O/a 3-6-86

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 67,186

REED A. BRYAN, III, et al.,

Petitioner,

vs.

CENTURY NATIONAL BANK OF BROWARD, as Personal Representative of the Estate of CAMILLE PERRY BRYAN, Deceased,

Respondents.
_____/

REED A. BRYAN, III, et al.,

Petitioners,

vs.

JAMES H. BRYAN, SR., STUART BRYAN and LUCY GARDNER OWENS,

Respondents.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PREFACE

By order of October 28, 1985, this court accepted jurisdiction based on conflict. The case involves the validity of a deed executed by a competent woman who was a voluntary ward. The trial court held the deed valid and the District Court reversed and held the deed void. The record before the district court which includes the transcript of testimony is referred to as (R). The record consists of the proceedings before the circuit court (civil division), in a quiet title/undue influence case. The entire court file of a prior voluntary guardianship proceeding relating to the deceased ward was placed in evidence. This file contains transcripts of several hearings and testimony on the issue of approval of the deed. This court file was admitted as plaintiff's exhibit #9 in the action in the civil division. (R 376). This guardianship file is not separately paginated and contains several separate transcripts of testimony. Reference will be made by the witness's name and date or by the guardianship evidentiary exhibit number and date. The Petitioner's Appendix is referred to as (A). All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case is a dispute over title to real and personal

property. The controversy concerns a deed by a woman who was a voluntary ward under §744.341, Fla. Stat. (1979). The ward was mentally competent and under no undue influence or other disability when she signed a deed conveying her home to her grandnephew. The ward died before the guardianship court could approve the transaction. The guardianship was terminated upon her death and her deed became the subject of a subsequent quiet title/undue influence action brought when her personal representative sought to invalidate the deed. The deed in question was approved in the Circuit Court Civil Division in accordance with plaintiff's prayer to quiet title and against counterclaims by Century National Bank as personal representative of the now deceased ward's estate (and former voluntary guardian during her lifetime), and certain other heirs of the deceased ward.

The trial court held the deed valid and the heirs and the personal representative appealed. The Fourth District Court of Appeal reversed the trial court and determined the deed to be void, holding, as a matter of law, that the ward's deed required court approval and only the guardianship court could approve the deed. After motions for rehearing and other relief were denied, a Petition for review was filed on June 11, 1985 and this court entered its

order of October 28, 1985 accepting jurisdiction and setting oral argument.

Bryan family members were Florida pioneers. Camille Perry Bryan died May 10, 1981, at the age of 102 years. (R 459). In 1904 she came to the settlement which later became known as Fort Lauderdale (1911) in what later became known as Broward County (1915), as the bride of Tom Bryan. Bryan family members were active in the development of Fort Lauderdale and Broward County. Camille Bryan, a very strong-willed lady was also active in the development of the community. (R 127-130). The disputed deed relates to a home constructed in 1925 which had always been titled in Camille Bryan's name alone. (R 136-137; Plaintiff's exhibit 3 and 6).

Camille Bryan clearly wanted this house to remain in the family after her death and it was her obvious and clear desire that this home and its contents become the property of Reed A. Bryan, III (R 240, 243). Tom Bryan had died in 1969 and Camille had drawn a Will in 1975 devising the home to Reed A. Bryan, Jr., petitioner's father. However, Reed A. Bryan, Jr. predeceased Camille in 1976. Thereafter, Reed Bryan, III became even closer to his great aunt and tended to many of her personal needs that had previously been

attended to by his father. In 1977 Reed Bryan, III prevailed upon Camille, who was then 98 years of age, but mentally competent, to petition the court for appointment of a voluntary guardian to assist her with the management of her affairs. From April, 1977 until the termination of the guardianship shortly after Camille's death in 1981, Century National Bank of Broward acted as her voluntary guardian.

After the death of Reed A. Bryan, Jr., the evidence clearly establishes that it was Camille's desire to convey the home and furniture to Reed A. Bryan, III. Both the Circuit Court and the District Court so ruled. The deed in question was signed by Camille Bryan on August 22, 1980, and on the same day she signed a Petition for Order Approving the deed. Numerous witnesses testified to Camille Bryan's intent and expressed desire that Reed A. Bryan, III and his wife have her home. Although elderly, she was mentally alert, competent, and able to exercise independent judgment until October 29, 1980 when she sustained an accident and became totally disabled. The time period that is critical to this case is from February, 1980 through October 29, 1980 during which time there was no substantial conflicting evidence as to Camille Bryan's desire to make the gift nor her mental competence to do so. (See plaintiff's exhibit 9, testimony of Vera Braithwaite, April 1, 1981, p. 12-20; B.

Berhop of March 9, 1981, p. 22-25, 52-54, 87-88, 101-112, 245-246, 249 and R 54, 87, 101, 242, 246). She was seen by her family physicians shortly before and shortly after the date of execution of the deed and Petition for approval on August 22, 1980, and he testified as to her mental and physical competence on those occasions. (See R 39-51, 97, 98, 112-115, 180; plaintiff's exhibit 12, deposition of Oscar Soto, M.D., p. 9-25).

In June of 1980, Reed Bryan or one of his law partners had discussions with the bank trust officer in charge of Camille's guardianship as to the contemplated deed and transfer of the home to Reed Bryan, III. The bank took no position in favor of or against the transaction. On August 22, 1980 Camille Bryan executed the deed in question and also signed a Petition for an order confirming the sale. The Petition alleged that it was Camille's desire to convey title to the property and the personalty located therein to Reed Bryan, III for the purpose of keeping the property in the family following her demise. It stated further that it was her desire to lessen the estate tax consequences to the ward's family and estate by transferring the subject property "as part of an estate planning procedure, as contemplated in §744.441, Fla. Stat." The Petition stated that Reed Bryan, III was to pay $100,000 as the purchase

price in the form of a promissory note and to the extent the value of the property exceeded the note, the transaction was a gift. (R 394-397). The bank signed the Petition for approval of the deed and on or about October 1, 1980 delivered it to Reed Bryan, III who had also received delivery of the deed from Camille in August of 1980. The bank stated that it wished to have consents from all of the heirs of Camille Bryan, identified as the residual beneficiaries of her Will.[1] The bank regarded the consents from all heirs as necessary. Consents were solicited and five of eight consents obtained before October 29, 1980. The Petition was eventually filed without three of such consents being obtained. The delay in recording the deed and moving ahead on the entire matter was pursuant to a request from James Bryan made to Petitioner Reed Bryan, III (R 258-260).

On October 29, 1980 Camille Bryan sustained an accident

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[1] The bank was testamentary Trustee and personal representative of the Estate of Tom M. Bryan and also, as well as being voluntary guardian of Camille Bryan, was personal representative under her purported will. The persons from whom consents were requested were the residual beneficiaries under that will as it then existed some nine months before her death and as ultimately admitted to probate.

which rendered her completely incapacitated. She was hospitalized and could not act from that point on.

Before her death four separate evidentiary hearings occurred on the Petition for approval of the deed before the judge of the probate division handling the guardianship case. These hearings occurred in February, March, and April of 1981. Century National Bank in its capacity as voluntary guardian presented the Petition, but during the process of the four hearings assumed a position of "neutrality." The guardian chose not to attack the deed by the ward, but joined in the Petition for approval as a necessary party. At a later date the bank in pursuance of its neutral posture sought to withdraw as petitioner and to substitute Reed A. Bryan, III as petitioner, but the guardianship judge ruled that the statutory authority for entertaining the Petition contemplated only the presentation of a petition by the guardian. The guardian's motion to withdraw was denied.

The guardianship approval proceedings were still pending on May 10, 1981 when Camille Bryan died at the age of 102. Century National Bank was then appointed personal representative of Camille's estate and immediately did an about face and claimed the property as an asset of the estate. Before the guardianship court, while the ward was

still alive, the guardian/bank remained "neutral". In probate the bank, as personal representative of the deceased ward, claimed the deed was invalid.

Despite the four hearings and judicial labor expended the guardianship judge never got to the point of ruling on the validity of the deed. On November 9, 1981, the guardianship court entered an order on the Petition of Century National Bank, now simultaneously both guardian and personal representative, holding that the ward's death prevented the court from exercising further jurisdiction and that no determination need be made on the validity of the deed, "the issue raised by said Petition is moot so far as this guardianship is concerned." (R 429).

On November 25, 1981 Reed Bryan, III filed a suit to quiet title in the civil division of the Circuit Court and joined the personal representative and all interested heirs and beneficiaries under the will of Camille Bryan. In this case, the bank (in its new capacity) denied that Reed Bryan, III had title to the property and sought to quiet title in the residual beneficiaries including the contesting heirs. The property was thus subjected to the estate proceedings as a probate asset, on the ground that no court approval of the decedent's deed has been obtained, rendering it void. There

were eight heirs, some of whom consented to the validity of the deed and others who disagreed and asserted by counterclaim that Reed Bryan, III was guilty of undue influence and inequitable conduct. The trial court granted plaintiff's motion for summary judgment on the issue of law of whether the existence of the voluntary guardianship rendered the competent ward's deed a nullity. (R 582-584, 596-599). After a lengthy evidentiary hearing, over four days, the court entered final judgment approving the deed and ruling in Reed Bryan, III's favor on the issues of undue influence and inequitable conduct. The trial court found that Camille Bryan was competent when she made the deed that she was under no undue influence, and that the deed was effective to convey the real and personal property in question. (R 606-608).

Two of the eight heirs sought review of the Circuit Court's judgment on undue influence and inequitable conduct before the Fourth District Court of Appeal, and the bank separately sought review on the validity of the ward's deed in the light of her status as a voluntary ward. These appeals were consolidated and, by opinion of January 30, 1985, the District Court affirmed the trial court's holding that the deed was untainted by undue influence or other inequitable conduct but reversed based on the technical

absence of court approval. The court held the voluntary ward's conveyance of real and personal property invalid because approval of the deed had not occurred in the guardianship proceedings. Upon subsequent motions the District Court declined to recognize the court approval which occurred in the civil division and declined to remand for further approval proceedings in the probate division where the deceased ward's estate remains open. (A 14-27).

SUMMARY OF ARGUMENT

An elderly woman who was mentally competent became a voluntary ward under Section 744.341, Florida Statutes (1979) at her own request. The ward later executed a deed and a Petition for approval of that deed. It was the ward's clear intent to make a partial gift of her home and furniture to her grandnephew, her closest relative. The ward was to retain the property during her lifetime. The Century National Bank was appointed guardian of the property of the ward and also signed the Petition for approval of the deed. Several hearings occurred before the circuit judge in the probate division handling the guardianship on approval of the deed. The guardian bank took a neutral position in these proceedings, but objections were made by certain disappointed heirs who wanted the house.

The ward died while the approval proceedings were still going on before the judge in the guardianship matter. Due to the ward's death, the guardianship was terminated without a ruling on the deed. Immediately thereafter a new suit was filed by the grandnephew in the circuit court, civil division. All of the heirs were parties in this action along with the bank which had now become the personal representative of the ward's estate. The bank took an inconsistent position and now sought to invalidate the deed. The heirs asserted that the grantee in the deed, the grandnephew, had exerted undue influence over the ward when she executed the deed. After a trial the circuit court determined that the deed was valid. The trial judge concluded that the ward was at all times competent and that undue influence had not occurred. The disappointed heirs and the personal representative bank appealed and the district court reversed. Although the district court expressly affirmed the findings of no undue influence and the competency of the ward, the court went further and ruled that only the guardianship court/judge could approve the deed. The district court refused to recognize approval of the deed before the civil division in the quiet title/undue influence case. The court held that only the guardianship judge had "jurisdiction" to approve the deed.

Petitioner contends that the circuit court was correct in ruling that the deed of a voluntary ward is not void and is effective. Such a deed is at most voidable. The circuit court should have been affirmed. The district court erred in holding that only the probate division/guardianship judge could approve the deed and in refusing to recognize the civil division's approval of the deed.

A chronological summary in chart fashion follows.

Chronological Summary

CIRCUIT COURT PROBATE DIVISION (Guardianship)	4/25/77	Camille Bryan creates, vol. guardianship in Probate Division and CN Bank appointed Guardian
	8/22/80	Camille Bryan signs deed to her grandnephew & Pet. for order confirming deed. Bank/Guardian also signs Pet. for approval.
	10/29/80	Accident - Camille Bryan incapacitated
	1/31/81	Pet. for approval of deed filed in Probate (guardianship) Court: 4 hearings - before guardianship judge; Guardian bank remains neutral; some heirs object, approval unruled upon.
	5/10/81	Camille Bryan dies
	6/12/81	Bank becomes Personal Representative - claims deed invalid
	11/9/81	Order in guardianship: Ward's death terminates guardianship. Deed approval unruled on.
CIRCUIT COURT CIVIL DIVISION	11/25/81	Quiet title suit filed in civil division by grandnephew, bank and heirs attack deed by counterclaims.
	4/19/83	Start of trial - all interested persons and issues before the court.
	7/18/83	Judgment: deed valid & no undue influence - (civil division)
DCA	1/30/85	Opinion on appeal to 4th DCA. Deed held void due to no approval in guardianship court. The finding of no undue influence is affirmed.

ISSUES ON REVIEW

ISSUE I

WHETHER A DEED EXECUTED BY A COMPETENT WARD IN A VOLUNTARY GUARDIANSHIP IS EFFECTIVE WITHOUT COURT APPROVAL?

ISSUE II

WHETHER, IF COURT APPROVAL IS REQUIRED, THE DISTRICT COURT ERRED IN HOLDING THAT ONLY THE JUDGE IN THE GUARDIANSHIP PROCEEDING COULD APPROVE THE DEED?

ARGUMENT

ISSUE I

WHETHER A DEED EXECUTED BY A COMPETENT WARD IN A VOLUNTARY GUARDIANSHIP IS EFFECTIVE WITHOUT COURT APPROVAL?

Petitioner contends that a mentally competent ward in a voluntary guardianship proceeding under Florida law is under no disability with regard to the transfer of property. Although it may be set aside on valid grounds, such a deed is effective if unchallenged. The statute in question is §744.341, Florida Statutes (1979), which provides:

> 744.341 Voluntary guardianship.--
> (1) Without adjudication of incompetency, the court shall appoint a guardian of the estate of a resident or nonresident person who, though mentally competent, is incapable of the care, custody, and management of his estate by reason of age or physical infirmity and who has voluntarily

> petitioned for the appointment. The petition shall be accompanied by a certificate of a licensed physician that he has examined the petitioner and that the petitioner is competent to understand the nature of the guardianship and his delegation of authority. Notice of hearing on any petition for appointment and for authority to act shall not be required, except that notice shall be given to the ward and any person to whom the ward requests that notice be given. Such request may be made in the petition for appointment of guardian or in a subsequent written request for notice signed by the ward.
>
> (2) Any guardian appointed under this section shall have the same duties and responsibilities as are provided by law as to guardians of property generally.

There are four important aspects of this statute:

1. The ward is not adjudicated incompetent but in fact the ward must be mentally competent.
2. Notice need not be given to third parties.
3. The guardian has the same duties and responsibilities as other guardians of property.
4. No legal restrictions are imposed on the ward.

Camille Bryan, while mentally competent, signed a deed conveying her home to her grandnephew Reed Bryan, III. She also signed a Petition for Order Confirming Sale to be filed in the guardianship proceeding. Camille did not request that notice be given to third parties regarding her deed. The two documents make it clear the transfer was part gift and part sale and included both the home and furniture. Century National Bank, the ward's guardian, did not sign the

deed but did sign the Petition for Order Confirming Sale. After suit was filed the circuit court proceeded with a complete trial on all issues and found that the ward had been mentally competent at all times in question, that the deed was valid, and that the assertions of inequitable conduct or undue influence were unsupported.

By opinion of January 30, 1985, the Fourth District Court of Appeal affirmed almost all of the findings and rulings of the trial court but totally reversed the trial court's conclusion--invalidating the deed based upon the legal technicality that it was not approved in the guardianship court. The District Court held:

> In view of the foregoing, we hold the deed from Camille Bryan to Appellee, Reed Bryan, III, was ineffective to convey title to Bryan because the court that had jurisdiction over the guardianship never authorized or approved that conveyance.

Petitioner submits that the circuit court was right and the district court was wrong. The deed was effective when the ward signed it. However, even if court approval was required it certainly occurred in the circuit court. The propriety of the approval in the civil division will be discussed in Point II.

Petitioner initially asserts that the deed by a

competent ward in a voluntary guardianship is at most voidable and certainly not void.

Since it can be readily disposed of, petitioner will begin with the side issue of undue influence or inequitable conduct. Throughout the history of this litigation unfounded accusations by disappointed heirs have been directed at Reed Bryan, III. The heirs have had their day in court on this issue numerous times and have always lost. The issue was first considered by the probate division in the guardianship matter. Full disclosure of all facts occurred there, but the death of the ward prevented Reed Bryan, III from securing a ruling from that court. Immediately after termination of the guardianship (at the request of the guardian bank), petitioner Bryan again affirmatively brought the matter to court in the quiet title/undue influence case filed in the civil division. Once again all conceivable issues regarding inequitable conduct were tried. Reed Bryan, III even agreed to assume the burden of rebutting a presumption of undue influence pursuant to In Re: Estate of Carpenter, 253 So.2d 697 (Fla. 1971). Having willingly assumed the burden of disproving presumed undue influence, Reed Bryan, III clearly demonstrated that Camille Bryan was totally competent at all times in question, that it was her clear and definitive

desire that he have the house in large part as a gift, and that she was not subjected to any undue or inequitable influence. The Fourth District Court of Appeal considered these questions and expressly ruled in favor of the trial court concluding that "the trial judge was justified in concluding that the presumption of undue influence was overcome by clear and convincing evidence." The issue of undue influence should be laid to rest. This competent, elderly, strong willed lady gave her house and furniture to her grandnephew who was probably the closest person in the world to her at the time of the gift. The fact that other heirs did not like it does not make it invalid. The fact that the heirs were able to delay approval in the guardianship proceeding also does not render the deed invalid.

Returning to the propriety of the trial court's ruling, the Florida guardianship law does not deprive the voluntary ward of the capacity to act. Section 744.341, Florida Statute (1979), says nothing about a presumption of incapacity. The only restrictive provision in the guardianship law is §744.331(8), which provides:

> 744.331 Adjudication of person mentally or physically incompetent; procedure.--No guardian of the person or of the property, or both, of a person alleged to be mentally or physically incompetent shall be appointed until after the person has been adjudicated to

> be incompetent in proceedings instituted for that purpose, in the following manner:
>
> * * *
>
> (8) After a judgment adjudicating a person to be mentally or physically incompetent is filed, the person shall, for the duration of the incompetency, be presumed to be incapable of managing his own affairs or of making any gift, contract, or instrument in writing that is binding on him or his estate. The filing of the judgment shall be notice of the incapacity. (Emphasis supplied)

It is only "after a judgment adjudicating incompetency" that a person is presumed incapable of making a gift. After the above provisions the Florida guardianship law goes on to provide for Voluntary Guardianships in §744.341. The first four words of that section state, "without adjudication of incompetency ... ." Clearly, the statutory scheme contemplates a presumption only after an adjudication of incompetency and not in situations where there is no adjudication of incompetency.

The distinctions are obvious. The voluntary guardianship requires a certificate of competence by a licensed physician. Competence is the issue in the voluntary guardianship rather than incompetence. All of the complex procedural provisions in subsections (1) through (8) of §744.331 are inapplicable to the voluntary guardianship. Further, the voluntary guardianship is distinguished from all other types of guardianship in that notice to third parties is not required. Other guardianships require notice

but the voluntary type does not. Clearly, the legislature intended the ward to be autonomous. If the guardian bank had signed the deed in question here the statute specifically states that the guardian bank need not have given notice to anyone in applying for court approval. The guardian of a voluntary ward who is competent obviously serves in a markedly different capacity from the guardian of an involuntary incompetent ward. The voluntary guardian should serve to effectuate the will and desires of the voluntary ward. Although the guardian is not to be merely a "rubber stamp" the ward autonomy is underscored by the statutory notice provisions. Entitlement to notice contemplates an interest and the right to influence the outcome of litigation. Here the guardian/bank violated the guardianship law in insisting on notice to heirs. Even so, no formal attack on the deed occurred until after the ward's death and the counterclaims in the civil division action.

The law is clear that title to the ward's property remains in the ward. Guardianship of Williams, 313 So.2d 411 (Fla. 1st DCA 1975). There is no reason why a voluntary ward should not be allowed to give a present to a close family member. There is no reason why this voluntary ward should not have been allowed to make a partial gift of her home and furniture to her grandnephew. In Gruber v. Cobey,

12 So.2d 461 (Fla. 1943) this Court stated:

> There is no law in this country to prohibit one of sound mind from making a gift of what he has for a lawful purpose to any person of his choosing.

Camille Bryan's deed was legally effective. Even if she had been an adjudicated incompetent she still possessed the power and legal capacity to make a deed. A deed by a person adjudicated incompetent is not void but is only voidable depending upon circumstances of competency at the time in question and whether fraud, duress or undue influence was practiced. Hassey v. Williams, 174 So. 9 (Fla. 1937) and Herminghaus v. Crofton, 187 So.2d 347 (Fla. 4th DCA 1966). If a person enters into a contract when competent, his later incompetency does not affect the validity of the obligation. Baroudi v. Hales, 98 So.2d 515 (Fla. 3d DCA 1957).

Further, in Fleming v. Fleming, 352 So.2d 895 (Fla. 1st DCA 1977), the district court considered a similar situation and held that a deed by a physically but not mentally incompetent ward was voidable and could be effective to convey property. The Fleming court approved the ward's deed after the death of the ward. The court stated at page 898:

> An adjudication of either physical or mental incompetency as defined by Section 744.31, Florida Statutes (1973) carried a presumption that the incompetent is not capable of managing his property. But the presumption is not conclusive; it may be overcome by proof that the person is in fact

> capable at the time of any transaction. * * * Here, the trial court found the evidence showed Mrs. DeVaughn was competent at all material times to manage her property despite the adjudication of physical incompetency. We cannot disturb this finding unless the evidence shows it is clearly erroneous. Waterman v. Higgins, 28 Fla. 660, 10 So. 97 (1891).

Moreover, under the District Court's opinion, the death of the ward is apparently completely determinative. Not since "trial by combat" have lawsuits been determined by who dies first. In Panzirer v. Deco Purchasing, 448 So.2d 1197 (Fla. 5th DCA 1984) the issue concerned a gift of stock approximately one year before death. The trial court held the gift incomplete because the stockbroker had not completed an internal journal transfer. The district court reversed and held that a valid inter vivos gift occurred based on clear donative intent along with symbolic delivery. The opinion notes that the grantor could have done nothing more and that his unfortunate death should not frustrate the otherwise valid gift. Clearly a gift can be approved after death.

The circuit court here had jurisdiction over the property and over all interested parties including the grantee of the deed, the heirs and the personal representative of the estate of the deceased ward who had

also served in the capacity of the guardian of the ward while she was alive. The testimony was that the ward was living well within the income generated by her estate which the guardian was administering for her benefit. (Plaintiff's Exhibit No. 9, testimony of Lowell Mott of April 29, 1981, pages 13 through 15). No one suggested that the house might be required for payment of debts, taxes, expenses of guardianship or for the care and support of the ward.

A deed by a competent ward and a deed by the guardian of that ward must be clearly distinguished. There are obvious legal differences. The ward retains title to property and the guardian may sell or transfer the property to others only with court approval. There are even more obvious distinctions and prohibitions regarding transfers by the ward of property to his or her own guardian. Section 744.454 specifically prohibits the guardian from borrowing money or making purchases from the ward except under specific circumstances. Severe restrictions must be placed upon transfers by the ward to the guardian. In Webster and Moorefield, P.A. v. City National Bank, 453 So.2d 441 (Fla. 3d DCA 1984), the court held that a ward was without "capacity" to convey her property to her guardian as a gift. The Fourth District chose the same word "capacity" in

limiting the ward's ability to act. This was incorrect and unnecessary. The general law is that capacity to make a gift and capacity to make a will are governed by the same test. 28 Fla. Jur. 2d Gifts §9.

The reasons for these restrictions on guardian's receipt of gifts simply do not apply to a voluntary ward's transfer of his own property to a close family member when done with notice to the guardian. The law of other jurisdictions on conservatorships supports the validity of the deed here. In Wisconsin a conservatee retains the power to direct a gift of his own property. In Re: Evans Estate, 135 N.W.2d 832 (Wisc. 1965). The Wisconsin court stated as follows:

> But in a conservatorship, where there is no adjudication that the applicant is incompetent, it makes sense to allow the conservatee the freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection.
>
> Respondent contends that Evans could have accomplished the transfer of the property by terminating the conservatorship, then making the transfer, and finally reestablishing the conservatorship. This certainly would be a lot of extra work and waste motion to achieve basically what Evans desired here. Respondents also contend that if Evans did not want to end the conservatorship he could have executed a will leaving the notes outright to his niece and nephew. But if Evans was not incompetent, it would not be reasonable to prevent him from making the transfer inter vivos, not testamentary. (emphasis added).

California has a statutory provision for a limited conservator under California Probate Code §1801. In California, even under the prior conservatorship laws, the conservatee was not denied the right to make a will, control his own spending and enter into "transactions" to the extent reasonable to provide the necessities of life. See Board of Regents State Universities, State of Wisconsin v. Davis, 533 P.2d 1074 (Cal. 1975). The California court held that those not adjudicated incompetent should not be bound to statutory incapacity. The California case contains an exhaustive treatment of many of the arguments made in this area of the law.

Numerous cases support competent wards or conservatees making valid gifts and deeds. See e.g. Application of Dana, 465 NYS2d 102 (New York 1982) and Schmidt v. Schmidt, 459 A.2d 421 (Pennsylvania 1983). Even Citizens State Bank and Trust of Hiawatha, Kansas v. Nolte, 601 P.2d 1110 (Kan. 1979), relied on by the Fourth District Court, does not actually support the result reached by the Court. In Nolte, the Kansas court held that a conservatee under a voluntary conservatorship could validly contract with the consent of the guardian. Certainly, the guardian bank here was in a position of consenting to the transfer. The bank signed the Petition for Order Approving Sale and took a neutral

position during the guardianship hearings. Other than undue influence the heirs had no objection to assert.

It should be noted that §744.341 was amended effective July of 1984, to provide that the petition for appointment of a voluntary guardian may request the court to direct the guardian to take possession of less than all of the ward's property and that under such circumstances the ward obviously has control over the remaining property. Petitioner submits that this statutory amendment is declaratory of the existing law on the subject. Certainly, the guardian bank in this case always thought the ward had the power to continue maintaining a certain degree of control over her own property. The guardianship file introduced into evidence in the circuit court, civil division case showed a petition and order of July 22, 1977, allowing the ward to incur debts at local department stores and at a private club. The ward could maintain a checking account of $400 per month and incur expenses at stores, etc. up to $600 per month. The petition by the guardian bank stated that the ward was "capable of managing" such accounts and incurring such liabilities. (See guardianship file petition and order of July 22, 1977). There was also a petition to allow the ward to retain possession and control of certain valuable jewelry. Further, when the guardian

bank decided that it was advisable to spend $25,000 to repair the house in question the bank secured a written consent from the ward and filed it in court.[2] (See ward's consent of September 15, 1978). Obviously, this guardian bank recognized and treated this guardianship in accordance with the concept enunciated in the new statutory amendment allowing the ward to retain possession and control of property. There simply is no good reason why the ward cannot make an effective deed. There is no reason to conclude that all documents signed by a voluntary ward are void. This is particularly true under the circumstances of this case where the deed was immediately brought to the court for approval and where the guardian simply stayed neutral and did not object. The guardian bank waived the right to attack the deed when it failed to assert any objection before the guardianship judge. See Love v. Elliott, 350 So.2d 93 (Fla. 1st DCA 1977).

It is clear beyond doubt that a voluntary ward can make a valid will and terminate a voluntary guardianship by choice. It is clear beyond doubt that even an adjudicated incompetent can make a valid deed. A voluntary competent

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[2] The guardian bank did not request consents or waivers from all the prospective heirs before spending this $25,000.

ward should not be placed in a more restricted position. It simply makes no sense that a voluntary ward does not have at least the power to make a voidable deed to property. The trial judge was correct and the Fourth District Court of Appeal should have affirmed.

ISSUE II

WHETHER, IF COURT APPROVAL IS REQUIRED, THE DISTRICT COURT ERRED IN HOLDING THAT ONLY THE JUDGE IN THE GUARDIANSHIP PROCEEDING COULD APPROVE THE DEED?

The district court's opinion affirmed most of the rulings of the trial court but reversed on a technicality. The district court concluded that only the guardianship judge could approve the deed. Judge Tyson was the judge in the probate division handling the guardianship case. Judge Ferris was the judge in the civil division handling the quiet title/undue influence case. If the district court's opinion is correct then Judge Ferris would have been required to find that although the deed was valid and not the result of undue influence and although Camille Bryan clearly intended to convey her property and was competent to do so that Judge Tyson was the only judge who could approve the deed because he was in the probate division where guardianships are supervised. Judge Ferris could not approve the deed because he was in the civil division. The district court specifically stated:

> We hold the deed from Camille Bryan to appellee Reed Bryan, III was ineffective to convey title to Bryan because the court that had jurisdiction over the guardianship never authorized or approved that conveyance.

The opinion repeatedly stated that court approval would have made the deed valid.

The Fourth District Court of Appeal refused to recognize the approval of the deed by Judge Ferris in the civil division. This is totally inconsistent with the rest of the opinion. The court went to the extent of affirming Judge Ferris' rulings on the absence of undue influence or inequitable conduct and at the same time concluded that Judge Ferris never even had jurisdiction of the case because only Judge Tyson could approve the deed. This is inconsistent and illogical. The opinion repeatedly states that court approval of the deed was necessary but does not actually mention or even hint why court approval has not occurred.

The Fourth District has previously recognized that all of the judges in the circuit court have jurisdiction over all matters within that court's jurisdiction. In In Re: Guardianship of Bentley, 342 So.2d 1045 (Fla. 4th DCA 1977), the court stated:

> We express some surprise that a matter of this magnitude could not have been resolved

> without resort to appellate procedures. The question involved is not one of jurisdiction. The Circuit Court has jurisdiction as prescribed by the Constitution and general law. See Article V, Section 5, Florida Statutes (1975). All of the judges of the Circuit Court are authorized to exercise that Court's jurisdiction. However, for efficiency in administration, the Circuit Court is frequently divided into divisions, with each division handling certain types of cases. Judges and cases can both be transferred from one division to another by the Chief Judge of the Circuit. Fla.R.Civ.P. 1.020.

The Bentley case dealt with the probate division and the juvenile division. The Fourth District expressly ruled that the divisions made no difference and that all of the judges in the Circuit Court are authorized to exercise the court's constitutional jurisdiction. Judge Ferris had as much jurisdiction as did Judge Tyson. The divisions in the Circuit Court operate solely for the efficiency of administration of the circuit's judicial business. Certainly, they do not constitute jurisdictional walls as the opinion in question so holds. In Maugeri v. Plourde, 396 So.2d 1215 (Fla. 3d DCA 1981) the Third District disapproved an argument that only the judge in the probate division could approve a settlement in a wrongful death case involving minors. The divisions simply do not control jurisdiction.

The Fourth District's opinion is clear that Judge Tyson could have approved this deed within the guardianship

proceeding of the probate division. What conceivable reason can there be why Judge Ferris could not approve it in the civil division? The property and all of the parties were within the jurisdiction of the court and no conceivable argument could have been made which was not made. Indeed, if there is anything that any of these litigants did not raise then the appropriate result would have been to remand the case for further hearing on these issues. In fact, none of the heirs nor the bank have anything else to raise or try. All parties were before a court of competent jurisdiction and there is no reason why the Fourth District Court of Appeal did not end its opinion with an affirmance and the comment that: court approval was necessary and approval has occurred.

The district court opinion here uses the word "capacity" in an inappropriate sense. It is logically inconsistent to hold that the ward did not have the "capacity" to make a deed and in the same sentence to say that the court in the guardianship case could have approved the deed. Obviously, the ward did have the capacity to make a deed. What the District Court intended to hold was that the deed was voidable, subject to the guardian's objection and the court's approval.

The Fourth District's opinion is also shortsighted in suggesting that what the ward should do is terminate the guardianship, transfer the property and then restart the guardianship. This process was also suggested in the Nolte opinion but criticized as a waste of motion by the Wisconsin court in In Re: Evans Estate, supra. Further, there is no reason to allow by circumvention what may be accomplished directly. There is simply no reason why a voluntary ward and a voluntary guardian must be at odds in the management of the ward's property. The fears expressed by the Fourth District that the ward might "willy-nilly transfer his property" are highly impractical. The California court considered exactly the same problem and stated in Davis as follows at 1054:

> Finally, we do not accept defendant's contentions that recognition of the conservatee's right to contract will frustrate the purposes of the Conservatorship Act and render unmanageable the administration of conservatorships. The fact that two persons co-manage property does not necessarily mean that the property thereby becomes unmanageable. Many types of relationships are premised upon co-management. (E. g., tenancy in common, joint tenancy, community property.) In some situations, in fact, the conservator will more likely play the role of supervisor rather than co-manager as in the case of a conservatee, not adjudged an incompetent, who has entered into reasonable contracts. ...

Surely, courts should encourage a system of co-management of property rather than stripping a voluntary ward of all human rights and capacities.

The parties submitted extensive supplementary briefs at the request of the Fourth District Court of Appeal. These briefs are included in the record before this court and dealt primarily with the social and legal problems of the elderly. The thrust of nearly all current studies over the past two decades shows that it is entirely inappropriate to lump the aged together with mental incompetents and other helpless segments of society. The trend is to recognize that the frail elderly do have the ability to manage and control their own property with a minimum of assistance. Nearly all commentators discovered by petitioner have rejected the historically condoned tendency to assume that the frail elderly are simply incapable of coping. Legal assistance to the elderly should not be viewed on an all or nothing basis. See How the Human Brain Responds to Aging, 24 J. Am. Geriatrics Society 4 (1976); Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51. S. Cal. L. Rev. 527 (1978); Gunn, Mental Impairment in the Elderly: Medical-Legal Assessment, 25 J. Am. Geriatrics Soc. 193 (1977); Ernst et al., and Cohen, Civil Liberties and the Frail Elderly. 15 Society 34 (July/August 1978). Studies on the effects of imposed guardianships indicate that many of the aged on whom such guardianships are imposed suffer merely from some loss of memory and unfamiliarity with legal processes and do not lose their judgment concerning personal

goals and the management of their own estates. The current goal of the courts should be to approach the whole problem with a great deal of flexibility and respect for both the frail elderly and the strong elderly. The supplemental briefs of the parties contain extensive citation and discussion of current legal and medical journals in this area.

Judge Tyson (the guardianship judge) was required to terminate the guardianship proceeding upon the death of the ward pursuant to §744.521, Florida Statutes (1979). This statute specifically requires that the guardianship be terminated when a ward dies. A guardianship must also be terminated under the statute if a ward becomes sui juris or is restored to competency. Under such circumstances would anyone suggest that a deed by such a person could not be approved? Similarly, the Fleming case makes it absolutely clear that the deed or any other act of a person may be approved after the death of that person.

The opinion of the District Court of Appeal erred in not reaching the conclusion that approval of the deed has already occurred.

CONCLUSION

The Circuit Court was correct. This court should vacate the opinion of the Fourth District Court of Appeal and approve the decision of the trial court. Alternatively, the matter should be remanded to the Fourth District Court of Appeal with directions that the approval of the deed in the civil division rendered the deed effective.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 2d day of December, 1985, to:

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