a distinct possibility when, as in the instant case, the defendant pleads guilty at the first trial and not guilty at the second.

Thus, in the long run, the balance must be struck in each jurisdiction.³⁶ However, with the dilemma of the accused in focus, measuring this "distinct possibility" against a potentially greater number of correct convictions makes an appealing and cogent argument for the latter, and consequently supports the position of the majority in this case.

Michael H. Hynes

GUARDIAN AND WARD—GUARDIAN CANNOT MAKE GIFT OUT OF
INCOMPETENT'S ESTATE ABSENT SHOWING THAT THE INCOMPETENT
WOULD HAVE MADE THE GIFT.

In re Trusteeship of Kenan (N.C. 1964)

The trustee of an incompetent filed a petition with the clerk of the superior court requesting permission to make certain gifts from the incompetent's estate in order to effect substantial tax savings. The taxable income for 1963 was estimated to exceed \$2,800,000 with taxes totaling \$2,000,000. Approximately \$35,500 was required for adequate maintenance of the incompetent who was found to be incurable. The income after all taxes and expenses would have exceeded the statutory minimum if the proposed gifts were made.¹ While there was no indication of the full amount of the tax savings, it was found that the long term effect of the gifts under the Internal Revenue Code would be to allow the estate to pay substantially less in gift taxes than would be incurred in estate and inheritance taxes on the incompetent's death.

36. Justice Schauer in his dissenting opinion argues that the majority's opinion will lead to automatic appeals by all persons who are convicted of first degree murder, but only sentenced to life imprisonment because they will have everything to gain and nothing to lose. He also foresees that the sentencing practices of the trial courts will be severely restricted because of this case. However, it is not clear that the holding extends to all cases in which new trials are granted. It is arguable that it applies only to cases in which the conviction is for murder in the first degree and the punishment less than the death penalty.

1. Chapters 111-13 S.L. 1963, enacted by the North Carolina legislature require that the income remaining after the proposed gifts be in excess of twice the sums expended annually for maintenance during the preceding five years.

The court below entered orders authorizing all the gifts to be made with one exception which is not here material. The North Carolina Supreme Court reversed, *holding* that since there was no finding that the ward *would* have made the gifts were she then competent, allowing such gifts would amount to a taking of property contrary to established case law and in derogation of her constitutional rights. *In re Trusteeship of Kenan*, N.C., 134 S.E.2d 85 (1964).

The requirement that there be a finding of what the incompetent would do if sane, before a trustee will be allowed to make a gift of the incompetent's property is an almost unanimous requirement in this type of case.² The problem of a trustee's dominion over his ward's property originally arose when courts were petitioned to make allowances for needy relatives or friends of affluent persons committed to the care of the courts. Though the recent increase of estate and inheritance taxes has spawned an increase in the desire on the part of trustees to make tax saving gifts, the question of the extent of dominion is not limited to those types of cases alone. An inquiry as to the ward's probable intent is normally required before approval will be given to certain acts of the trustee. Thus the election by the trustee of an incompetent widow to take against the will of her husband,³ the decision of a trustee to contest a will providing a life estate for the incompetent who is next-of-kin to the testatrix,⁴ and the request of a trustee to preserve the incompetent's estate by making tax-saving gifts,⁵ have all required a finding of the incompetent's supposed intent.

Aside from the problem of safeguarding the incompetent's estate, there are important problems of policy involved. When an allowance is made from an incompetent's estate for the support of persons who are legally dependent upon him, there is no question of his intent, and no problem of interference with constitutional rights. When an order is made for the support of persons who were actually, but not legally, dependent on the incompetent, there is a problem of allocating the burden between the individual estate and the community. If the incompetent has assumed the duty voluntarily and while sane, there is justification for continuing to allocate the burden to his estate if it is adequate. In the same way, the community is in need of the services performed by private philanthropy, which supplement the services rendered by its tax supported institutions, and this is recognized in the allowance of tax exemptions. The court, by denying the allowance of the gift, is in effect saying that the community has acquired a right to continued support when the burden has been voluntarily undertaken, but not as a new matter. Thus, in deciding these cases, the courts look to the intent of the incompetent.

2. See 25 AM. JUR., *Guardian and Ward*, § 79 (1940), and the authorities there cited.

3. *In re Hill's Will*, 264 N.Y. 349, 191 N.E. 12 (1934); *Ambrose v. Rugg*, 123 Ohio St. 433, 175 N.E. 691 (1931); see also 74 A.L.R. 449, 452.

4. *In re Brindle's Estate*, 360 Pa. 53, 60 A.2d 1 (1948).

5. *In re duPont*, ... Del. Ch. ..., 194 A.2d 416 (1963); *In re Trusteeship of Kenan*, ... N.C. ..., 134 S.E.2d 85 (1964).

Under the "so-called doctrine of substitution of judgment,"⁶ the court of competent jurisdiction has the power to grant the trustee's petition concerning the ward's property "where it specifically appears that the insane person himself would have provided for such [occurrence] had he been sane."⁷ The language of the cases indicate, however, that there is no real "substitution of judgment," but rather an attempt to determine the incompetent's supposed judgment.⁸ Therein lies the problem.

The leading case in the area is *Ex parte Whitbread*,⁹ an English decision which seems to support the doctrine that the intent must be followed. However, a careful study of that case indicates a different interpretation than generally given and suggests a more logical solution. The authors of one such study¹⁰ submit that *true* substitution of the trustee's judgment is the "only principle that can produce coherency or consistency in making such allowances. . . ."¹¹ They are aware, however, that their interpretation "has not always been squarely followed by the courts,"¹² and proceed to examine over twenty English and American decisions, the upshot of which is the development of the misnamed "substitution of judgment" doctrine.

The *Whitbread* case is cited by the *Kenan* court for the proposition that the court must find "that which it is probable the lunatic himself would have done."¹³ The Lord Chancellor's language does at first seem to require that test,¹⁴ but on a reading of the whole opinion it is clear that a more reasonable test was intended. He states that the court should look beyond the mere legal demands and consider ". . . what the lunatic would probably do, and what it would be beneficial to him should be done."¹⁵ (Emphasis added.) On the basis of this two pronged examination, a

6. *In re Beilstein*, 145 Ohio St. 397, 399, 62 N.E.2d 205, 206 (1945).

7. *Id.* at 401, 62 N.E.2d at 207.

8. *In re Brice's Guardianship*, 233 Iowa 183, 185, 8 N.W.2d 576, 578 (1943): "[T]he court may direct that to be done which the incompetent, if sane, would probably have done."; *In re Johnson*, 111 N.J. Eq. 268, 162 Atl. 96 (1952): "[T]he court will do that . . . which it is reasonable to believe the lunatic himself would do if he had the capacity to act."; *In re Flagler*, 248 N.Y. 415, 162 N.E. 471 (1928): "Convincing proof must be given . . . that the incompetent, if sane, would make the allowance asked for. . . ."

9. 2 Mer. 99, 35 Eng. Rep. 878 (Ch. D. 1816).

10. Thompson & Hale, *The Surplus Income of a Lunatic*, 8 HARV. L. REV. 472 (1895).

11. *Id.* at 473.

12. *Ibid.*

13. *In re Trusteeship of Kenan*, 134 S.E.2d 85, 92, citing *Ex parte Whitbread*, 2 Mer. 99, 103, 35 Eng. Rep. 878, 879 (Ch. D. 1816).

14. A suggested reason for the use of the *Whitbread* case as authority for the "substitution of judgment" doctrine is the headnote that appears in the English reporter. An abstract, like all such headnotes, it states the allowance is made "upon the principle that the Court will act with reference to the Lunatic, and for his benefit, as it is probable the Lunatic himself would have acted if of sound mind." *Id.* at 99, 35 Eng. Rep. at 878. In light of the whole opinion the reporter apparently felt it unnecessary to explain "sound mind" indicated an inquiry into the probable action of a reasonable man.

15. *Id.* at 102, 35 Eng. Rep. at 879.

disposition should be made "... in such manner as the court thinks it would have been wise and prudent . . ." ¹⁶ for the lunatic himself to have acted had he been capable. ¹⁷ (Emphasis added.) It is also important to note that the report of the Master, on which the allowance of the action in the *Whitbread* case was based, in no way intimated any inquiry into what the lunatic would or would not do. When the language and the circumstances of the *Whitbread* case are closely examined, it becomes evident that it is not authority for the unalterable proposition that the court must always look to the intent of the incompetent.

It seems then that the majority of the courts citing *Whitbread* force a burden upon the trustee which that opinion never envisaged. In order to take steps consistent with his duty to manage the incompetent's estate prudently — a duty imposed by practically every jurisdiction ¹⁸ — the trustee must come forward with testimony to establish on "a preponderance of the evidence . . . that the lunatic, if then of sound mind, would make the gift." ¹⁹ This burden may in some instances be impossible to meet, ²⁰ though the "wise and provident" course would not only allow the gifts, but actually require them.

It is submitted that a different conclusion would place the courts and the trustee on a more sound footing. As one authority has suggested, ²¹ if a trustee is to manage his ward's property as his own, he must have the dominion which an owner has over his own property. His fiduciary duty, enforced by personal liability, would result in far more adequate protection of the ward's interest than arbitrary restrictions which may make prudent management impossible. Court control, such as the instant case illustrates, deprives the incompetent of the trustee's liability for failure to exercise prudent management and fails to replace it with that of the court.

It is not suggested, however, that the trustee have unbridled authority. Court control is of course necessary. But the courts should lift the burden

16. *Id.* at 103, 35 Eng. Rep. at 879.

17. Note the language of the lower court in the *Kenan* decision: "but rather it is wise and provident for the petitioner to make the gifts. . . ." 134 S.E.2d at 94.

18. Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264 (1960). The author states that the "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. (Footnotes omitted.) The authority for the phrase "manage them prudently" includes citations to the cases and statutes of most states, to the *Model Probate Code* and to cases decided by the United States Court of Claims.

19. *In re Trusteeship of Kenan*, 134 S.E.2d 85, 91 (1964).

20. The difficulty of meeting the burden is indicated by the following statement of the standard of proof required found in 44 C.J.S., *Insane Persons*, § 90c n.62 (1945):

In determining whether incompetent, if sane would, . . . [so act] . . . the court must be governed by proof presented as to needs and necessities of relative seeking allowance, relationship and intimacy which relative and incompetent bore to each other prior to the adjudication of incompetency, and to the present and probable future requirements of incompetent . . . considered with relation to size and condition of incompetent's estate, giving to all pertinent factors such weight as from all circumstances the court finds the incompetent would give. (Cases omitted.)

See also *In re Johnson*, 111 N.J. Eq. 268, 162 Atl. 96 (1932) (requiring a showing of a "habit of contributing").

21. See Fratcher, *supra* note 18 at 335.

of affirmative proof from the shoulders of the trustee and allow him a "judicial" discretion, a freedom to exercise sound business judgment. Absent the burden entirely, permission to give the ward's property to charity may well be an unconstitutional taking.²² But it is not necessary to completely remove all checks on the power of the trustee.

As the incompetent is the ward of the court, it is the court's duty to safeguard the property rights guaranteed him by the Constitution. However, when it is necessary at law to show a particular intent or an unknown course of action, it is generally supposed that all men act rationally and that the unknown factor to be shown is the action of a reasonable man. Adopting that policy here, the necessary check on otherwise unbridled authority is to be found in a middle ground. If the trustee were relieved of the burden of showing actual intent when petitioning the court for approval of his actions, it will be borne by a guardian *pendente lite* or by those who oppose the proposed action or gifts. They would be required to come forward with affirmative proof that the incompetent would not take similar action if sane. The trustee will then be required to show only that his proposed steps are in the exercise of wise and prudent management. This will engender greater discretion on his part (hence increasing his liability to the estate) while at the same time protect the incompetent's property from a taking without due process.

Pennsylvania, it seems, is one of the very few states which may not require a showing of the incompetent's probable action. Dealing with a will contest in the case of *In re Brindle's Estate*,²³ the Pennsylvania Supreme Court was clear that it is the court's responsibility to decide what is best for the ward. The majority had "no doubt of the power of the common pleas . . . to determine what appears best for the ward. . . ."²⁴ In his dissenting opinion,²⁵ Justice Stern discussed this point (considered not controlling by the majority) in greater detail. Pointing out the similarity between the case at bar (whether or not to allow a trustee to contest a will) and that of a widow's election, he stated that both cases involve an incompetent person who is called upon to make a choice.²⁶ That choice, because of the incompetent's inability to determine what is best for himself, must "be made solely on the basis of expediency or personal welfare of the incompetent. . . ."²⁷ As this is the "*primary consideration* . . .

22. The *Kenan* court discussed without deciding that the proposed gifts might amount to a taking contrary to Mrs. Kenan's constitutional rights. The opinion states that, while property may not be taken without court order, "it is nonetheless true that courts of equity have authorized the gift of a part of incompetent's income or principal." *In re Trusteeship of Kenan*, 134 S.E.2d 85, 91 (1964).

23. 360 Pa. 53, 60 A.2d 1 (1948).

24. *Id.* at 57, 60 A.2d at 3.

25. *Id.* at 64, 60 A.2d at 6.

26. This similarity (discussed *supra* at notes 3, 4 & 5), involves the problems raised in dealing with incompetent's property. As there stated, it may appear in any guardian-ward case, although it is not always in issue. *E.g.*, *In re Hill's Will*, 264 N.Y. 349, 191 N.E. 12 (1934).

27. *In re Brindle's Estate*, 360 Pa. 53, 68, 60 A.2d 1, 8 (1948).