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STATE OF WASHINGTON

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Consolidated

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

NADENE M. SAMMANN, Individually,
Appellant

v.

ANNA J. ARMSTRONG, as Personal Representative
of the Estate of Robert M. White,
Respondent.

Appeal From the Superior Court
For Pierce County
Case No. 14-2-06640-1
Honorable Jerry T. Costello

**CORRECTED REPLY BRIEF OF APPELLANT
NADENE M. SAMMANN**

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3. REPLY

Appellant Nadene M. Sammann (“Nadene”) presents her Corrected Reply Brief to the Personal Representative’s Response. Nadene filed her Reply Brief with Division One on June 19, 2015. The Reply may have had some parts of the Appendix missing. Hence, this Corrected Reply with a complete Appendix is being filed as soon as possible.

Respondent Anna J. Armstrong, as Personal Representative of the Estate of Robert M. White, (“ Representative”) filed a misleading and incorrect statement of the case, with factual statements not supported by the record.

Further, the Representative failed to provide legal authority for many of her arguments, and/or misrepresented the authorities in her Response. Contrary to her Response, Appellant appealed the Order Dismising my Claims in the Representative’s Motion for Summary Judgment.

4. **The Personal Representative Failed to Cite To the Record For 17 of Her Statements of Fact.**

In Pages 1 thru 6 of the Personal Representative’s Statement of the case, she failed to provide references to the record for 17 of her statements of fact. Pursuant to the Rules of Appellate Procedure, RAP 10.3 (a) (5), the Appellate courts require “a fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the Record must be included for each factual statement. RAP 10.3 (a) (5). In the Representative’s statement of the case, from pages 1-6, she failed to cite references to the record 17 times.

On Page 1 of her statement of the case, she failed to cite references to the record 7 times.

On page 2 of her statement of the case, she failed to cite references to the record 2 times.

On page 3 of her statement of the case, she failed to cite references to the record 3 times.

On page 4 of her statement of the case, she failed to cite to References to the record 2 times.

On page 5 of her statement of the case, she failed to cite references to the record 2 times.

On page 6 of her statement of the case, she failed to cite references to the record 1 time.

Pursuant to the Rules of Appellate Procedure, a party, in their brief, must cite to the record for every fact in their Statement of the Case. The Representative failed to comply with the Appellate Rules. RAP 10.3(a)(5) See **Washburn v. Beatt Equip. Co.** 120 Wn.2d 246, 840 P.2d 860. (1992)

Pursuant to the Rules of Appellate Procedure, a party, in their brief, must not present legal conclusions in their Statement of the Case. Over the six pages of her Statement of the Case, the Representative offered legal conclusions in violation of the Rules of Appellate Procedure. RAP 10.3 See **Washburn v. Beatt Equip.Co.** 120 Wn.2d 246, 840 P.2d 860 (1992)

5. Appellant Moves the Court to Strike the Response Brief of the Representative, Based on her Failure to Follow the Rules of Appellate Procedure, RAP 10.3(a)(5).

Appellant moves the Court to Strike the Response Brief of the Representative, based on her failure to follow the Rules of Appellate Procedure, RAP 10.3(a) (5).

As further good cause, the Representative's mis-represents the cases cited for her arguments.

For example, on page 8, of her Response, the Representative mischaracterizes the case of Lobdell v. Sugar N'Spice, 33 Wn.App 881, 658 P.2d 126 (1983). The Representative states that "Lobdell, supra deals with the standard of proof necessary to reverse a finding of fact by the trial court after trial". However, Lobdell id. doesn't say that at all. A careful reading of Lobdell indicates the Representative simply made up the above opinion. Lobdell id. deals with the standard of review for an appeal.

This Court should ignore the Representative's argument above, and strike her Response Brief.

This court should reverse the trial court's Orders granting summary judgment and award of attorney fees to the Representative.

6. SUPPLEMENTARY STATEMENT OF FACT

Nadene's case was filed on March 5, 2014. CP 3-20 .
Three months later, the Personal Representative filed her motion for summary judgment. CP 21-22 .

7. ARGUMENT

Contrary to the Personal Representative's use of a Declaratory Relief case citation in her Response, Appellant Nadene never sued or petitioned the court under the Declaratory Relief Act. The Representative never argued the issue of the Declaratory Relief Act and it was never before the trial court, nor was it part of any motion for summary judgment.

Issues and argument never argued before the trial court should not be considered by the Appellate Court. RAP 2.5

This case arises out of a failed guardianship case, where attorney fees were awarded to Robert White's Guardian, made into judgments by the Guardian against Appellant Nadene and her mother, Marguerite jointly and severally. The Claims in Nadene's lawsuit follow:

- 1) For Fees unlawfully awarded to the Guardian, for which the Representative had notice and failed to recover from the Robert's Guardian.
- 2) For the costs and fees of fulfilling Robert's Contract, acting as his agent, in discovering the location of his assets, reporting on them to the supervising judge in the trial court and to his Guardian.
- 3) For recovering overcharged funeral costs and returning them to his Estate.

Both the Supreme Court and this Division of the Court of Appeals issued Orders Denying Attorneys Fees to the Guardian. The Supreme Court's Order was entered on March 1, 2010, and The Court of Appeals Order was entered April 4, 2010.

Subsequently, both the Supreme Court and this Division of the Court of Appeals entered restraining orders prohibiting Nadene and Marguerite from filing documents with the trial and appellate courts.

8. The Representative Failed to Collect Most of The Debts Owed to the Estate. The Debts Owed to the Estate Are:

1. The Attorney Fees unlawfully awarded to the Guardian.
2. Overcharged Funeral Expenses
3. VA Burial Allowance
4. The VA and Social Security Pension Payments appropriated by Robert's sister Rosemarie and never returned to his Estate.

Contrary to the Representative's assertions, the attorney fees unlawfully awarded to the Guardian were:

- 1) fees denied to the Guardian by the March 1, 2011 Supreme Court Order.
- 2) fees denied to the Guardian by the April 4, 2011 Court of Appeals Order.
- 3) Duplicate fees from the Guardian's 2nd-5th Annual Accountings. These fees were carried forward from one year to the next, and resulted in the same fees (same dates, same items, same # hours) being paid multiple times from Robert's Guardianship Estate to his Guardian. These duplicate fees resulted in larger judgments unfairly entered against Nadene and her mother, Marguerite.
- 4) Excessive and/or unreasonably high fees for mundane tasks (purchasing toiletry items) performed by legal staff of the Guardian when minimum wage staff should have been employed.

ARGUMENT

9. **APPELLANT NADENE HAS STANDING TO BRING THIS ACTION AND APPEAL AGAINST THE PERSONAL REPRESENTATIVE BECAUSE NADENE IS A CREDITOR WITH A RECOGNIZED INTEREST IN THE ESTATE.**

Appellant Nadene M. Sammann has standing to bring this action and appeal against the Personal Representative because Nadene is a creditor with a recognized interest in the Estate.

To have standing in an estate case, it is necessary to have a recognized interest in the estate. In this case, Nadene (Robert's niece) is a creditor of the Estate.

The Representative claims Nadene has no standing to bring a claim against the Representative. She does not explain why or give a reason for this. She cites Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn. 2d 791, 802, 83 P.3d 419 (2004) as authority for her argument. Her authority is misplaced, and misapplied to this case.

Grant, id does not discuss or concern an estate, or the issue of who has standing to bring an action against a personal representative.

It is evident that the Representative could not find an estate case or statutory authority to support her argument on standing.

The Representative also cites RAP 3.1 as authority on the issue of standing. RAP 3.1 states, "Only an aggrieved party may seek review by the appellate court". Here, Nadene is an aggrieved party by reason

of the fees owed to the Estate, that should have been recovered.

The judgments against Nadene should have been reduced or vacated by recovering those unlawfully awarded fees.

The Representative has admitted (in her Answer to the Complaint) that she intends to foreclose on Nadene's Home and execute on the Judgments incurred by reason of Robert's contract with Nadene.

The above actions and breach of duty of the Personal Representative form the basis of Nadene being an aggrieved party, with standing to bring this action and appeal.

Nadene worked to discover and locate Robert's missing assets, at his request, (see Contract and Appointment of Nadene). CP 178.

And, even after Robert's death, Nadene worked to recover and succeeded in getting the funeral home to refund the overcharged funeral expenses to the Estate. The Representative does not address this issue in her Response, and therefore, does not dispute Nadene's work in recovering Robert's assets for the Estate.

Appellant Nadene has standing to bring this action and is an aggrieved party, pursuant to RAP 3.1.

From pages 8-14 of her Response, the Representative presents assertions without any legal authority, case law, or statutory support.

It is evident that the Representative could not find any legal authority, case law, or statutory support for her assertions.

The Representative's arguments are frivolous meritless, and in bad faith.

To summarize the Representative's assertions from page 8-15:

First, she asserts there were no fees awarded to the Guardian in defiance of two Appellate Court Orders, and

Second, if there were fees unlawfully awarded to the Guardian, then the Personal Representative had no duty to recover those fees, and Third, there is no evidence that those fees were actually paid to the Guardian from the ward's funds, and

Fourth, that the attorney fees that were denied to the Guardian by The Supreme Court were actually related to a petition for review,

And, Fifth, that those fees denied to the Guardian by the Supreme Court and this Court of Appeals were a "legitimate Guardianship expense and if those fees were ever awarded to the Guardian, that award was not improper".

The Representative fails to cite any authority for any of her assertions.

What is even more troubling is that the Representative appears to be defending the actions of the guardian, which is contrary to the duty of a Representative. The Representative owes a duty of loyalty to the Estate she is charged with.

The Representative's next asserts that Appellant Nadene's citation of several probate and guardianship statutes were only

addressed in this appeal, when in fact, they were contained in Nadene's motion for summary judgment filed in the trial court. The Representative cites RAP 2.5 in asking this court to deny review of these arguments.

First, the Representative's assertions are factually frivolous, and designed to mislead the court. The Representative is aware that those statutes are central to Appellant's case. Even if the Representative's assertion was true, Washington courts have allowed issues to be considered for the first time on appeal when fundamental justice so requires". State v. Card, 48 Wn. App. 781, 784, 741 P.2d 65 (1987); see also State v. Lee, 96 Wn. App. 336, 338, n.4, 979 P.2d 458 (1999) (courts may consider issues for first time on appeal in interests of justice); Greer v. Northwestern Nat'l Ins. Co., 36 Wn. App. 330, 338-39, 674 P.2d 1257 (1984) (fundamental justice required review of insurance policy clause to determine whether it violated public policy, though issue was not raised until oral argument). Appellate courts have considered issues of "fundamental justice", even when raised for the first time on review, for the reasons set forth in a pre-RAP decision Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970) (quoted in Greer, 36 Wn. App. at 339):

"Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A Case brought before this

court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it”.

On page 14, the Representative next argues, that even if those statutes quoted in her Opening Brief were before the trial court, would allow a court at a Final Hearing in a guardianship proceeding, to allow a personal representative or any interested person, to re-litigate the appropriateness of attorneys fees awarded by the Court after notice in prior annual guardianship orders.

Yet, that is precisely what those statutes allow.

On Page 13-14 of her Response, the Representative makes reference to the citation of those statutes before the trial court:

While the Representative claims that Appellant Nadene responded to her motion for summary judgment, in another part of her brief, page 3, she states that Nadene did not file a Response to the Representative’s motion for summary judgment. The Representative then states that Nadene filed her own motion for summary judgment, which the trial court refused to hear. In fact, the Report of Proceedings states on the day of the Hearing for the Representative’s motion for summary judgment, the judge allowed Nadene to Respond to the Representative’s motion, but not to present Nadene’s own motion. RP July 11, 2014.

10. TORTIOUS INTERFERENCE WAS RAISED AS A VALID CLAIM IN NADENE’S COMPLAINT

Contrary to the Representative’s assertions on pages 15-16,

Tortious interference with an inheritance was raised as a valid claim in Nadene's complaint. (CP 16), when Appellant stated she believed the Representative intended to deny Appellant Marguerite her inheritance and to attach Appellants' home.

At the hearing on the Representative's motion for summary judgment, the trial court would not hear Nadene's timely motion for summary judgment, and the court would not allow a Reply argument and as result, Appellant Nadene could not raise the above issue during her one and only argument and opportunity to speak, because of the time constraints in the courtroom.

This court should allow review of the issue of Tortious Interference with an Inheritance because fundamental justice requires it. Nothing in RAP 2.5(a) prevents the appellate courts from continuing to review such issues even though they have not been properly preserved in the trial court.

11. **THE \$13,035.00 AWARD OF ATTORNEY FEES WAS NOT WARRANTED AND SHOULD BE REVERSED**

Appellant Nadene filed this action on March 4, 2014. The Representative filed her motion for summary judgment 3 months later.

12. **THIS CASE WAS ONE OF FIRST IMPRESSION**

This case was one of first impression. Cases of first impression are not frivolous if they present debateable issues of substantial public

importance. Olson v. City of Bellevue, 968 P.2d 894, Washington Court of Appeals, Division One. (1998).

Appellant brought this action to recover fees and damages she suffered when Robert asked her to discover what had happened to his missing funds: more than \$400,000. In his written contract he appointed Nadene to work on his behalf to discover, locate and recover his funds, but also to secure his release from the Federal VA ward where he was placed against his will by the State, and where he was kept for five years by the court appointed guardian, without any visits to family, and where he died of deprivation of food and water.

Appellant fulfilled her part of the contract and appointment to act for Robert. She discovered the location of some of his assets and continued to act for him and his estate, even after he had died. Appellant worked to recover the overcharged funeral expenses that were sent back to his guardian and then to the Representative.

Additionally, the Representative's arguments are meritless for 4 reasons:

First, there was no opportunity for discovery by appellant. This case was in its infancy. And, Appellant's complaint complied with the requirements for a complaint under the Civil Rules.

Second, the court would not allow appellant a hearing on her motion for summary judgment. Third, the Representative's Declaration in support of her motion for summary judgment lacked the evidentiary documents provided by Nadene to the Representative's attorney. The trial court committed reversible error when it refused to hear Appellant Nadene's motion for summary judgment and denied her the right to amend her complaint.

On page 16, The Representative misrepresents Appellant's argument in her opening Brief by stating that Nadene argued that the attorney fees were improperly awarded against her by the trial court under civil rule 11 and RCW 4.84.185. Then on page 17, the Representative states that Nadene did not argue that the trial court erred in finding that she brought the action for an improper purpose.

The Representative's Response should be stricken because she misrepresents the appellant's arguments.

The relief requested by Nadene was not improper. For five years, most of Robert's family members, including the representative, knew of the written contract signed by Robert, and they approved Nadene's work on behalf of Robert.

The award of attorney fees of \$13,005.00 was improper and should be reversed. Appellant's citation of the appropriate statutes in her complaint and motion for summary judgment coupled with the facts of this case did not warrant a fee award to the Representative. Further, Appellant made a good faith argument for the extension of existing law in her motion for summary judgment. -13-

13. A SANCTION AWARD OF \$13,035.00 UNDER RCW 4.84.185 WAS IMPROPER

A sanction award of \$13,035.00 under RCW 4.84.185 was improper. Under that statute, all the claims in a complaint must be frivolous or it fails. Contrary to the Representative's version of the statute, if only one part of the claim has merit, then an award under RCW 4.84.185 is not warranted. Appellant's claims for damages because of the Representative's own breach of duties are not frivolous because they are based on existing law.

14. APPELLANT'S CLAIMS UNDER ROBERT'S CONTRACT HAVE MERIT BECAUSE THE LAW IS CHANGING AND EVOLVING REGARDING AN INCAPACITATED PERSON'S RIGHT TO CONTRACT.

Appellant's claims under Robert's contract have merit because the law is changing and evolving regarding an incapacitated person's right to contract.

The Representative has used an outdated 27 year old citation, United Pacific Insurance Company v. Buchanan, 52 Wn. App. 836, 765 P.2d 23 as support for her argument that it was legally impossible for Robert to contract because he was under guardianship.

But the law is evolving regarding the capacity to contract and the rights of incapacitated persons to make a contract. The courts, especially the Federal courts, see things differently, in a more modern context.

United Pacific represents a cut and dried approach to the issues of capacity and the rights of incapacitated persons. The District of Columbia Court of Appeals has made a sea change decision, **Hernandez v. Banks**, 65 A.3d 59, District of Columbia Court of Appeals, which looks at these two issues on a case by case basis, rather than the one size fits all approach. And, even though this case is about a contract made while a person is mentally incapacitated, yet not under guardianship, it is fundamentally altering the outdated approach of **United Pacific Insurance v. Buchanan, id.** 52 Wn. App.836 (1988).

The Hernandez Court found that a contract with an incapacitated person is not void, but is voidable, if the incapacitated person disaffirms the contract. Robert never disaffirmed the contract, or the appointment of Appellant.

Hernandez is an unpublished decision, but General Rule 14.1 and Federal Circuit Appellate Rule 32-1 allows citation of unpublished opinions. See Appendix, A-3.

The Hernandez court stated that the “void rule relies on an outdated theory of contract formation and outdated understandings of mental illness., and we overrule the holding of **Sullivan v. Flynn**, 20 D.C. (9 Mackey) 396, that contracts entered into by mentally incapacitated persons are inherently void. In its place, we adopt the voidable rule as set forth in the Restatement of Contracts section 15, which better balances the competing interests of ensuring the security

of transactions and enabling mentally incapacitated persons to participate in society, while protecting them from unfair imposition.”

The Representative’s citation of **United Pacific**, id. should be disregarded.

Next, the Representative relies on **Zuver v. Airtouch Communications**, 153 Wash. 2d 293, P.3d 753 (2004) as support for her argument that there was no mutuality of obligation.

Nevertheless, Appellant Nadene did perform her part of the contract with Robert. And, she continued to perform her contract for Robert even after he died, by recovering debts owed to his Estate.

15. CIVIL RULE 11 SANCTIONS ARE NOT SUPPOSED TO BE A FEE SHIFTING MECHANISM.

Civil Rule 11 sanctions are not supposed to be a fee-shifting mechanism. The award of fees to the Representative appears to be a method of attaching Appellant’s home and estate for an improper purpose.

Here, Nadene discovered the location of Robert’s assets, communicated the information to Robert, his Guardian, and to other family members, and worked to secure his release from the Federal VA Ward where he was placed against his will. Nadene recovered debts owed to the Estate, in the form of overcharged funeral expenses. In the course of monitoring Robert’s Guardianship, Nadene discovered additional duplicate fees charged to Robert’s Estate that were never recovered and returned to the Representative.

Nadene performed these tasks because Robert had appointed her as his agent and signed a contract asking her to find his missing assets. CP 178 .Robert also asked Nadene to (quote) “get me out of here”(the Federal VA Ward) CP 178 .

Nadene interpreted Robert’s request and contract to mean, end the Guardianship and secure his release from the Federal VA ward.

Nadene is owed the amount of attorney fees that should have been recovered from the guardian. The guardian of Robert unlawfully asked for attorney fees that were denied to her by both appellate courts. These same attorney fees were made into judgments against Appellant Nadene. The Representative failed to recover those fees from the Guardian or even attend the Guardian’s Final Accounting Hearing. Instead, the Personal Representative intends to seize Nadene and her mother’s home. Nadene is a creditor of the estate, because those judgments should have been reduced or vacated.

RCW 11.48.010 states that,” the Personal Representative **shall collect all debts** due the deceased and **pay all debts** as hereinafter provided. (Emphasis provided).

The Personal Representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.

Contrary to the Representative’s argument on page 25, the Washington State Legislature clearly stated its intent in creating RCW 11.48.010.

General Powers and Duties, that the personal representative has a duty to collect all debts due the deceased and pay all debts.

This statute has been State Law since 1917.

In the Personal Representative's Response Brief, she argues that "no evidence exists in the record regarding the guardian's unlawful request for fees".

16. Evidence of Unlawfully Awarded Fees To The Guardian Exists In The Judgments Themselves and in the Guardianship Case

Evidence of the unlawfully awarded fees exists in the judgments themselves against Appellant Nadene and her mother, Marguerite and in the Personal Representative's Motion for Summary Judgment.

Appellant Nadene and her mother, Marguerite were prevented from filing any documents or motions in the trial and appellate courts. The restraining order was signed on December 3, 2010 and notice was given to the clerks of the court. We complied with those orders. The clerks complied with those orders.

Nadene and Marguerite complied and did not file any documents or motions in those courts. Yet, one year later, the guardian asked the trial court for attorney fees for the time period following the time when the restraining order was signed.

It was impossible for appellants Nadene and Marguerite to file any documents, and it was impossible for any attorney fees to be generated by the guardian because appellants Nadene and Marguerite never filed any documents with the clerks of those courts. Yet, the guardian asked for attorney fees for a time period when nothing was

filed or served by Nadene and her mother, Marguerite.

In her Response, the Personal Representative argues there was “No evidence in this case regarding the actual payment of fees to the Guardian”. Presumably, she means no copies of actual checks written by the Guardian to herself. That is true.

Only the Personal Representative can ask for copies of checks made out by the Guardian to herself from the ward’s estate.

By law, only the Personal Representative may ask for recovery of attorney fees and other fees from the Guardian.

Only the Personal Representative has standing to ask for recovery of Attorney fees and other fees from the Guardian.

In this particular case, both appellants were restrained by court orders from recovering these unlawfully awarded fees because we could not file any documents in the guardianship case.

If the personal representative had performed her duties and she and her attorney certainly had ample notice and time to do so, they could have recovered the unlawfully awarded fees plus interest for the Estate, as well as attorney fees expended in recovering those fees. The recovered fees would have benefited the Estate, and as a matter of equity, should have resulted in reducing or vacating the Judgments against Appellant Nadene.

Instead, the personal representative and her attorney sat there and did nothing to recover the attorney fees.

The personal representative and her attorney has refused to give any compelling reason for refusing to recover the fees.

Their only explanation is that no law exists that allows a personal representative to recover fees from a guardian that were previously awarded to her. That is not true.

The legislature specifically wrote RCW 11.92.050 in order to create a mechanism and procedure to allow a personal representative and court to review all the Fees awarded to a Guardian. The procedure consists of filing of a Final Accounting Report, a request for approval of the Final Accounting Report, and if a Guardian so requests, having a guardian ad Litem appointed to approve the report. And, a hearing date is scheduled to allow any person to come forward to contest or comment on the Guardian's Final Accounting Report and all Her Filings.

In this case, the personal representative and her attorney had Notice of the Final Accounting Report and the Request to Approve all her Fees for Year 2 through Year 5 of Robert's Guardianship. There is no authority cited by the representative for the Notion that a guardian may ask the trial court for attorney fees previously denied to her by the appellate court and that the trial court may unilaterally award fees to her that were specifically denied to her by both appellate courts. The personal representative cannot cite any authority, whether case law or under revised code of Washington, for the proposition that a trial court may supersede specific orders of the highest courts in this state. To do so would throw the entire system of justice in this state into disarray. -20-

As an officer of the court, attorneys who either ask for such fees in direct disobedience to an appellate court order or who condone such actions are in breach of their duties as attorneys and Officers of the Court.

Officers of the Court are presumed to behave in an honorable and respectful manner to the court. And, disrespecting the Appellate courts in this manner does harm to our system of justice.

Appellant Nadene had a Duty to inform the Court That the Guardian had violated the two Appellate Court Orders denying the Guardian Her Attorney Fees.

As an Officer of the Court, the personal representative's attorney also had a duty to inform the court that the guardian had violated the two appellate court orders.

If Appellants did not inform the court, who would?

The Attorney for the Personal Representative is more concerned with protecting the guardian than protecting his client from liability and protecting the heirs of Robert's Estate.

Appellant Nadene identified additional debts owed to Robert that the personal representative and her attorney failed to collect. Without her discovery of the location of Robert's missing assets, the Personal Representative and Estate would have been ignorant of these assets and their location.

The personal representative and her attorney were given notice by the Guardian of her intention to ask at the Final Guardianship Hearing on August 2, 2013 for approval of all the fees charged by her in her 2nd, 3rd, 4th, and 5th Accountings.

Both the personal representative and her attorney argue that she had no duty to collect any of the debts owed to the estate.

Specific provisions in probate law were set up by the State Legislature re: the duties of a personal representative administering an estate. A Representative must comply with those provisions of RCW 11.48.010. The Representative breached her duty to collect and recover the debts and assets of the estate.

17. ATTORNEY FEES ON APPEAL

18. THE PERSONAL REPRESENTATIVE CANNOT BE AWARDED ATTORNEY FEES AS A SANCTION AGAINST APPELLANT BECAUSE SHE FAILED TO COMPLY WITH APPELLATE RULES RAP 18.1 AND RAP 18.9. CIVIL RULE 11 NO LONGER APPLIES TO APPEALS.

The Personal Representative cannot be awarded attorney Fees as a sanction in this Appeal against Nadene because she failed to comply with Appellate Rules RAP 18.1 and RAP 18.9.

Civil Rule 11 no longer applies to appeals.

On page 21 of her Response, the Personal Representative requests attorneys fees on appeal. Her request failed to comply with the Rules of Appellate Procedure, because she cited Civil Rule 11.

The Personal Representative did not cite any Rule of Appellate Procedure as the basis for a sanction fee award against Nadene.

Instead, she cited Civil Rule 11, which no longer applies to an appeal.

The Washington state Appellate Practice Deskbook, Chapter 26-1 Supplement Rev 2011 states the correct rules for requesting sanctions:

**Ch. 26.3 WHEN AN APPELLATE COURT MAY AWARD
ATTORNEY FEES AS A SANCTION**

RAP 18.7 no longer authorizes the appellate court to impose sanctions for violations of CR 11 on appeal. Instead, the award of fees as a sanction is governed by RAP 18.9.

**19. The Representative Has No Grounds Or Basis For An
Award Of Fees As A Sanction Against Nadene.**

The Representative has no grounds or basis for an award of fees as a sanction against Nadene.

And, in any event, in her Response, she failed to cite the correct, applicable Rules RAP 18.1 and RAP 18.9.

**In This Appeal, The Personal Representative Has No Grounds
Or Basis For An Award of Reasonable Attorney Fees Under Any
Other Rule Or Authority. She Did Not Request or Provide Argument
For An Award Of Reasonable Attorney Fees Under Any
Other Legal Theory, Statute, Or Authority.**

In this Appeal, the Personal Representative has no grounds or basis for an award of reasonable attorney fees or costs under any other rule or authority. She did not request or provide argument for an award of reasonable attorney fees or costs under any other legal theory, statute, or authority. The Representative's Request for Attorney Fees on Appeal should be denied.

The Appellate Courts require that any request for fees by respondent or appellant must cite a statute, rule or authority, and provide argument in support of a fee request.

In this appeal, the Personal Representative did not cite the correct statute or rule in requesting an attorney fee award as a sanction, and she did not ask for, argue or claim that reasonable attorney fees or costs should be awarded to her under any other rule, statute, or authority. There was no request for fees based on a prevailing party, nor was there any rule or authority cited as an argument as a prevailing party. Even if this court decides to award fees as a sanction or as an award of reasonable attorney fees and costs, we would ask the court to consider that this case is one of first impression.

“Cases of first impression are not frivolous if they present debatable issues of substantial public importance”. **Olson v. City of Bellevue**, 968 P.2d 894, Washington Court of Appeals, Division One, (1998). The Representative’s request for attorney fees should be denied.

The Representative’s argues in her Response on page 27 that Appellants Marguerite and Nadene are guilty of a civil conspiracy and attorney fees on appeal should be awarded based on that theory, citing **Sterling Business Forms, Inc.v. Thorpe**, 82 Wash. App. 446, 918 P.2d 531 (1996) as authority.

An action for civil conspiracy lies when there is an agreement

by two or more persons to accomplish some purpose, not in itself unlawful, by unlawful means. Sterling, id., contended the unlawful means included the use of confidential information re: methods, customers, and solicitation of an employer's clients for an employee's future venture.

Here, the Representative claims Nadene and her mother, Marguerite engaged in a civil conspiracy by filing their two claims on the same day in Pierce County Superior Court, and they should pay an appellate fee award.

The Representative's arguments and citations are frivolous and baseless. Based on the facts and the law, she is not entitled to a trial court or appellate fee award. Appellant again requests sanctions against the Representative, pursuant to RAP 18.1 and RAP18.9.

20. CONCLUSION

This Court should grant the motion to supplement the record (filed on June 19, 2015) and reverse the orders granting summary judgment and award of attorney fees to the Representative. The underlying judgments and interest against Nadene should be reduced or vacated. The Representative and/or her attorney should pay fees (if any) and costs.

Respectfully Submitted this 30th day of June, 2015.


Nadene M. Sammann, Appellant.

Corrected Reply Brief of Appellant
Nadene M. Sammann
No. 46628-7-II
Consolidated – Page 25

Nadene M. Sammann
17058 37th Avenue N.E.
Seattle, Washington 98155
(206) 365-8019

APPENDIX

Nadene M. Sammann
v. Anna J. Armstrong, as
Personal Representative
Of the Estate of Robert
M. White, Respondent.

No. 46628-7-II
Consolidated
Appendix

Appendix A-1

Robert M. White's
Signed Contract
Dated June 19, 2009

Nadene M. Sammann
v. Anna J. Armstrong
No. 46628-7-II
Consolidated

Nadene M. Sammann
17058 37th Avenue N.E.
Seattle, Washington 98155
Appendix A-1

0004
1730
7/2/2014



STATEMENT IN SUPPORT OF CLAIM

PRIVACY ACT INFORMATION: The law authorizes us to request the information we are asking you to provide on this form (38 U.S.C. 501(a) and (b)). The responses you submit are considered confidential (38 U.S.C. 5701). They may be disclosed outside the Department of Veterans Affairs (VA) only if the disclosure is authorized under the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22, Compensation, Pension, Education and Rehabilitation Records - VA, published in the Federal Register. The requested information is considered relevant and necessary to determine maximum benefits under the law. Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: VA may not conduct or sponsor, and respondent is not required to respond to this collection of information unless it displays a valid OMB Control Number. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have comments regarding this burden estimate or any other aspect of this collection of information, call 1-800-827-1000 for mailing information on where to send your comments.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)	SOCIAL SECURITY NO.	VA FILE NO.
ROBERT M. WHITE	[REDACTED]	[REDACTED]
<i>DAMAGES</i>		
		C/CSS -

The following statement is made in connection with a claim for ~~benefits~~ in the case of the above-named veteran:

I, Robert M. White, make the following claim. On Nov. 19, 2008, I was taken from my

home(613 S. 19th St., Tacoma, Wash.) by Julie Carey, a court appointed GAL. Ms. Carey

took me to St. Joseph's Medical Center, where I was stripped of my clothing and I had to

surrender all my money. The amount of cash that I brought with me from my home was

more than \$30,000. A financial record of my cash was made by St. Joe's on a form. I

believe the financial record is part of my medical history. On or about Dec. 8th - 9th, 2008,

Julie Carey met with me and promised to safeguard my cash. On or about Dec. 8th - 9th, 2008

I was taken to the VA Nursing home at American Lake, Tacoma, Wash. I later learned

Julie Carey filed a report to the Court stating two VA social workers, Deanna Carron and

Theresa Christian found less than \$10,000 on my person when I was admitted to the VA

Nursing Home. All of my cash assets come from substantial VA and Social Security

Disability benefits. The total value of all my cash valuables was more than \$400,000

before I was taken from my home. Now, a court appointed guardian claims my assets are

less than \$6,000. I am requesting that my niece, Nadene Sammann ask the VA to conduct

an investigation into the disappearance of my cash. I make this claim for the return of all

my cash. I want my valuables returned to me and I want to get out of here.

(CONTINUE ON REVERSE)

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

SIGNATURE 	DATE SIGNED <i>June 19 09</i>	
	TELEPHONE NUMBERS (Include Area Code)	
ADDRESS AMERICAN LAKE VA MEDICAL CENTER BUILDING 28 NORTH 9600 VETERANS DRIVE TACOMA, WASH. 98493	DAYTIME	EVENING

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

APPENDIX A.2

Hernandez v. Banks,
65 A.3d 59, (2013)
District of Columbia
Court of Appeals

Nadene M. Sammann
v. Anna J. Armstrong
No. 46628-7-II
Consolidated

Nadene M. Sammann
17058 37th Avenue N.E.
Seattle, Washington 9815
Appendix A2

65 A.3d 59

District of Columbia Court of Appeals.

Ricardo HERNANDEZ, Appellant,

v.

Bryant BANKS and Sheillia Banks, Appellees.

Nos. 08-CV-1571, 09-CV-744. | Argued
En Banc June 19, 2012. | Decided May 2, 2013.

Synopsis

Background: Property owner brought action against tenants who had entered into lease with property's former owner, seeking a non-redeemable judgment for possession of the property on grounds that former owner lacked mental capacity to enter into lease. The Superior Court, Stephanie Duncan-Peters, J., determined that owner was not entitled to possession. Owner appealed. The Court of Appeals, 21 A.3d 977, reversed. Tenants filed petition for rehearing en banc, which was granted.

[Holding:] The Court of Appeals, Blackburne-Rigsby, Associate Judge, held that lease was voidable, not void, overruling *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396.

Remanded.

West Headnotes (9)

[1] **Courts**

⇒ Number of judges concurring in opinion, and opinion by divided court

The District of Columbia Court of Appeals, sitting en banc, may overrule its predecessor courts' decisions, including common law decisions.

Cases that cite this headnote

[2] **Courts**

⇒ Nature of judicial determination

Courts

⇒ Previous Decisions as Controlling or as Precedents

In common law cases, the task of the Court of Appeals is to carefully consider its own precedents, weigh rulings from other jurisdictions for their persuasive authority, and, guided by judicial doctrines such as stare decisis and the uniquely judicial means of case-by-case adjudication, declare the common law of the District of Columbia.

Cases that cite this headnote

[3] **Courts**

⇒ Previous Decisions as Controlling or as Precedents

Courts

⇒ Decisions of Same Court or Co-Ordinate Court

The doctrine of stare decisis is essential to the respect accorded to the judgments of court and to the stability of the law, but it does not compel the Court of Appeals to follow a past decision when its rationale no longer withstands careful analysis.

Cases that cite this headnote

[4] **Courts**

⇒ Previous Decisions as Controlling or as Precedents

The doctrine of stare decisis does not irreversibly require that the Court of Appeals follow without deviation earlier pronouncements of law which are unsuited to modern experience and which no longer adequately serve the interests of justice.

Cases that cite this headnote

[5] **Contracts**

⇒ Physical or mental condition of party

A voidable contract entered into by a mentally incapacitated party is presumed valid and legally binding, subject to possible avoidance by the mentally incapacitated party, who must manifest an election to do so. Restatement (Second) of Contracts § 15.

Cases that cite this headnote

[6] **Contracts**

⇒ Physical or mental condition of party

Contracts

⇒ Effect of invalidity

Unlike a void contract which has no legal effect, a voidable contract entered into by a mentally incapacitated party binds both parties unless disaffirmed or avoided by the incapacitated party. Restatement (Second) of Contracts § 15.

2 Cases that cite this headnote

[7] **Contracts**

⇒ Physical or mental condition of party

Absent fraud or knowledge of the asserted incapacity by the other contracting party, the power of avoidance of a voidable contract entered into by a mentally incapacitated party is subject to limitation based on equitable principles. Restatement (Second) of Contracts § 15.

1 Cases that cite this headnote

[8] **Contracts**

⇒ Estoppel and Ratification

The power of avoidance of a voidable contract entered into by a mentally incapacitated party terminates if the incapacitated party, upon regaining capacity, affirms or ratifies the contract. Restatement (Second) of Contracts § 15.

2 Cases that cite this headnote

[9] **Mental Health**

⇒ Contracts before adjudication or appointment of guardian

Lease entered into by mentally incapacitated property owner was voidable, not inherently void; changes in contract law and evolving understanding of mental illness warranted adoption of rule of voidability, in order to balance competing interests of ensuring the

security of transactions and enabling mentally incapacitated persons to participate in society, while protecting them from unfair imposition, overruling *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396. Restatement (Second) of Contracts § 15.

1 Cases that cite this headnote

Attorneys and Law Firms

*60 Aaron G. Sokolow, with whom Morris R. Battino was on the brief, for appellant.

Daniel S. Harawa, Student Attorney (No. 12689), with whom Doreen M. Haney, Supervising Attorney, was on the brief, for appellees.

Julie H. Becker, The Legal Aid Society of the District of Columbia, with whom John C. Keeney, Jr., The Legal Aid Society of the District of Columbia, was on the brief, for The Legal Aid Society of the District of Columbia, AARP Legal Counsel for the Elderly, University Legal Services, Bread for the City, and Washington Legal Clinic for the Homeless, amici curiae, in support of appellees.

Before WASHINGTON, Chief Judge, GLICKMAN, FISHER, BLACKBURNE-RIGSBY, THOMPSON, OBERLY, BECKWITH, EASTERLY, Associate Judges, and RUIZ, Senior Judge.*

Opinion

BLACKBURNE-RIGSBY, Associate Judge:

We granted appellees' petition for rehearing en banc to consider whether we should continue to follow the rule of *Sullivan* *61 v. *Flynn*, 20 D.C. (9 Mackey) 396 (1892), that the contracts of mentally incapacitated persons are inherently void, or should instead join the majority of jurisdictions in deeming such contracts only voidable.

The background is as follows. Appellant's predecessor-in-interest, 718 Associates,¹ appealed a decision by the trial court determining that it was not entitled to a non-redeemable judgment for possession of property located at 718 Marietta Place, N.W., Washington, D.C. (the "Property"). Appellees Bryant and Sheillia Banks (the "Bankses") contend that they are legally entitled to continue living in the Property by virtue of a lease entered into with the previous owner of

the Property, Ms. Patricia Speleos. At trial, 718 Associates argued that appellees' lease was void because Ms. Speleos was mentally incapacitated when she signed the lease. The trial court upheld the validity of the lease, finding that although Ms. Speleos was mentally incapacitated when she entered into the lease agreement, her incapacity rendered the lease voidable at her election, rather than inherently void. The trial court found that the lease had not been disaffirmed by Ms. Speleos or her representatives and therefore did not award possession of the Property to 718 Associates. 718 Associates appealed, and a three-judge division of this court reversed the trial court's decision, holding that *Sullivan* controlled and the lease was inherently void.² *718 Assocs. v. Banks*, 21 A.3d 977, 984 (D.C.), *reh'g en banc granted, opinion vacated sub nom. 718 Assocs. Tr. 718 NW Trust v. Banks*, 36 A.3d 826 (D.C.2011). We conclude that the voidable standard better comports with modern contract law and modern understandings of mental illness and therefore overrule *Sullivan* and adopt the majority approach that such contracts are voidable, rather than inherently void.

I. Background

The Bankses entered into a lease agreement regarding the Property at issue in this case with Ms. Speleos in March 2001. Pursuant to that lease, appellees were obligated to pay \$500 per month in rent and were given the exclusive option to purchase the Property at any time for \$50,000. In July 1997, 718 Associates purchased a tax sale certificate to the Property for \$2,103 and was subsequently issued a tax deed in August 2001. *See* D.C.Code § 47-1304 (1997 Supp.) (providing that when a *62 property is not redeemed by the owner following the issuance of a tax sale certificate, a deed shall be given to the tax sale purchaser).

In November 2001, as part of a separate proceeding initiated by Adult Protective Services, Superior Court Judge Kaye K. Christian found Ms. Speleos, who was then eighty-four years old, to be mentally incapacitated as defined by D.C.Code § 21-2011(11) (2001).³ Pursuant to the finding of incapacity, Judge Christian appointed Stephanie Bradley as conservator of Ms. Speleos's estate and Ms. Speleos's nieces as guardians of Ms. Speleos. *See* D.C.Code §§ 21-2051, -2044 (2001) (appointment of conservators and guardians, respectively). A hearing was later held to determine the status of seven real estate transactions Ms. Speleos had entered into in March 2001, prior to her adjudication of incapacity. Ms. Bradley alleged that Ms. Speleos was already incapacitated at the

time of the transactions, in which she purportedly transferred seven properties with tax-assessed values of over half a million dollars for only \$41,000 in recited consideration. Judge Christian voided the transactions, but did not rule on the validity of the Bankses' lease, which was also entered into prior to Ms. Speleos's adjudication of incapacity. Instead, Judge Christian noted that another hearing would need to be held to address that lease. However, that additional hearing was never held.

On August 4, 2003, Judge Hiram E. Puig-Lugo found, based on the testimony of Ms. Speleos's conservator and guardians, that Ms. Speleos was mentally ill and was likely to injure herself. *See* D.C.Code § 21-545(b)(2) (2001). For that reason, Ms. Speleos was committed indefinitely to the District of Columbia Department of Mental Health for outpatient treatment. On August 5, 2003, 718 Associates filed suit against Ms. Speleos's estate to quiet title to the Property, claiming that their tax deed divested all interest and title of the Estate and vested good title to the Property in 718 Associates. *See* D.C.Code § 47-1304 (2001). While the suit to quiet title was pending, Ms. Speleos passed away, and her sister, Ann E. Pizzulo, became Personal Representative of the Estate. The suit to quiet title was resolved in October 2006, when 718 Associates and the Estate entered into a settlement agreement, which resulted in 718 Associates obtaining title to the Property. Pursuant to that settlement agreement, the Estate provided an affidavit attesting that there were no valid leases or permissive tenants on the Property.⁴

In April 2008, 718 Associates filed the present action seeking a non-redeemable judgment for possession of the Property *63 against the Bankses. The Bankses claimed that they were entitled to remain tenants when 718 Associates obtained title to the Property because they had a valid lease with the Property's former owner, Ms. Speleos. 718 Associates challenged the validity of that lease, claiming that Ms. Speleos lacked capacity at the time that she entered into the lease transaction with the Bankses and, as a result, the lease was void.⁵ The trial court, Judge Stephanie Duncan-Peters, found that Ms. Speleos was mentally incompetent when she entered into the lease agreement with appellees.⁶ The trial court concluded, however, that the lease was voidable, rather than void. Citing *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396 (1892), the trial court recognized that “[h]istorically, a conveyance or contract by an insane or *non compos mentis* individual was declared void, and not merely voidable.” The trial court observed that “the District of Columbia has not considered this particular issue,” but did

not discuss whether *Sullivan* remained binding precedent in the District of Columbia. The trial judge then examined what she described as the “modern view” that such a transaction is voidable, citing to cases from other jurisdictions⁷ and discussing the public interest in protecting incapacitated persons’ personal and property rights. After concluding that contracts entered into by mentally incapacitated persons are voidable, rather than void, the trial court found that there was “no ratification or disaffirmance by Ms. Speleos or an authorized representative on her behalf...”⁸ The trial court concluded by observing that “[t]he public policy considerations that would give the [c]ourt power to void the lease agreement, namely protection of the incompetent party, are not applicable to [718 Associates, a subsequent purchaser].”

*64 On appeal to the division, although 718 Associates “largely accede[d] to the trial court’s determination that the lease was voidable and not void,” they did “ask [the division] to find ‘that the lease agreement is void in accordance with’ *Sullivan*, *supra*, 20 D.C. (9 Mackey) at 401 (1892) (holding that ‘the deed of an insane person is void, and therefore cannot be ratified by acts *in pais*’).”⁹ *718 Assocs.*, *supra*, 21 A.3d at 981 n. 9. The division concluded that it was constrained to apply *Sullivan* because *Sullivan* remained binding precedent in the District of Columbia and therefore could only be overruled by this court sitting en banc.¹⁰ *718 Assocs.*, *supra*, 21 A.3d at 984 (citing *M.A.P.*, *supra* note 2, 285 A.2d at 312).

II. Discussion

We begin our discussion by outlining the relevant legal principles governing the contracts of mentally incapacitated persons. We then explain our reasons for overruling *Sullivan* and adopting the voidable rule, as stated in the Restatement (Second) of Contracts, as the law of the District of Columbia.

A. Legal Background

We granted rehearing en banc to consider whether the rule from *Sullivan*, that contracts entered into by mentally incapacitated persons are inherently void, should continue to be followed in the District of Columbia, or if we should join a majority of jurisdictions and hold that such contracts are voidable. We first address the applicable standard of review and define the void and voidable rules concerning the contracts of mentally incapacitated persons.

1. Standard of Review

[1] [2] [3] [4] Because neither this court sitting en banc nor the D.C. Circuit (prior to 1971) overturned or announced a departure from *Sullivan*, it remains the law in the District of Columbia. This court sitting en banc may overrule our predecessor courts’ decisions, including common law decisions. *See, e.g., Davis v. Moore*, 772 A.2d 204, 234 (D.C.2001) (en banc) (Ruiz, J., concurring in part and dissenting in part). “[I]n common law cases our task is to carefully consider our own precedents, weigh rulings from other jurisdictions for their persuasive authority, and, guided by judicial doctrines such as *stare decisis* and the uniquely judicial means of case-by-case adjudication, declare the common law of the District of Columbia.”¹¹ *Id.* “The doctrine *65 of *stare decisis* is of course ‘essential to the respect accorded to the judgments of the [c]ourt and to the stability of the law,’ but it does not compel us to follow a past decision when its rationale no longer withstands ‘careful analysis.’ ” *Arizona v. Gant*, 556 U.S. 332, 348, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003)). Furthermore, the doctrine of *stare decisis* “‘does not irreversibly require that we follow without deviation earlier pronouncements of law which are unsuited to modern experience and which no longer adequately serve the interests of justice.’ ” *Carl v. Children’s Hosp.*, 702 A.2d 159, 178–79 (D.C.1997) (Schwelb, J., concurring) (quoting *Beaulieu v. Beaulieu*, 265 A.2d 610, 613 (Me.1970)). Before discussing why *Sullivan* should be overruled, we briefly explain the void and voidable rules as they relate to the contracts of mentally incapacitated persons.

2. Void Rule

Sullivan held “that the deed of an insane person is void, and therefore cannot be ratified by acts *in pais*.”¹² 20 D.C. (9 Mackey) at 401. Although *Sullivan* did not go into such detail, it is generally understood that “[a] void bargain is not a contract at all;” a void “contract” cannot be ratified and therefore does not bind the parties. RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 10:2, at 278–79 (4th ed. 2009). Because the parties were never bound, the party with capacity can repudiate an agreement even though the incapacitated party has already performed. *Id.* A minority of jurisdictions continue to follow the rule that contracts entered into by mentally incapacitated persons are void.¹³

3. Voidable Rule

[5] [6] [7] [8] A majority of jurisdictions follow the rule that contracts entered into by mentally incapacitated persons are voidable, *66 rather than inherently void. Under that rule, the contractual act of a person later found mentally incapacitated, rather than adjudicated incapacitated or under a guardianship at the time of the contract,¹⁴ is not inherently void but at most voidable at the instance of the mentally incapacitated party, and then only if avoidance is equitable.¹⁵ A voidable contract is presumed valid and legally binding,¹⁶ subject to possible avoidance by the mentally incapacitated party,¹⁷ who must manifest an election to do so.¹⁸ The voidable rule is set forth in the Restatement as follows:

(1) A person incurs only voidable contractual duties by entering into a transaction *67 if by reason of mental illness or defect

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or

(b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

(2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981). In sum, a voidable contract—unlike a void contract, which has no legal effect—binds both parties unless disaffirmed or avoided by the incapacitated party. Absent fraud or knowledge of the asserted incapacity by the other contracting party, the power of avoidance is subject to limitation based on equitable principles.¹⁹ The power of avoidance also terminates if the incapacitated party, upon regaining capacity, affirms or ratifies the contract.²⁰ Having explained the relevant legal principles, we proceed to consider whether *Sullivan* should be overruled and the voidable rule adopted in its place.

B. Overruling *Sullivan v. Flynn*

[9] In considering whether the precedent established in *Sullivan* should be overruled, we examine whether *Sullivan's* rationale still withstands careful analysis. Concluding that it does not, we first explain why the outcome in *Sullivan* was not compelled by the holding in *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 21 L.Ed. 73 (1872). Next, we examine the validity of the rationales supporting the void rule: that a mentally incapacitated person is not capable of forming a contract and that the void rule best protects the incapacitated party. Finally, we conclude that the voidable rule better balances the competing interests of protecting the incapacitated party while ensuring the security of transactions.

The court in *Sullivan* reasoned that it was bound by the United States Supreme Court's decision in *Dexter* to hold that the deed of an insane person is void. *Sullivan, supra*, 20 D.C. (9 Mackey) at 401–02. The only issue before the Court in *Dexter* was “whether a *power of attorney* executed by a lunatic is void, or whether it is only voidable.” 82 U.S. (15 Wall.) at 20 (emphasis added). Analogizing to contracts involving infants, the Court held that a power of attorney granted by a “lunatic” was void. *Id.* at 25–26. At the time *Dexter* and *Sullivan* were decided, it was common for courts to distinguish powers of attorney from contracts. *See* 5 WILLISTON ON CONTRACTS § 9:5, at 37–44 (observing that although the general rule is that an infant's contract is voidable rather than void, “[a]t one time, certain contracts made by an infant were held void, rather than voidable” and “it has often been asserted and sometimes decided that an infant's power of attorney or agreement to make another his agent is void” (citing, *inter alia, Dexter, supra*, 82 U.S. (15 Wall.) 9). However, the distinction between powers of attorney and contracts is no longer widely accepted. *See* 5 WILLISTON ON CONTRACTS § 9:5, at 46–47 (“[T]he better view has been to treat the creation of an agency by a minor like other agreements made by infants, as merely voidable....” (citing, *inter alia, RESTATEMENT (SECOND) OF AGENCY* § 20 (1958) (“A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person.”))))); 12 WILLISTON ON CONTRACTS § 35:1, at 202 (4th ed. 2012) (“An agency contract is formed according to the same rules that are applicable to any other contract; an agency is created in much the same manner as a contract is made, in that the agency results from an agreement between the principal and the agent to serve in that capacity.”); *see also* RESTATEMENT (SECOND) OF AGENCY § 32 (1958) (“Except to the extent that the fiduciary relation between principal and agent requires special rules, the rules

for the interpretation of contracts apply to the interpretation of authority.”). In the years following *Dexter*, there was disagreement over whether it should be interpreted narrowly, to apply only to powers of attorney, or broadly to encompass other contracts.²¹ That the Supreme Court did not intend to establish a sweeping rule that all contracts of mentally incapacitated persons are void is demonstrated by the Court's decision in *Luhrs v. Hancock*, 181 U.S. 567, 21 S.Ct. 726, 45 L.Ed. 1005 (1901), where the Court observed, without even addressing *Dexter*, that “[t]he deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside.” 181 U.S. at 574, 21 S.Ct. 726 (citation omitted). However, *Luhrs* is not binding on this court and therefore does not replace *Sullivan* as the law of the District of Columbia.²²

*69 The court in *Sullivan* acknowledged that contracts generally, as opposed to powers of attorney specifically, were not at issue in *Dexter*; nonetheless, the *Sullivan* court felt “bound to recognize, in so full and careful a discussion, a deliberate intention of the [*Dexter*] court to establish a rule.”²³ 20 D.C. (9 Mackey) at 402. Although *Dexter* did not actually hold that all contracts entered into by mentally incapacitated persons are void, and therefore did not compel the *Sullivan* court to hold such, *Dexter* did use some broad language (dictum) to explain the rationales used to support the void rule.

Next, we examine the rationales commonly used to support the void rule, as explained by the Court in *Dexter*: 1) that a mentally incapacitated person cannot enter into a valid contract because to do so “requires the assent of two minds” and a mentally incapacitated person “has nothing which the law recognizes as a mind,” and 2) that a mentally incapacitated person, unlike an infant, will never gain the mental capacity necessary to avoid a contract and therefore “has no protection if his contract is only voidable.” *Dexter*, *supra*, 82 U.S. (15 Wall.) at 20–21.²⁴ As we discuss below, these rationales no longer comport with *70 modern contract law and modern understandings of mental illness.

I. Contract Formation

Implicit in the holdings of both *Dexter* and *Sullivan* is the premise that formation of a contract requires the mental assent of the parties involved, or a “meeting of the minds.”²⁵ Under this subjective theory of contract formation, it would seem logical to conclude that if one of the parties lacked a sufficient

“mind” there could be no such mental assent or “meeting of the minds” and therefore no contract. Weihofen, *supra* note 24, at 230. The question of whether a party's actual mental assent was necessary to the formation of a contract was the subject of a “significant doctrinal struggle in the development of contract law” between subjective theorists, who argued that a “meeting of the minds” was necessary to contract formation, and objective theorists, who took the view that “[t]he expression of mutual assent, and not the assent itself, was the essential element in the formation of a contract.” *Newman v. Schiff*, 778 F.2d 460, 464 (8th Cir.1985) (emphasis added). “By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today.” 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 210 (3d ed. 2004); see also *Hart v. Vermont Inv. Ltd. P'ship*, 667 A.2d 578, 582 (D.C.1995) (observing that the District of Columbia follows the objective law of contracts) (citation omitted). The basis for the void rule—that a mentally incapacitated person has no “mind” and is incapable of mental assent—“has given way to ... the doctrine that contractual obligation depends on manifestation of assent rather than on mental assent [or meeting of the minds].” RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. a (emphasis added).

To continue to adhere to the Court's rationale in *Dexter*, and by extension *Sullivan*, one also has to accept the premise that “a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind...”²⁶ 82 U.S. (15 Wall.) at 20. The notion that a person either does or does not have a “mind” has given way to a more nuanced understanding of mental capacity.²⁷ Courts have recognized that a person who is declared incapacitated *71 “may be subject to varying degrees of infirmity or mental illness, not all equally incapacitating.” 5 WILLISTON ON CONTRACTS § 10.3, at 296; see also *Cundick v. Broadbent*, 383 F.2d 157, 160 (10th Cir.1967) (recognizing “different degrees of mental competency” when addressing whether a contract could be voided for lack of capacity). Furthermore, a person may have some capacity to contract and its existence in a specific case may depend on the nature of the particular transaction at issue.²⁸ Thus, the first rationale supporting the void rule—that a mentally incapacitated person “has nothing which the law recognizes as a mind” and therefore cannot form a contract—no longer withstands careful analysis in light of changes in contract law and evolving understanding of the complexities of mental illness.

2. “Protection” of the Party with a Mental Illness or Defect

The other rationale relied on by *Dexter* and incorporated in *Sullivan* is that a mentally incapacitated person, unlike an infant, will never regain the mental capacity necessary to avoid a contract and therefore “has no protection if his contract is only voidable.” *Dexter, supra*, 82 U.S. at 20–21. This rationale is based upon an outdated understanding of mental illness and of what it means to “protect” mentally incapacitated persons.

At the time *Dexter* and *Sullivan* were decided, “idiocy” and “lunacy” were primarily understood to be permanent conditions.²⁹ Therefore, the view that a mentally incapacitated person would never gain the mental capacity necessary to avoid a contract made some sense, although it overlooked the fact that the contract could also be avoided by a guardian or, after death, by a personal representative. See RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. d. Evolving understanding of mental illness and advances in medicine have shown that mental capacity can vary over *72 time and is susceptible to significant improvement with treatment. See, e.g., *Trepanier v. Bankers Life & Cas. Co.*, 167 Vt. 590, 706 A.2d 943, 944 (1997) (recognizing that certain types of incapacity are only temporary); *Street v. Street*, 211 P.3d 495, 499 (Wyo.2009) (“Mental incapacity is not always permanent and a person may have lucid moments or intervals when that person possesses the necessary capacity to convey property.”); cf. *Wallace v. United States*, 936 A.2d 757, 769 (D.C.2007) (recognizing that a defendant may regain competence to stand trial). Therefore, having the choice of whether to follow through on a contract or avoid it can be very beneficial to a person who entered into the contract during a period of incapacity. See, e.g., *Blinn v. Schwarz*, 177 N.Y. 252, 69 N.E. 542, 545 (1904) (“If the deed or contract is void, it binds neither party, and neither can derive any benefit therefrom; but, if voidable, the lunatic, upon recovering his reason, can hold onto the bargain if it is good, and let go if it is bad.”).

Dexter, upon which *Sullivan* was predicated, relies on an outdated understanding of what it means to “protect” a person with a mental illness or defect. Whereas people with mental illnesses were once stigmatized and segregated from the rest of society as a common form of “treatment,”³⁰ modern statutes focus on protecting the civil and legal rights of people with mental illnesses and on encouraging participation in society. The policy of the District of Columbia is that

residents with intellectual disabilities “shall have all the civil and legal rights enjoyed by all other citizens.” D.C.Code § 7–1301.02(a)(1) (2012 Supp.).³¹ For example, commitment to a residential facility of the Department of Health is permitted only when it is “the least restrictive alternative consistent with the best interests of the person and the public.” D.C.Code § 21–545(b)(2) (2004 Supp.). Consistent with that policy, the voidable rule better “protects” mentally incapacitated persons by facilitating meaningful participation in society. If the contracts of mentally incapacitated persons are void, rather than voidable, their legal “protection” is the opposite of what it should be—“[i]t would be a handcuff instead of a shield.” *Breckenridge’s Heirs v. Ormsby*, 24 Ky. (1 J.J. Marsh.) 236, 239 (1829). Similarly, by limiting the ability to disaffirm the contract to the mentally incapacitated party or her representative, the voidable rule protects against cases in *73 which the other contracting party seeks to take advantage of an individual’s mental incapacity to avoid an otherwise fair and enforceable contract.³² If the contracts of a mentally incapacitated person are treated as void, the competent party to the contract would not need to perform even if the incapacitated party is ready to, or already has, performed the bargain. 5 WILLISTON ON CONTRACTS § 10.2, at 279.

Determining how to treat the contracts of mentally incapacitated persons requires the reconciliation of two conflicting policies: “the protection of justifiable expectations and of the security of transactions, and the protection of persons unable to protect themselves against imposition.” RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. a. We have already discussed how the voidable rule better serves the second policy. The voidable rule also better serves the first policy of creating greater certainty for real property and other commercial transactions. Under the *Sullivan* rule, because a mentally incapacitated person’s contract is inherently void, the competent contracting party and others with rights dependent on that party cannot obtain the benefit of their bargain, regardless of the inequities (although he or she may still have some remedy based on a quasi-contract theory). See, e.g., *Nevin v. Hoffman*, 431 F.2d 43, 47 (10th Cir.1970) (“[I]f a deed is absolutely void, a subsequent bona fide purchaser obtains nothing despite his innocence.”); *Metro. Life Ins. Co. v. Bramlett*, 224 Ala. 473, 140 So. 752, 754 (1932) (explaining that because the contracts “of an insane person” are inherently void, “one who contracts with an insane person takes nothing, though ignorant of his insanity, and though he paid value, and his contract is valid for no purpose”). The Restatement rule, by contrast, instructs a

court to “grant relief as justice requires.” RESTATEMENT (SECOND) OF CONTRACTS § 15(2). Under this rule, a contract might be enforced despite one party's incapacity where the other party had no reason to know of the incapacity and has substantially performed, cannot recover his or her consideration, or would otherwise suffer hardship. See RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. f & illustrations thereto (discussing situations in which avoidance would be inequitable).

Because we conclude that the void rule relies on an outdated theory of contract formation and outdated understandings of mental illness, we overrule the holding of *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396 (1892), that contracts entered into by mentally incapacitated persons are inherently void. In its place, we adopt the voidable rule as set forth in the Restatement (Second) of Contracts § 15, which better balances the competing interests of ensuring the security of transactions and enabling mentally incapacitated persons to participate in society, while protecting them from unfair imposition.

III. Application of the Voidable Rule to This Case

In the instant case, Ms. Speleos was found to have been incapacitated at the time she entered the lease with

appellees.³³ *74 Therefore, the contract was voidable at the election of Ms. Speleos or her representative unless avoidance of the contract would be unjust. See RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. f (“If the contract is made on fair terms and the other party has no reason to know of the incompetency, performance in whole or in part may so change the situation that the parties cannot be restored to their previous positions or may otherwise render avoidance inequitable. The contract then ceases to be voidable.”).³⁴ Here, the trial court upheld the lease based on its determination that the lease was voidable and its finding that Ms. Speleos or her representatives did not effectively avoid or disaffirm the lease. Because the division was bound by the *Sullivan* rule deeming contracts entered into by mentally incapacitated persons void, the division did not reach 718 Associates' arguments challenging the finding that the contract had not been disaffirmed.³⁵ Now, as an en banc court we overrule *Sullivan* and join a majority of jurisdictions in holding that contracts entered into by mentally incapacitated persons are voidable, rather than inherently void. As a result, we remand to the division to consider whether the trial court erred in determining that the lease between Ms. Speleos and appellees was never disaffirmed.³⁶

So ordered.

Footnotes

- * Judge Ruiz was a Retired Associate Judge of the court at the time of argument. Her status changed to Senior Judge on July 2, 2012.
- 1 While this appeal was pending before a three-judge division of this court, 718 Associates sold the Property and assigned all rights in the Property to Ricardo Hernandez, the current appellant. While 718 Associates' petition for rehearing en banc was pending, 718 Associates submitted a motion for leave to amend the caption to substitute parties, which we granted. See *Flack v. Laster*, 417 A.2d 393, 400 (D.C.1980) (“Once property or rights have been assigned, the assignee stands in the shoes of the assignor and can sue in his [or her] own name to enforce the rights assigned.” (citations and internal quotation marks omitted)).
- 2 As the three-judge division of this court concluded, *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396 (1892), remained binding precedent in the District of Columbia. *Sullivan* was decided by the Supreme Court of the District of Columbia sitting in General Term, which is the predecessor court to the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”). See *John R. Thompson Co. v. District of Columbia*, 92 U.S.App.D.C. 34, 36, 203 F.2d 579, 581 (1953) (recognizing the Supreme Court of the District of Columbia in General Term as its predecessor), *rev'd on other grounds*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480 (1953). Decisions of the D.C. Circuit rendered prior to February 1, 1971, as well as the decisions of this court, “constitute the case law of the District of Columbia” and can be overruled only by this court en banc. *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C.1971).
- 3 D.C.Code § 21–2011(11) defines an “[i]ncapacitated individual” as:
[A]n adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.

4 The affidavit was prepared by an attorney and signed by the Personal Representative of the Estate. The attorney, who also represented the Estate in the settlement agreement negotiations, later testified that she paid a brief visit to the Property and saw a broken-down vehicle in the backyard, broken top-floor windows, and overgrown grass. She did not attempt to knock on the door or deliver written notice to determine whether the Property was occupied. Although at this point Ms. Bradley, the conservator of the Estate, was aware of the Bankses' lease, the attorney representing the Estate testified that she was not aware of the Bankses' lease or occupancy of the Property.

5 718 Associates also claimed that Ms. Speleos's signature on the lease was forged. The trial court found that Ms. Speleos's signature was not forged, and 718 Associates did not challenge that finding on appeal. In addition, 718 Associates argued that Ms. Speleos lacked the authority to lease the Property to appellees because, 718 claimed, title was transferred before Ms. Speleos signed appellees' lease. The trial court rejected this argument because the deed was notarized after the lease was signed, and 718 Associates did not challenge this finding on appeal.

6 Judge Duncan–Peters based her finding on the following evidence:

(1) Judge Christian's declaration that Ms. Speleos was incompetent to handle her own affairs in November 2001; (2) Judge Christian's decision to void the March 2001 deeds in January 2002; (3) the timing of these deeds, *i.e.*, that they were [] entered into no more than a week after Ms. Speleos leased the subject property; (4) Dr. Lowy's testimony that it is highly unlikely that Ms. Speleos was competent in March 2001 (*i.e.*, the year the lease was entered into); (5) Ms. Bradley's [Ms. Speleos's conservator's] prior and current testimony regarding Ms. Speleos[s] state of mind during the relevant time period; and (6) the fact that Mr. and Ms. Banks [appellees] are the only individuals asserting that Ms. Speleos was competent and they have a vested interest in such a finding.

7 *See, e.g., United States v. Manny*, 645 F.2d 163, 166–69 (2d Cir.1981); *Cundick v. Broadbent*, 383 F.2d 157, 159–60 (10th Cir.1967); *Rubenstein v. Dr. Pepper Co.*, 228 F.2d 528, 536–37 (8th Cir.1955); *Trepanier v. Bankers Life & Cas. Co.*, 167 Vt. 590, 706 A.2d 943, 944 (1997).

8 Because the trial court found that the lease had not been disaffirmed, it did not reach the issue of whether equity would have prevented Ms. Speleos, or her representative, from avoiding the lease. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. f (1981) (“If the contract is made on fair terms and the other party has no reason to know of the incompetency, performance in whole or in part may so change the situation that the parties cannot be restored to their previous positions or may otherwise render avoidance inequitable. The contract then ceases to be voidable.”).

9 An “act *in pais*” is an “act performed out of court, such as a deed made between two parties on the land being transferred.” BLACK’S LAW DICTIONARY 27 (9th ed. 2009).

10 *Sullivan* was followed in *Martin v. Martin*, 270 A.2d 141, 143 (D.C.1970) (“*Martin II*”). In *Martin II*, this court refused to sustain the findings of the trial court—that requests for disability benefits made by Mr. Martin’s wife to the Veterans Administration were at the request of Mr. Martin or were ratified by him and were therefore valid—“because of [Mr. Martin]’s adjudicated incompetence at the crucial times.” 270 A.2d at 143. We explained that “[a]ppellant, while under that status, was incapable of executing contracts, deeds, powers of attorney, or other instruments requiring volition and understanding.” *Id.* (citing *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 20, 21 L.Ed. 73 (1873), and *Sullivan, supra*, 20 D.C. (9 Mackey) at 401). *Martin II* does not directly control this case because Mr. Martin, unlike Ms. Speleos, had already been adjudicated incompetent at the time of the contract at issue. However, *Martin II* demonstrates that this court relied on *Sullivan* as recently as 1970.

11 In their en banc brief appellees argue:

Because both *Sullivan* and *Martin II* concern contracts entered into by persons already adjudicated incapacitated, the precedent set in *Sullivan* and *Martin II* does not govern this case. Neither decision precludes this [c]ourt, under the principle of *stare decisis*, from ruling that contracts entered by those not previously adjudicated incapacitated should be voidable.

This argument is based on a misreading of *Sullivan*. The “inquisition *de lunatico*” (commission of lunacy) in that case occurred after, not before, the execution of the deed in question. *See Sullivan, supra*, 20 D.C. (9 Mackey) at 398. Appellees are correct that *Martin II* involved a person who had already been adjudicated incompetent. *See Martin II, supra*, 270 A.2d at 143.

12 We recognize that the use of the term “insane” and other terms used by prior decisions may be offensive to some. However, we quote the original language of cases to ensure accuracy and to highlight society’s evolving understanding of mental illness. Furthermore, while we prefer the term “incapacitated” to the term “incompetent,” see *infra* note 36, we have retained the terminology used by other courts, including the trial court in this case.

13 *See, e.g., Shoals Ford, Inc. v. Clardy*, 588 So.2d 879, 881 (Ala.1991) (“The well-settled law in Alabama is that contracts of insane persons are wholly and completely void.” (citing *Williamson v. Matthews*, 379 So.2d 1245 (Ala.1980), and

ALA.CODE § 8–1–170 (1975))). In some jurisdictions, whether a contract is void or voidable depends upon the degree of incapacity. See, e.g., *Fleming v. Consol. Motor Sales Co.*, 74 Mont. 245, 240 P. 376, 378 (1925) (explaining that under Montana law, “[a] person entirely without understanding has no power to make a contract of any kind ... [and] the contract is void ab initio” whereas the contract of “a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined,” is voidable) (internal quotation marks and citations omitted); *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 896–98 (S.D.1987); see also RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. a (1981) (“Incapacity may be total, as in cases where extreme physical or mental disability prevents manifestation of assent to the transaction.... Often, however, lack of capacity merely renders contracts voidable.”).

14 See *infra* note 36.

15 5 WILLISTON ON CONTRACTS § 10:3, at 296. See, e.g., *Pappert v. Sargent*, 847 P.2d 66, 69–70 (Alaska 1993); *Young v. Lujan*, 11 Ariz.App. 47, 461 P.2d 691, 693 (1969); *Neale v. Sterling*, 117 Cal.App. 507, 4 P.2d 250, 250 (1931) (observing that contracts made by incompetent persons before a judicial determination of incompetency are voidable by statute); *Green v. Hulse*, 57 Colo. 238, 142 P. 416, 418 (1914); *Doris v. McFarland*, 113 Conn. 594, 156 A. 52, 56 (1931); *Perper v. Edell*, 160 Fla. 477, 35 So.2d 387, 390 (1948); *Holcomb v. Garcia*, 221 Ga. 115, 143 S.E.2d 184, 187 (1965) (observing that “[t]he deed of an incompetent who has never been adjudicated to be of unsound mind is not absolutely void, but only voidable” by statute); *Jordan v. Kirkpatrick*, 251 Ill. 116, 95 N.E. 1079, 1080 (1911); *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370, 56 N.E. 97, 97–98 (1900); *Breckenridge’s Heirs v. Ormsby*, 24 Ky. (1 J.J. Marsh.) 236, 239 (1829); *Hovey v. Hobson*, 53 Me. 451, 453 (1866); *Flach v. Gottschalk Co. of Baltimore City*, 88 Md. 368, 41 A. 908, 908 (1898); *Sutcliffe v. Heatley*, 232 Mass. 231, 122 N.E. 317, 318 (1919); *Wolcott v. Conn. Gen. Life Ins. Co.*, 137 Mich. 309, 100 N.W. 569, 571–72 (1904); *Schultz v. Oldenburg*, 202 Minn. 237, 277 N.W. 918, 921 (1938); *Jamison v. Culligan*, 151 Mo. 410, 52 S.W. 224, 225 (1899); *Sawtelle v. Tatone*, 105 N.H. 398, 201 A.2d 111, 115 (1964); *Robinson v. Kind*, 25 Nev. 261, 62 P. 705, 705 (1900); *Blinn v. Schwarz*, 177 N.Y. 252, 69 N.E. 542, 544–45 (1904); *Ipock v. Atl. & N.C.R. Co.*, 158 N.C. 445, 74 S.E. 352, 353 (1912); *Charles Melbourne & Sons, Inc. v. Jesset*, 110 Ohio App. 502, 163 N.E.2d 773, 775 (1960); *National Gen. Theatres, Inc. v. Bolger*, 266 Or. 584, 514 P.2d 344, 347 (1973); *Der Hagopian v. Eskandarian*, 396 Pa. 401, 153 A.2d 897, 899 (1959); *Williams v. Sapieha*, 94 Tex. 430, 61 S.W. 115, 116–18 (1901); *Trepanier v. Bankers Life & Cas. Co.*, 167 Vt. 590, 706 A.2d 943, 944 (1997); *Upton v. Hall*, 225 Va. 168, 300 S.E.2d 777, 779 (1983); *Morris v. Hall*, 89 W.Va. 460, 109 S.E. 493, 495 (1921); *French Lumbering Co. v. Theriault*, 107 Wis. 627, 83 N.W. 927, 931–33 (1900).

16 See, e.g., 5 WILLISTON ON CONTRACTS § 10:5, at 313 (“With respect to third parties, the contract is considered valid until it has been avoided.”); see also *Aetna Life Ins. Co.*, *supra* note 15, 56 N.E. at 98 (“Until disaffirmed, the voidable executed contract, in respect to the property or benefits conveyed, passes the right or title as fully as an unimpeachable contract. By ratification, it becomes impervious; by disaffirmance, a nullity.”); *Blinn*, *supra* note 15, 69 N.E. at 545 (“The deed of a lunatic is not void, in the sense of being a nullity, but has force and effect until the option to declare it void is exercised. The right of election implies the right to ratify, and it may be to the great advantage of the insane person to have that right.”).

17 Usually the mentally incapacitated party or his or her representative is the party who will seek to disaffirm or avoid the agreement. However, “if the other party did not know of the incompetency at the time of contracting he cannot be compelled to perform unless the contract is effectively affirmed.” RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. d; see also *id.* at illus. 2 (providing an example of a contract where the competent party may insist on ratification before beginning performance).

18 RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981) (“A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.”). Avoidance is often referred to as disaffirmance, and ratification is often referred to as affirmance; the terms are used interchangeably.

19 RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. f; see also *id.* at illus. 5 (providing an example of a contract that ceases to be voidable for equitable reasons).

20 RESTATEMENT (SECOND) OF CONTRACTS § 380 (1981).

21 Compare *Kevan v. John Hancock Mut. Life Ins. Co.*, 3 F.Supp. 288, 290 (W.D.Mo.1933) (“[T]he reference in the [*Dexter*] opinion to contracts generally is clearly dictum.”), and *Wolcott v. Conn. Gen. Life Ins. Co.*, 137 Mich. 309, 100 N.W. 569, 571 (1904) (“[T]he Supreme Court, in *Dexter v. Hall*, held that the power of attorney of a lunatic was void, and rested their decision on the analogy existing between the rights of infants and those of lunatics, and say, ‘In fact, we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.’ This they could not have said respecting deeds of conveyance, as the Reports of the state court contain numerous decisions affirming

the view that the deed of a lunatic is not void, but only voidable.”), and *French Lumbering Co. v. Theriault*, 107 Wis. 627, 83 N.W. 927, 933 (1900) (holding that the deed of an “insane person” is voidable, not void, and criticizing cases that read *Dexter* to apply to more than powers of attorney), with *Daugherty v. Powe*, 127 Ala. 577, 30 So. 524, 525 (1900) (“One of the essential elements to the validity of a contract is the concurring assent of two minds. If one of the parties to a contract is insane at the time of its execution, this essential element is wanting. The principle is the same whether the contract rests in parol or be by deed. A deed executed by a person non compos mentis is absolutely void.” (citing, *inter alia*, *Dexter*, *supra*, 82 U.S. (15 Wall.) 9)), and Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554, 558–59 (1943) (“The case [*Dexter v. Hall*] involved a power of attorney, and hence some authorities have interpreted it strictly and limited its application to such instruments. However, it is more generally thought to have embodied a principle applicable to all contractual or consensual acts.” (footnotes omitted)).

22 As *amici* in this case point out, had the highest court of the District of Columbia had the opportunity post-*Sullivan*, but pre-*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to revisit the void vs. voidable issue, there is little doubt that the court would have conformed the law in the District of Columbia to the rule set forth in *Luhrs* that contracts made by mentally incapacitated persons are voidable and not void, just as courts in other jurisdictions did in the wake of *Luhrs* (which arose in Arizona). See, e.g., *Beale v. Gibaud*, 15 F.Supp. 1020, 1027–28 (W.D.N.Y.1936); *Levine v. Whitney*, 9 F.Supp. 161, 162 (D.R.I.1934); *Christian v. Waiialua Agric. Co.*, 31 Haw. 817, 877–79 (Haw.1931), *rev'd*, 93 F.2d 603 (9th Cir.1937), *rev'd*, 305 U.S. 91, 59 S.Ct. 21, 83 L.Ed. 60 (1938). But the highest court of our jurisdiction did not have that opportunity in the period between *Luhrs* and *Erie*, and thus never overruled *Sullivan* (with the result that the three-judge division of this court was bound by *Sullivan*). See *Raley v. Life and Cas. Ins. Co. of Tenn.*, 117 A.2d 110, 111 (D.C.1955) (concluding that “whatever the effect of the [pre-*Erie* Supreme Court ruling declaring substantive common law] in the [state] where the case arose, it cannot be said [after the decision in *Erie*] to have declared general common law or to be binding on State or Federal courts generally”). And, of course, post-*Erie*, our court is not obligated to follow *Luhrs*. See *Erie*, 304 U.S. at 78, 58 S.Ct. 817 (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”). As an en banc court, we may revisit the question of what the law is for this jurisdiction on the void vs. voidable issue and must determine for ourselves whether to adhere to, or instead abandon, the rule of *Sullivan*. The instant case presents us with our first opportunity to do so in the specific context of a contract where the incapacitated party had not already been judicially determined to be mentally incapacitated or committed to a mental institution at the time the contract was made. See *infra* note 36.

23 The *Sullivan* court also noted that it would have adopted the void rule in any event. The court observed that the voidable rule, as articulated by some American courts in relation to deeds, was the result of “the omission of Sir William Blackstone to observe that authoritative decisions had distinguished these deeds from the ancient feoffments with the livery of seisin, and that it should have been considered, even in his time, settled that they were absolutely void, while feoffments were voidable only.” *Sullivan*, *supra*, 20 D.C. (9 Mackey) at 402. We need not address Sir William Blackstone’s supposed error here. Even if the law in England supported the *Sullivan* court’s decision, the void rule and its underlying rationales “are unsuited to modern experience” and “no longer adequately serve the interests of justice,” as we will address below, and therefore we do not feel constrained to continue following the rule, no matter how ancient its roots. *Carl*, *supra*, 702 A.2d at 178–79 (Schwelb, J., concurring) (quoting *Beaulieu*, *supra*, 265 A.2d at 613). Appellant urges us to continue to follow the void rule set forth in *Sullivan*, stressing that the void rule has been the law in the District of Columbia for the past 119 years. However, “the law cannot remain static; it must be permitted to evolve with the changing complexion of society and the developing sciences.” *Bethea v. United States*, 365 A.2d 64, 72 (D.C.1976).

24 Another possible explanation for the void rule has been posited:

One reason older cases talked of such contracts as void is that only by doing so could a court of law, as distinguished from equity, grant relief. The law courts could not administer equitable relief, such as requiring reconveyance or restoration. To protect the incompetent, the courts had to call the contract or deed void in order to hold that the incompetent had not parted with title or made a binding promise.

Henry Weihofen, *Mental Incompetency to Contract or Convey*, 39 S. CAL. L. REV. 211, 231 (1966). To the extent that this reason motivated courts to find contracts void, it is no longer necessary because law and equity have merged.

See, e.g., Green, *supra* note 21, at 574 (“There is no such impediment in our liberalized modern procedure.”).

25 See Green, *supra* note 21, at 559 (“[The subjective] theory of the basis of contract used to have widespread acceptance and at such a time it was perfectly natural that it should serve as the major premise in a syllogism dealing with the operative effect of mental incompetency.”).

- 26 In England, “[p]ersons with intellectual/mental disabilities were divided into two classes: the idiot, who had never had capacity, and the lunatic, ‘a person who hath had understanding but ... has lost the use of his reason.’ ” Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 103 (2012) (citations omitted).
- 27 See, e.g., Green, *supra* note 21, at 560–61 (“Suffice it to say for present purposes that presence or absence of ‘mind’ is nowhere used as the test of mental incompetency at the present time. The test is the *degree* of capacity for understanding possessed by the individual. If he fails to possess this degree of capacity for understanding, we say he is incompetent, but because we are measuring his understanding in terms of degree we are assuming that, although incompetent, he has some capacity for understanding, but not enough. And from a practical standpoint, we know, and psychiatrists know, that insanity is a matter of degree, and that one may be insane and still have some understanding.” (footnotes omitted)).
- 28 See RESTATEMENT (SECOND) OF CONTRACTS § 12(1) (“Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.”); see, e.g., *Butler v. Harrison*, 578 A.2d 1098, 1100–01 (D.C.1990) (“The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the particular transaction in which she is engaged ... whether or not she is competent in transacting business generally.... [T]he party asserting incompetency must show not merely that the person suffers from some mental disease or defect such as dementia, but that such mental infirmity rendered the person incompetent to execute the particular transaction....” (citations omitted)).
- 29 See David L. Braddock & Susan L. Parish, *Social Policy Toward Intellectual Disabilities in the Nineteenth and Twentieth Centuries*, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES 83, 86 (Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh eds., 2003) (discussing the history of mental institutions and observing that “[i]n the later decades of the 1800s, as treatment gave way to confinement and custodial care in larger facilities, cure rates concomitantly dropped and psychiatrists reported that mental illness was largely incurable.... By the late 1800s, the earlier optimism of rehabilitating patients with mental illness and sending them back to their home communities had been replaced with a rigid pessimism that decried the possibility of cure....”); ALLISON C. CAREY, ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH-CENTURY AMERICA 39 (2009) (discussing early American restrictions on “incompetents” and observing that “[t]he adjudication process assumed incompetence to be a permanent and pervasive trait of the individual....”).
- 30 One author summarized part of this history as follows:
In the nineteenth and first half of the twentieth century, however, the primary social and legal policy for persons with intellectual and psycho-social disabilities was institutionalization. Beginning with well-intentioned experimental schools, economic and other forces led quickly to custodial asylums with reduced emphasis on educating residents and returning them to community life. By the beginning of the twentieth century, poor farms or almshouses were also a significant aspect of state provision for people with intellectual disabilities.
The segregation of this population was accompanied by, and in large part generated, a particularly virulent medical model fueled by Social Darwinism. According to this model, persons with intellectual disabilities suffered from a hereditary, incurable disease that led to criminality, immorality or depraved behavior, and pauperism, all of which constituted an unacceptable drain on society.
Booth Glen, *supra* note 26, at 104 (footnotes and internal quotation marks omitted).
- 31 The D.C. Code, including this section, was recently amended by the People First Respectful Language Modernization Amendment Act of 2012, which “remove[s] offensive, dated language referring to persons with disabilities, including the term mental retardation, and replace[s] it with respectful language that puts people first.” 2012 District of Columbia Laws 19–169 (Act 19–361).
- 32 Under certain circumstances the other contracting party cannot be compelled to perform unless the contract is effectively affirmed. See *supra* note 17.
- 33 Judge Duncan–Peters based this finding partially on Judge Christian's earlier declaration that Ms. Speleos was incompetent to handle her own affairs in November 2001. Judge Christian found Ms. Speleos to be “an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that ... she lacks the capacity to take actions necessary to obtain, administer, and dispose of real and personal property....” Thus, after Ms. Speleos entered the lease transaction with the Bankses, it was determined that at the time she entered into that transaction, she was “unable to understand in a reasonable manner the nature and consequences of the transaction”—a lease of real property with the opportunity to purchase. RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(a).

- 34 The trial court did not reach the issue of whether avoidance would be inequitable in this case because it found that Ms. Speleos and her representatives did not avoid or disaffirm the lease.
- 35 On appeal to the division, 718 Associates also argued that “even assuming that the lease was not inherently void, the trial court’s judgment still rests upon an error of law as well as two clearly erroneous findings of fact.” *718 Assocs., supra*, 21 A.3d at 981 n. 9. 718 Associates argued “that the trial court misapprehended the law when it reasoned that the Estate needed to have specific knowledge of appellees’ lease in order to disaffirm it.” *Id.* Additionally, 718 Associates claimed “that the following factual findings were clearly erroneous: (1) that [Ms. Speleos’s] conservator never made an unequivocal disaffirmance; and (2) that the Estate did not know about appellees’ lease when the affidavit was executed.” *Id.*
- 36 Importantly, Ms. Speleos had not already been adjudicated by the court as incapacitated or appointed a guardian when she entered into the lease agreement with the Bankses. Therefore, the question of what effect an adjudication of incapacity or appointment of a guardian has on a person’s ability to contract is not squarely before us. *Martin II*, decided in 1970, held that a contract entered into by a person who had already been adjudicated incompetent and committed to a mental institution was void. 270 A.2d at 143. However, current statutes regarding capacity and guardianship attempt to “encourage the development of maximum self-reliance and independence of the incapacitated individual.” D.C.Code § 21–2044 (2011 Supp.); D.C.Code § 21–2055 (2001). This preference for self-reliance is reflected in the Code provision, adopted in 1987, regarding the effect of a finding of incapacity, which provides:
- A finding under this chapter that an individual is incapacitated shall not constitute a finding of legal incompetence. An individual found to be incapacitated shall retain all legal rights and abilities other than those expressly limited or curtailed in the order of appointment of a guardian or in a protective proceeding, or subsequent order of the court. D.C.Code § 21–2004 (2001). The policy subsequently adopted by the District of Columbia Council is therefore arguably in tension with the holding of *Martin II* and the rule expressed in the Restatement § 13 that a person “has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect.” RESTATEMENT (SECOND) OF CONTRACTS § 13 (1981). However, the effect that an adjudication of incapacity or the appointment of a guardian has on a person’s ability to contract, in light of the current statutory framework, is a question that will need to be decided when the issue is properly presented.

APPENDIX A-3

Circuit Rule 32.1
Federal Court of Appeals

Nadene M. Sammann
v. Anna J. Armstrong
No. 46628-7-II
Consolidated

Nadene M. Sammann
17058 37th Avenue N.E.
Seattle, Washington 98155
Appendix A-3

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Circuit Rule 32.1

Citing Judicial Dispositions

(a) Citation to Published Opinions and to Statutes. Citations to decisions of this court must be to the Federal Reporter. Dual or parallel citation of cases is not required. Citations of state court decisions included in the National Reporter System must be to that system in both the text and the table of authorities. Citations to all federal statutes, including those statutes applicable to the District of Columbia, must refer to the current official code or its supplement, or if there is no current official code, to a current unofficial code or its supplement. Citation to the official session laws is not required unless there is no code citation.

(b) Citation to Unpublished Dispositions.

(1) Unpublished Dispositions of this Court.

(A) Unpublished dispositions entered before January 1, 2002. Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

(B) Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.

(2) Unpublished Opinions of Other Courts. Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e., the res

judicata or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1.

(3) Procedures Governing Citation to Unpublished Dispositions. A copy of each unpublished disposition cited in a brief that is not available in a publicly accessible electronic database must be included in an appropriately labeled addendum to the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. Any addendum exceeding 40 pages must be bound separately from the brief. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

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DIVISION II

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STATE OF WASHINGTON

DECLARATION OF SERVICE

BY _____
DEPUTY

I, Nadene M. Sammann, declare that I am over the age of 18 years,
a citizen of the United States, and competent to make this Declaration.

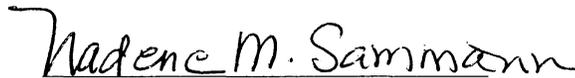
On June 30th, 2015, I mailed a true and correct copy of:

“Corrected Reply Brief of Appellant Nadene M. Sammann”, with Appendix,
and this “Certificate of Service”, which is identical to the original thereof,
which are on file with the Clerk of this Court, and deposited the above in a sealed
envelope and mailed the same with the correct pre-paid postage affixed via U.S.
Postal First Class Mail, Certified Mail, Return Receipt Requested, to:

Anna J. Armstrong, as Personal Representative
Of the Estate of Robert M. White,
C/O Mr. Bart L. Adams,
Adams and Adams Law PS
2626 North Pearl Street
Tacoma, Washington 98407
(Attorney For Respondent)

I declare that the above is true and correct under penalty of perjury
under the laws of the State of Washington.

DATED this 30th day of June 2015, at Seattle, Washington.


Nadene M. Sammann, Appellant.

Declaration of Service
No. 46628-7-II
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