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Incompetency and Divorce Laws: Protective or Defective?

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I. Introduction

> A . . . fundamental legal principle, which demands a revision of the legal approach toward the mentally disabled, is that of individualization. There appears to be little legal justification for laws now on the books which deny persons with mental disabilities an entire set of rights on one omnibus finding of "incompetency". . . .[1]

The rights of persons suffering from mental disabilities are increasingly being recognized. An adjudication of incompetency no longer conclusively bars a person from marrying,[2] making a will,[3] testifying in court,[4] or donating a gift.[5] The law of divorce, however, clings to the ancient misconception that a person has either full capacity or none at all.[6] Notwithstanding medical and legal recognition of varying types and degrees of incompetency, an overwhelming majority of the jurisdictions in the United States hold that an adjudicated incompetent is conclusively presumed to lack the capacity to bring an action in divorce. Furthermore, the decision to bring an action in divorce is considered outside the scope of the guardian's powers. Thus, a person who has been adjudicated incompetent has no means of pursuing an action in divorce regardless of his spouse's misconduct. Although designed to protect the incompetent's marital

1. THE MENTALLY RETARDED CITIZEN AND THE LAW 4, 5 (M. Kindred ed. 1976) (sponsored by the President's Committee on Mental Retardation) [hereinafter cited as THE MENTALLY RETARDED CITIZEN AND THE LAW].

2. Middlecoff v. Middlecoff, 167 Cal. App. 2d 698, 335 P.2d 234 (1959); Wilson v. Mitchell, 10 Misc. 2d 559, 169 N.Y.S.2d 249 (Sup. Ct. 1957); *In re* Gray's Estate, 119 Okla. 219, 250 P. 422, (1926). *See generally* Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. FAM. L. 463 (1977) [hereinafter cited as *The Right of the Mentally Disabled*].

3. Groseclose v. Rice, 366 P.2d 465, 468 (Okla. 1961). *See* Mohler's Estate, 343 Pa. 299, 305, 22 A.2d 680, 683 (1941); Annot., 89 A.L.R.2d 1120 (1963). *See generally* R. ALLEN, E. FERSTER, & H. WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 283-93 (1968) [hereinafter cited as R. ALLEN].

4. J. WIGMORE, 2 WIGMORE ON EVIDENCE § 492 (3d ed. 1940).

5. *See* Everly's Admr. v. Everly's Admr., 295 Ky. 711, 175 S.W.2d 376 (1943).

6. R. ALLEN, *supra* note 3, at 10. "Under Roman law, mentally impaired persons were deemed incapable of engaging in any jural activity . . . . Thus, such a person could neither receive nor convey title to property, nor . . . witness a will, nor . . . contract, nor marry. . . ." *Id.*

Until the beginning of the present century, in England and America jural acts by such persons were absolutely void. Today, however, ad hoc determinations are increasingly being used in many different areas of the law.

affairs from outside interference, this rule may subject an incompetent to victimization by an unscrupulous spouse.[7]

This comment seeks an accomodation between the competing concerns for the protection of the marriage relation and the substantial injustice that may result when an incompetent is barred from bringing an action in divorce. The strengths and weaknesses of the majority and minority viewpoints are analyzed to develop an approach that protects the personal rights of incompetents and avoids unjust results. Furthermore, divorce law is integrated with the broader body of the law of incompetency to bring divorce law into conformity with modern legal conceptions of mental disability. Finally, Pennsylvania law is analyzed and recommendations for Pennsylvania are made.

II. The Majority View

A. Background

The majority view in the United States is that neither an incompetent nor a guardian on the incompetent's behalf may maintain[8] an action in divorce *a vincule matrimony* (divorce *a.v.m.*).[9] Moreover, when an incompetent's spouse sues him for divorce,[10] he is denied the right to crosspetition or counterclaim for divorce on grounds on his own;[11] in most jurisdictions, an incompetent or his guardian may only bring a suit[12] for divorce from bed and board[13] or an action in

7. *See* note 105 and accompanying text *infra*.

8. Scott v. Scott, 45 So. 2d 878 (Fla. 1950); Cohen v. Cohen, 346 So. 2d 1047 (Fla. Dist. Ct. App. 1977); Worthy v. Worthy, 36 Ga. 45 (1867); Mohler v. Estate of Shank, 93 Iowa 273, 61 N.W. 981 (1895); Shenk v. Shenk, 100 Ohio 32, 135 N.E.2d 436 (1954); Krukowsky v. Krukowsky, 49 Pa. D. & C.2d 651 (C.P. Del. 1970); *see* Annots., 6 A.L.R.3d 682 (1966); 149 A.L.R. 1284 (1944).

9. A divorce *a.v.m.* is an absolute divorce from the bonds of matrimony. The parties are wholly released from their matrimonial obligations. BLACK'S LAW DICTIONARY 566 (rev. 4th ed. 1968). *See, e.g.*, PA. STAT. ANN. tit. 23, § 10 (Purdon 1955).

10. The insanity or incompetency of the defendant is no bar to the maintenance of an action in divorce against him, Harrigan v. Harrigan, 135 Cal. 397, 67 P. 506 (1902); Clarady v. Mills, 431 S.W.2d 63, 64 (Tex. Civ. App. 1968), unless the insanity was the cause of the offensive conduct. Castner v. Castner, 159 Pa. Super. Ct. 387, 48 A.2d 117 (1948). Indeed, in many states institutionalization for insanity may be grounds for divorce. *See, e.g.*, N.J. STAT. ANN. § 2A:34-2 (West Supp. 1977); PA. STAT. ANN., tit. 23, § 10(41) (Purdon Supp. 1977).

11. Mohrmann v. Kob, 291 N.Y. 181, 51 N.E.2d 921 (1943); Clarady v. Mills, 431 S.W.2d 63, 64 (Tex. Civ. App. 1968); *cf.* Cohen v. Cohen, 73 Cal. App. 2d 330, 336, 166 P.2d 622, 625 (1946) (guardian could not counterclaim for divorce against express wishes of ward).

12. *E.g.*, Vitale v. Vitale, 147 Cal. App. 2d 665, 305 P.2d 690 (1957) (annulment); Pulos v. Pulos, 140 Cal. App. 2d 913, 295 P.2d 907 (1956) (separation); Young v. Colorado Nat'l Bank., 148 Colo. 104, 365 P.2d 701 (1961) (annulment); State ex rel. Quear v. Madison, 229 Ind. 503, 99 N.E.2d 254 (1954); Kaplan v. Kaplan, 256 N.Y. 366, 176 N.E. 426 (1931); *see* Annot., 6 A.L.R.3d 682 (1966). *See generally* 24 AM. JUR. 2d *Divorce and Separation* § 273 (1966).

13. A divorce from bed and board is a partial or qualified divorce, akin to a judicial separation. Although the parties are separated and forbidden to live together, the marriage bond itself is not affected. Yost v. Yost, 143 Neb. 80, 8 N.W.2d 686 (1943); BLACK'S LAW DICTIONARY 566 (rev. 4th ed. 1968). *See, e.g.*, N.J. STAT. ANN. § 2A:34-3 (West Supp. 1977);

annulment.[14] The incompetent's disability does not arise, however, unless he is formally adjudicated incompetent by a court with proper jurisdiction.[15] Thus, a person who may actually lack capacity to authorize the action may be permitted to bring the suit until he is judicially declared incompetent.[16] Furthermore, the time of the adjudication may be important. When an adjudication of incompetency occurs after the filing of the petition in divorce, the action does not abate, but may be maintained by a guardian.[17] Finally, the presence of a "lucid interval" is not sufficient to remove the legal disability of a person who had been adjudicated incompetent.[18]

B. Rationale Of The Majority View

1. Absence of Express Statutory Authorization.—The limitation on the right of an incompetent to maintain an action in the majority jurisdictions results purely from a narrow construction of a general divorce act and not from any express legislative prohibition.[19] Courts adopting the majority view do so because the divorce statutes do not expressly provide an incompetent the right to bring the action.[20] The majority views the absence of a specific provision providing for substitute verification of the complaint as an indication that the legislature intended to prohibit an incompetent from bring-

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PA. STAT. ANN., tit. 23, § 11 (Purdon 1955) (declared unconstitutional as violation of equal protection because no comparable remedy for males).

14. An annulment is a judicial declaration that no valid marriage ever took place because of some disability or defect that existed at the time of the ceremony. 4 AM. JUR. 2d *Annulment of Marriage* § 1 (1962). *See, e.g.*, DeMedio v. DeMedio, 215 Pa. Super. Ct. 255, 257 A.2d 290 (1969); *see* Lazerow, *Mental Incompetency as Grounds for Annulment*, 7 J. FAM. L. 442 (1967) (criticizing justifications for restricting rights of the incompetents to marry).

15. Spooner v. Spooner, 148 Ga. 612, 97 S.E. 670 (1943); Stevens v. Stevens, 266 Mich. 446, 254 N.W. 162 (1934); *see* 24 AM. JUR.2d *Divorce and Separation*, § 273 (1966). In *Stevens*, for example, the defendant appealed a divorce decree on the ground that the plaintiff was an adjudicated incompetent and therefore could not maintain the action. The court found that the decree declaring the plaintiff incompetent was invalid for technical reasons—there had been no proper return of service upon all interested parties. Because the adjudication was invalid, the plaintiff was not legally incompetent, and no bar to his right to bring the action existed. 266 Mich. at 449, 254 N.W. at 163.

16. "A suit may be maintained in a person's own name even if he himself alleges that he is mentally ill and of unsound mind. Until there is an adjudication of incompetency he stands as anyone else before the Court." R. ALLEN, *supra* note 3, at 295; *see* Anonymous v. Anonymous, 3 App. Div. 2d 590, 162 N.Y.S.2d 984 (1957). This rule applies to other civil actions.

17. Scoufus v. Fuller, 280 P.2d 720, 721 (Okla. 1954). *Contra*, Wood v. Beard, 107 So. 2d 198, 199 (Fla. 1958) (the individual must be competent throughout the suit).

18. Phillips v. Phillips, 203 Ga. 106, 110, 45 S.E.2d 621, 624 (1947); Heine v. Witt, 251 Wis. 157, 168, 28 N.W.2d 248, 253 (1947); *cf.* Worthy v. Worthy, 36 Ga. 45 (1867) (dictum) (action in divorce could be authorized by ward during lucid interval). The law of divorce on this point is contrary to the law of marriage. Generally, capacity to marry is measured at the time the marriage is entered. Griffin v. Beddow, 268 S.W.2d 403 (Ky. 1954); *The Right of the Mentally Disabled, supra* note 2, at 468. Therefore, marriage contracted during a lucid interval is valid. Briggs v. Briggs, 160 Cal. App. 2d 312, 325 P.2d 219 (1958); DeNardo v. DeNardo, 293 N.Y. 550, 59 N.E.2d 241 (1955).

19. No state statute specifically prohibits an adjudicated incompetent from bringing an action in divorce *a.v.m.*

20. *E.g.*, Wood v. Beard, 107 So.2d 198, 199 (Fla. 1958); Johnson v. Johnson, 294 Ky. 77, 78, 170 S.W.2d 889, 890 (1943); Mohrmann v. Kob, 291 N.Y. 181, 51 N.E.2d 921 (1943).

ing an action in divorce.[21]

This interpretation of the divorce statutes diverges from usual principles of statutory construction. Courts generally hold that, absent an express prohibition, the exercise of a right by a certain class of persons is presumed available to all.[22] Moreover, courts presume that a cause of action in favor of an incompetent may be brought on his behalf by a guardian or other legal representative in the absence of an express limitation.[23] Indeed, some courts have construed this absence in divorce statutes as an indication that an incompetent may bring an action in divorce.[24]

Furthermore, the majority's narrow construction is often inconsistent with their approach to the right of an incompetent or his legal representative to bring a suit for separation or annulment.[25] For example, in *Kaplan v. Kaplan,*[26] a New York case, the court ruled that a legal representative of an incompetent may bring an action in separation. The court reasoned thus: "Certainly, the Legislature never intended to deny [incompetents] access to the courts for protection of rights which the law grants to all injured parties."[27] Yet, twelve years later in *Mohrmann v. Kob,*[28] the same court, in deciding that a committee of a lunatic could not bring an action in divorce *a.v.m.* for its ward, stated, "Until [the legislature] has enacted a statute which expressly or by clear implication authorizes the committee of an insane person to make that choice, the courts may not assume that power."[29] Hence, the same statute that is construed to permit an incompetent to bring an action for separation or annulment is construed to bar him from bringing an action for divorce *a.v.m.* These inconsistent results[30] suggest that principles of statutory construction

21. *E.g.*, Mohler v. Shank, 93 Iowa 273, 61 N.W. 981 (1895); Johnson v. Johnson, 294 Ky. 77, 170 S.W.2d 889 (1943); Higginbotham v. Higginbotham, 146 S.W.2d 856 (Mo. App. 1940); Turner v. Bell, 198 Tenn. 232, 279 S.W.2d 71 (1955); Dillon v. Dillon, 274 S.W. 217 (Tex. Civ. App. 1925).

22. *See* 82 C.J.S. *Statutes* § 332 (1953). The early English Divorce Act was challenged as being inapplicable to incompetents because it did not expressly state that it was applicable. The court held that the Act applied to classes of persons unless they were expressly denied the right. "What the Legislature has not expressly enacted, the Judges ought not to presume that it intended, and upon that presumption to add an implied ground [insanity] for dismissal of a petition to those expressed in the Act." Mordaunt v. Moncreiff, [1874] L.R., 2 S. & D. App. 374, 387.

23. Cohn v. Carlisle, 310 Mass. 126, 128, 37 N.E.2d 260, 262 (1941); Kaplan v. Kaplan, 256 N.Y. 366, 367-68, 176 N.E. 426, 426 (1931); *see* Ely, *The Status of Mental Incompetents in Civil Cases in Missouri*, 33 Mo. L. Rev. 1, 10 (1968).

24. McRae v. McRae, 43 Misc. 2d 252, 250 N.Y.S.2d 778 (1964); Baker v. Baker, [1880] L.R., 5 P.D. 142, 145; *see* Mohrmann v. Kob, 264 App. Div. 209, 35 N.Y.S.2d 1 (1942), *rev'd* 291 N.Y. 181, 51 N.E.2d 921 (1943).

25. *See, e.g.*, Pa. Stat. Ann., tit. 23, §§ 10, 12 (Purdon 1955). Krukowsky v. Krukowsky, 49 Pa. D. & C.2d 651 (C.P. Del. 1970) (interpreting above statutes).

26. 256 N.Y. 336, 176 N.E. 426 (1931).

27. *Id.* at 427.

28. 291 N.Y. 181, 51 N.E.2d 921 (1943).

29. *Id.* at 190, 51 N.E.2d at 925.

30. 56 Harv. L. Rev. 310, 311 (1942) (noting action in separation may be brought for

are not the true basis for the majority view.

2. Necessity for Assertion of Offense to Sever Marriage Tie.—Since no single offense by itself ends the marriage relationship,[31] the offended spouse can choose to either condone[32] the offensive act and thus preserve the tie, or assert the right to end the marriage in a legal proceeding as a prerequisite to dissolution. The courts adopting the majority view hold that an incompetent lacks the requisite volition to make a personal choice to assert his right to a divorce.[33]

The majority's emphasis on the incompetent's inability to assert a marital offense to terminate the relation seems misplaced. For example, in an action for the breach of a civil contract, the breach must be asserted before the contract is terminated since no violation of the terms of an agreement in itself destroys the contract. Any party to a contract is at liberty to waive the other party's breach[34] and, like the concept of condonation,[35] may be estopped[36] from asserting at a later time a breach he has waived. Yet, the guardian of an incompetent is permitted to bring an action on behalf of his ward for breach of contract[37] notwithstanding the possibility that the ward would waive the breach if he were competent. Therefore, the necessity that a person assert a right to dissolve the marriage is not, by itself, a valid rationale for denying an incompetent the right to bring the action in divorce; the true rationale underlying the majority approach

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incompetent although no express statutory provision existed, while most courts hold otherwise for divorce).

31. Wood v. Beard, 107 S.W.2d 198, 199-200 (Fla. App. 1958); *accord*, Scott v. Scott, 45 So. 2d 878 (Fla. 1950); *see* Johnson v. Johnson, 294 Ky. 77, 170 S.W.2d 889 (1943).

32. Condonation means the blotting out of the offense imputed, so as to restore the offending party to the same position he or she occupied before the offense was committed. The term "forgiveness". . . does not fully express the meaning of "condonation." A party may forgive in the sense of not meaning to bear ill will, or not seeking to punish, without at all meaning to restore to the original position.

Commonwealth v. Sanders, 187 Pa. Super. Ct. 494, 497, 144 A.2d 749, 751 (1958). Once an offense is condoned, it cannot be asserted thereafter as a ground for divorce unless the offense is repeated. Condonation usually applies to all classes of marital misconduct including adultery. 27A C.J.S. *Divorce* § 59 (1959).

33. Cohen v. Cohen, 73 Cal. App. 330, 336, 166 P.2d 622, 625 (1946); Cohen v. Cohen 346 So. 2d 1046, 1049 (Fla. App. 1977); Johnson v. Johnson, 294 Ky. 77, 79, 170 S.W.2d 889, 890 (1943); Turner v. Bell, 198 Tenn. 232, 246, 279 S.W.2d 71, 77 (1955); Dillon v. Dillon, 274 S.W. 217 (Tex. Civ. App. 1925); Heine v. Witt, 251 Wis. 157, 28 N.W.2d 248 (1947).

34. "A waiver may be defined as an intentional relinquishment of a known right," J. CALAMARI & J. PERILLO, CONTRACTS § 166 (1970), although it does not necessarily destroy the right unless there is consideration or detrimental reliance.

35. *See* note 32 *supra*.

36. J. CALAMARI & J. PERILLO, CONTRACTS § 166 (1970).

The combination of waiver and estoppel is analogous to the concept of condonation. If in an ordinary contract a breach is "waived" and the offending party relies on this waiver by continuing performance, the innocent party may be estopped from asserting the waived right. 3A A. CORBIN, CORBIN ON CONTRACTS, § 755 (1960). Similarly, if a marriage offense or breach is condoned, it may no longer be asserted to end the marriage unless revived by a new offense.

37. Kaplan v. Kaplan, 256 N.Y. 336, 176 N.E. 426 (1931); Fallot v. Gouran, 220 F.2d 325 (3d Cir. 1955).

derives from the personal nature of the marital relationship and the sanctity accorded that relationship in the law.

3. Personal Nature of the Divorce Decision.—The majority courts consider the decision to sever the marriage tie so personal in nature that a guardian or other legal representative may not assert a marriage offense on behalf of an incompetent.[38] Besides being a civil contract, marriage is a personal status,[39] and therefore, courts are legitimately concerned that a guardian, if permitted to interfere with the relationship, might be acting against the wishes of the ward in a personal relationship.[40] Hence, courts are reluctant to bring about a permanent change in the incompetent's status without his consent.

Since the decision to condone a marital offense is much more subjective than a decision to waive a breach of contract, the courts have little guidance for decision making. The right of condonation is exercised frequently, even in cases involving adultery.[41] Therefore, a judge ought not assume that an offended spouse would invariably choose to terminate his marriage, even in a case of adultery.[42] If the incompetent regained his capacity after the guardian terminated the marriage, the incompetent would have lost the opportunity to condone the offense and to continue the marriage relation.[43]

4. Public Policy Favoring Preservation of Marriage Relationships.—Finally, the majority courts adhere to a public policy favoring the preservation of the marriage relation.[44] Indeed, this policy explains the majority courts' inconsistency in permitting mainte-

38. *E.g.*, Cohen v. Cohen, 73 Cal. App. 330, 335, 166 P.2d 622, 625 (1946); Cohen v. Cohen, 346 So. 2d 1046, 1049 (Fla. App. 1977); *In re* Babushkin, 176 Misc. 911, 912, 29 N.Y.S.2d 162, 163-64 (1941); *see also* Heine v. Witt, 251 Wis. 157, 167-68, 28 N.W.2d 248, 253 (1947).

39. Quear v. Madison Circuit Court, 229 Ind. 503, 507, 99 N.E.2d 254, 256 (1951); Shenk v. Shenk, 100 Ohio App. 32, 33, 135 N.E.2d 436, 438 (1954). The right to marry has been receiving increasing constitutional protection in recent years. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court recognized marriage as a constitutionally protected association, and more recently, in Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978), the court recognized marriage as a fundamental right; therefore, laws regulating marriage receive a stricter scrutiny than others.

40. Mohler v. Shenk, 93 Iowa 273, 279, 61 N.W. 981, 983 (1895) (guardian of an insane person has no more right to maintain an action to dissolve the marriage relation of his ward than to manage and control his will in the matter of entering the relation); *accord*, Cohen v. Cohen, 346 So. 2d 1047, 1049 (Fla. App. 1977); Phillips v. Phillips, 203 Ga. 106, 109, 45 S.E.2d 621, 623 (1947); Shenk v. Shenk, 100 Ohio App. 32, 34, 135 N.E.2d 436, 438 (1954).

41. Baker v. Baker, [1880] L.R., 5 P.D. 142, 150.

42. The early cases also evidenced the courts' fear of acting against the religious wishes of the ward. A situation might arise in which an incompetent, were he able, might not approve or condone a marital offense, yet believe it against his religious principles to seek a divorce no matter what the cause. *Id.* at 151.

43. Wood v. Beard, 107 So. 2d 198, 201 (Fla. App. 1958); *accord*, Scott v. Scott, 45 So. 2d 878, 879 (Fla. 1950); Johnson v. Johnson, 295 Ky. 77, 79, 170 S.W.2d 889, 890 (1943).

44. Wood v. Beard, 107 So. 2d 198, 200 (Fla. App. 1958); Newman v. Newman, 42 Ill. App. 2d 203, 217, 191 N.E.2d 614, 621 (1963) (English, J., dissenting); Johnson v. Johnson, 294 Ky. 77, 79, 170 S.W.2d 889, 890 (1943).

nance of a suit in separation on behalf of an incompetent but not allowing the maintenance of an action in divorce. The policy of preserving the marriage is contravened only by the latter, since a semblance of the marriage relation continues after separation.[45] Theoretically, the spouses could be reconciled should the incompetent regain his reason.

Thus, two major points are central to the majority position, the legitimate concern that the incompentent's wishes might be contravened if a divorce action were permitted on his behalf and public policy favoring the preservation of the marriage status.[46] Absence of express statutory authorization and the incompetent's inability to assert the marriage offense are not the true reasons why the majority courts deny the incompetent the right to bring an action in divorce.

III. The Minority View

A. Background

A small minority of jurisdictions in the United States allow a guardian or other legal representative of an incompetent to bring an action in divorce on behalf of his ward.[47] Two jurisdictions, Massachusetts[48] and Rhode Island,[49] adopt the minority position based on

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45. *See* 56 HARV. L. REV. 310, 311 (1942).

Implicit in the decision of Mohrman v. Kob, 291 N.Y. 181, 51 N.E.2d 921 (1943); *see* text accompanying notes 28-29 *supra* was the public policy determination favoring preservation of marriage. This policy was explicitly recognized in Newman v. Newman, 42 Ill. App. 2d 203, 191 N.E.2d 614 (1963) when a guardian was permitted to institute proceedings to vacate a divorce decree on behalf of his ward. In *Newman*

> The majority point out, with citation of appropriate authorities, that a conservator, or next friend, has no authority to maintain a divorce action on behalf of an incompetent, but does have authority to litigate for his ward to set aside a divorce decree. . . . The reason for the apparent inconsistent rules is, of course, that they fall on opposte sides of the public policy favoring preservation of marriages.

Id. at 217, 191 N.E.2d at 621 (English, J., dissenting); *accord* Wood v. Beard, 107 So. 2d 198, 200 (Fla. App. 1958); Johnson v. Johnson, 294 Ky. 77, 79, 170 S.W.2d 889, 890 (1943).

46. Although some state interest exists in protecting the marital relationship, the validity of the policy is questionable in circumstantces of incompetency cases. The state would seem to have little interest in fostering a relationship by which a competent spouse takes advantage of an incompetent partner, 56 HARV. L. REV. 310, 311 (1942), because "society is not interested in perpetuating a status out of which harm may result." Turner v. Bell, 198 Tenn. 232, 250, 279 S.W.2d 71, 79 (1955).

Moreover, in recent years divorce laws have become more lenient and often include no-fault grounds. Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 566-67 (1977). Thus, states are recognizing that marriages should not be kept protected for their own sake when the parties no longer recognize the rights and obligations.

47. Hopson v. Hopson, 257 Ala. 141, 57 So. 2d 505 (1952); Cohn v. Carlisle, 310 Mass. 126, 37 N.E.2d 260 (1941); Thayer v. Thayer, 9 R.I. 377 (1869); *see* 24 AM. JUR. 2d *Divorce & Separation*, § 273 (1955); 27A C.J.S. *Divorce* § 89 (1955). Dicta by the Tennessee Supreme Court indicates that that court may adhere to the minority view. Turner v. Bell, 198 Tenn. 232, 250, 279 S.W.2d 71, 79-80 (1955).

48. *See* MASS. GEN. LAW ANN., ch. 208, § 7 (West) (repealed 1975). "Signature of the Libellant. The libel shall be signed by the libellant, if of sound mind and legal age to consent to marriage; otherwise, it may be signed by the guardian of the libellant or by a person admitted by the court to prosecute the action." Although this statute was repealed, 1975 MASS. ADV.

language in their respective divorce statutes providing for representation of an incompetent by a guardian or next friend.[50] A New York decision[51] follows the minority view in the interest of justice without any express statutory authority permitting a guardian to bring an action in divorce for his ward. Finally, the Alabama courts adopt a hybrid approach, construing in *pari materia* the divorce statute and the general statute authorizing a guardian to sue for an incompetent.[52] Actually, Alabama's approach is similar to New York's, which adopt the rule without express statutory authority for the guardian to represent the ward in a divorce action, since the Alabama courts assume that an express limitation would be present had the legislature intended to forbid incompetents from bringing the action. Ostensibly, however, the court follows the Massachusetts and Rhode Island approach, claiming statutory authority as the basis of its position.[53]

B. Rationale of the Minority View

1. Analogy Between Divorce and Other Civil Actions.—The courts taking the minority position view divorce as more akin to a normal civil action than the majority courts do,[54] thus allowing an

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LEGIS. SERV., ch. 400 § 13, as part of the enactment of the Massachusetts Rules of Domestic Relation Procedure, 1975 MASS. ADV. LEGIS. SERV., ch. 400 § 14, the law was not changed as one author believed. *See* 11 SUFFOLK U.L. REV. 936, 948 (1977). Rule 17(b) provides as follows:

> Whenever an . . . incompetent person has a representative, such as a guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the incompetent person. If an . . . incompetent person does not have a duly appointed representative, he may sue by his next friend or guardian ad litem. The court may appoint a guardian ad litem . . . for an incompetent persons not otherwise represented. . . .

49. R.I. GEN. LAWS § 15-5-11 (1970) provides as follows:

> Every petition shall be signed and sworn to by the petitioner, if of sound mind and legal age to consent to marriage; otherwise upon application to the court and after notice to the party in whose name the petition shall be filed, the court may allow such petition to be signed and sworn to by a resident guardian or next friend.

50. The English Divorce Act, Matrimonial Causes Rules 1973, S.I. 1973 No. 2016 r. 112(2), also contains explicit authority for a next friend to bring an action in divorce on behalf of an incompetent.

Moreover, the early English cases also adopted the view that a guardian may prosecute an action in divorce on behalf of his ward even in the absence of express statutory authorization for the guardian to act. Baker v. Baker, [1880] L.R., 5 P.D. 142, 143; Mordaunt v. Moncreiff, [1874] L.R., 2 S. & D. App. 374, 387.

51. MacRae v. MacRae, 43 Misc. 2d 252, 250 N.Y.S.2d 778 (1964). The intermediate court ordered the appointment of a guardian ad litem to institute an action in divorce *a.v.m.* against an adulterous spouse, but the state's high court did not rule on the propriety of this shift from the marjority position.

52. The state's supreme court, in Campbell v. Campbell, 242 Ala. 141, 5 So. 2d 401 (1941), concluded that a guardian could bring such an action on his ward's behalf.

53. Hopson v. Hopson, 257 Ala. 141, 57 So. 2d 505 (1952). *But see* Johnson v. Johnson, 294 Ky. 77, 78-79, 170 S.W.2d 889, 890 (1943) (general act providing for guardian to bring actions on behalf of ward not sufficient statutory authority to authorize divorce action).

54. *See* Baker v. Baker, [1880] L.R., 5 P.D. 142, 145; *cf.* Quear v. Madison Circuit Court, 229 Ind. 503, 507, 99 N.E.2d 254, 256 (1951) (marriage is not only a civil contract, but also a personal status).

incompetent to bring the action through a guardian or next friend.[55] The incompetent's inability to verify his petition is no bar since the legal representative may make the affidavit for him.[56]

The early English cases, which also recognized the incompetent's right to bring the action,[57] took the view that if the divorce statute included cases in which the incompetent was a defendant, the statute, of necessity, included those in which the incompetent was a plaintiff.[58] Although the courts saw practical problems in both circumstances, they felt that divorce was essentially a civil action in which the incompetent could be either plaintiff or defendant.[59]

2. Prevention of Injustice.—The major concern underlying the minority position, however, is the potential abuse of the incompetent by his spouse if he is unable to bring an action in divorce. As noted in *Baker v. Baker*,[60] an early English case, a variety of adverse property consequences may result from refusing to permit an incompetent to bring an action in divorce.

> [I]f reasons of expediency are to be regarded, great wrong might arise from holding that no proceedings for divorce can be maintained against an adulterous wife of a lunatic. She might be left in possession of property settled on her by her husband, which she and her paramour might enjoy to the exclusion of the lunatic . . . a spurious offspring might be foisted upon her husband and his family, by which devolution of estates might be diverted in favor of illegitimate objects. These evils would only be avoided by the dissolution of the marriage.[61]

Thus, underlying this property concern is a sense of moral indignation in leaving an incompetent spouse remediless against the conduct of an unfaithful spouse.

The courts in the minority jurisdictions view their authority to permit a legal representative to bring a divorce action as arising out

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55. *See* note 40 and accompanying text *supra*.

56. Campbell v. Campbell, 242 Ala. 141, 142, 5 So. 2d 401, 402 (1942); Turner v. Bell, 198 Tenn. 232, 250, 279 S.W.2d 71, 79 (1955) (court may supply requisite volition); *cf.* Cohn v. Carlisle, 310 Mass. 126, 128-29, 37 N.E.2d 260, 262 (1941) (explicit statutory authorization for guardian or next friend to swear to petition).

57. *See* note 50 *supra*.

58. Baker v. Baker, [1880] L.R., 5 P.D. 142, 151.

59. If an insane respondent must defend herself as best she may by means of a guardian ad litem, I do not see where the Act has indicated that an insane petitioner may not institute a suit for divorce through his committee, as he might sue for the breach of an ordinary civil contract.

Id. at 149. The case referred to involving the insane defendant is Mordaunt v. Moncreiff, [1874] L.R., 2 S. & D. app. 374.

60. Baker v. Baker, [1880] L.R., 5 P.D. 142, 151.

61. *Id.* at 151; *accord* Cowan v. Cowan, 139 Mass. 377, 1 N.E. 152 (1885) (court should act to protect libellant with substantial property interest from interference or inheritance by husband).

In Mohrmann v. Kob, 291 N.Y. 181,. 51 N.E.2d 921 (1943), the dissent specifically lamented that an unfaithful spouse could receive her statutory share of the incompetent's estate, and perhaps support, because the court refused to permit the divorce action. *Id.* at 194, 51 N.E.2d at 927 (Thatcher, J., dissenting).

of equity. An incompetent is a ward of the court[62] and the court has a duty to act in his best interest.[63] Moreover, divorce is considered an action in equity even though it is strictly of ecclesiastical origin.[64] Thus, in *Campbell v. Campbell*,[65] the Alabama Supreme Court found that it had "ample power to protect the interest of the incompetent complainant."[66]

Like the majority position, the minority viewpoint may ultimately be reduced to two major points. First, while the majority seeks to protect the personal choice of the incompetent, the minority seeks to prevent him from being victimized because of his disability. Second, the minority courts place emphasis on protecting property interests of the incompetent while the majority follows an inflexible public policy of preserving the marriage relation.

IV. Fallacy in the Majority Approach: The Use of an Adjudication of Incompetency as the Test for Divorce Capacity.

The classes of persons included in the statutory definition of incompetent are extremely broad.[67] A person who is mentally ill,[68] mentally retarded, mentally deficient, weakminded, senile, alcoholic, addicted to drugs or who is under any other[69] mental disability that makes him likely to be the victim of designing persons[70] may be adjudicated an incompetent. Because of the variety of persons included in this class, courts should not conclusively presume[71] that

62. *In re* Sigel, 372 Pa. 527, 94 A.2d 761 (1953); *In re* Gerlach's Estate, 127 Pa. Super. Ct. 293, 193 A. 467 (1937).

63. *In re* Kowalke's Guardianship, 80 Ohio App. 575, 76 N.E.2d 899 (1946).

64. 27A C.J.S. *Divorce* § 7 (1959). There is no common law action for divorce; the remedy arises strictly by statute. An action was available, however, in the ecclesiastical courts for limited divorce, analogous to a separation. This action, along with an action for annulment, could be maintained on behalf of a lunatic. Parnell v. Parnell, 161 Eng. Rep. 1106 (1814); *see* McRae v. McRae, 43 Misc. 2d 252, 254, 250 N.Y.S.2d 778, 780 (1964).

65. 242 Ala. 141, 5 So. 2d 401 (1941).

66. *Id.* at 142-43, 5 So. 2d at 402.

67. *See* R. ALLEN, *supra* note 31, at 32-43 (complete listing of the terms and definitions included under the broad heading of incompetency).

68. The courts confuse the use of the terms "incompetent" and "insane" and often erroneously treat them as identical. In addition, some courts treat hospitalization for mental illness as an adjudication of insanity when this is not necessarily the case. *See* Weihofen, *Mental Incompetency to Contract and Convey,* 39 S. CAL. L. REV. 211, 215 (1966).

69. Seven state statutes specifically provide that a mental disability from any "other cause" may permit an adjudication of incompetency. R. ALLEN, *supra* note 3, at 33.

70. *See generally* THE MENTALLY RETARDED CITIZEN AND THE LAW *supra* note 1, at 19. *Compare* 20 PA. CONS. STAT. ANN. § 5501 (Purdon 1975) *with* WIS. STAT. ANN. § 880.01 (West Supp. 1971).

71. The majority approach's use of the adjudication of incompetency as a conclusive determination of the ward's ability to make a personal choice may be subject to challenge as a denial of equal protection of the law. U.S. CONST. amend. XIV. Clearly, legislators may choose classes of persons to be treated differently from others to meet certain legislative goals, but valid classifications must be "rationally related" to the purpose. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949) (ban on motor vehicle advertisements, except as engaged in regular business of owner). Moreover, cases involving fundamental rights and

individuals who are adjudged incompetent are necessarily unable to make binding personal choices. Certainly not all members of such groups lack the ability to make personal determinations. Alcoholics,

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suspect classifications receive a strict scrutiny. *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New or Equal Protection*, 86 HARV. L. REV. 1 (1972). When strict scrutiny is applied, a compelling state interest in the objectives of the statute and a close congruity between the means and end of the law are required to uphold its validity. Loving v. Virginia, 388 U.S. 1 (1967). The Burger Court has recently begun to use a sliding scale approach, which represents a middle ground between "strict scrutiny" and "mere rationality."

The conclusive presumption applied to incompetents would probably fall into the middle ground. Divorce is part of a complex of marriage-related rights that have been accorded constitutional protection in recent years. *See* Wilkinson & White, *supra* note 46, at 574-77 (discussion of constitutional protection of divorce). In Loving v. Virginia, 388 U.S. 1, 12 (1967), the Court recognized that ". . . marriage is one of the basic civil rights of man," and in Zablocki v. Redhail, 434 U.S. 374 (1978), the Court held that marriage was a fundamental right.

Divorce is also constitutionally protected. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court ruled that a sixty dollar filing fee for divorce suits violated the due process clause of the fourteenth amendment as applied to indigents; the fourteenth amendment did not permit the state to preempt the right to dissolve the marriage relation without affording all citizens access to the means for doing so.

Two other cases evidence the fundamental importance of the right of divorce. In United States v. Kras, 409 U.S. 435, 445 (1973), the Court distinguished subsequent claims brought by indigents for exemption from fees on the basis of the interests protected. And in Ortwien v. Sheaab, 410 U.S. 656 (1973) the Court upheld a twenty-five dollar appellate filing fee in actions seeking increased welfare benefits in the face of an indigent's claim that the fee requirement denied him equal protection. The Court noted, "[the indigent's] interest, like that of *Kras*, has far less constitutional significance than the interests of the *Boddie* appellants." *Id.* at 659. It is of major importance that in *Ortwein* the appellants had no alternative way of processing their claim except through the appeals process. Like *Boddie*, the state had a monopoly over the remedy appellant sought. Thus, the major distinction between *Boddie* and *Ortwein* is the constitutional significance of the right to divorce found in *Boddie* rather than the lesser interests of the *Ortwein* appellants.

In addition to the element of constitutional protection of divorce, the classification of incompetency may be suspect. Indeed, one commentator has argued that mental illness or incompetency is a suspect class. Note, *Mental Illness: A Suspect Classification*, 83 YALE L.J. 1237 (1974). *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (a suspect class is one that is saddled with disabilities, subjected to a history of purposeful unequal treatment or relegated to a position of political powerlessness). Thus, considering the two factors—divorce as a fundamental interest and incompetency as a suspect class—close scrutiny should be applied to the present rule denying incompetents the right to bring actions in divorce.

Applying the Burger Court's sliding scale approach, the courts may find the complete denial of the right to bring an action in divorce to all adjudicated incompetents constitutionally invalid. Courts have recognized in many other areas that many people are incompetent for limited pruposes. For example, a person may be incompetent to enter into a normal civil contract and yet have the lower capacity required to act in marital affairs. Given the Court's recent extensions of constitutional protection to marital rights, a more precise means of determining incapacity to choose a divorce may be mandated.

Moreover, conclusive presumptions of all types are now subject to close judicial scrutiny on due process grounds. *E.g.*, Vlandis v. Kline, 412 U.S. 441 (1973) (invalidating a Connecticut statute that conclusively presumed a student's legal address at the time of his application to a state university would remain his permanent address throughout his enrollment in the university); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (illegitimate children could not be conclusively presumed not dependent). "Where the private interests affected are very important, and the government interest can be promoted without much difficulty by a well-designed hearing procedure [the Constitution] requires the government to act on an individual basis, with general propositions serving as rebuttable presumptions only." U.S. Dep't of Agriculture v. Murry, 413 U.S. 508, 518 (Marshall, J., concurring). Given the strong private interest in obtaining a divorce and the simple hearing procedure required to make an individual determination of capacity, the conclusive presumption barring incompetents access to the courts should be rejected.

for instance, may be quite able to make personal decisions in the nature of divorce.[72] More importantly, wide variations in mental ability exist within each class.[73] It is apparent, therefore, that an adjudication of incompetency does not bear a necessary relationship to an individual's ability to make a personal choice to dissolve a marriage relation.[74] The adjudication should be viewed as merely a tentative guideline for identification of individuals who may lack such capacity.

Furthermore, the judicial determination of "incompetency" is often perfunctory[75] despite its grave consequences for an adjudicant.[76] "[T]he finding of incompetency is itself often the result of a minutes-long uncontested proceeding initiated by a relative or public official."[77] Because these proceedings are often brief and uncontested, they often deal with only a single question,[78] such as the individual's ability to enter into contractual relations. And while this issue may be satisfactorily decided,[79] the adjudication of incompetency is "no more comprehensive or extensive than the particular circumstances require."[80]

Moreover, an adjudication of incompetency is usually for a purpose that is fundamentally different from determining ability to make a personal choice. Indeed, such adjudications are generally deemed necessary only when substantial property interests are at stake.[81]

Finally, the courts have universally declared that much less capacity is required to marry than to conduct business.[82] "[M]arriage depends to a great extent on sentiment, attachment and affection which persons with equal, as well as those with stronger intellects

72. Comment, *Mental Illness and Contracts*, 57 MICH. L. REV. 1020, 1106 (1959). Although some incompetents are completely disabled, wide variations exist. Guardianship laws should distinguish between a guardian of the person and of property, and guardianship terms should always be individualized and subject to the "least restrictive alternative" principle. *See* THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 1, at 20-25.

73. Weihofen, *supra* note 68 at 223-24 (1966). Diminution of capacity attributable to old age exhibits the widest variation.

Besides the differences among individuals, each individual is likely to have different capacity at different times. Moreover, some disabilities are more stable than others. The mentally retarded, for instance, appear very stable, while the mentally ill exhibit more variation.

74. *See* notes 131-35 and accompanying text *infra*.

75. THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 1, at 19. *Accord*, Weihofen, *supra* note 68 at 223-34.

76. R. ALLEN, *supra* note 3, at 260; *see* Ely, *supra* note 23, at 10.

77. THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 1, at 19.

78. Weihofen, *supra* note 68 at 213.

79. *Id.*

80. *In re* Young's Estate, 38 Cal. App. 2d 588, 591, 101 P.2d 770, 771-72 (1940).

81. THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 1, at 18.

82. Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 670 (1976) (capacity legally required for marriage is not great); *see* R. ALLEN, *supra* note 3, at 299 (level of competency to marry is lower than for commercial contracts). Lazerow, *supra* note 14, at 445 ("anyone who has more capacity than a vegetable is considered able to marry").

feel and . . . it does not depend . . . on the exercise of clear reason, discernment and sound judgment."[83] Thus, in most jurisdictions a person who is adjudicated incompetent to enter into usual civil contracts may also be unable to obtain a divorce depsite his ability to meet the lower capacity required to marry.[84]

This problem is attributable to the courts' tendency to view incompetency as a unitary concept,[85] even though many people are incompetent for limited purposes.[86] Thus, even if the basic premise of the majority jurisdictions is accepted—that a person must personally choose to seek a divorce—the adjudication of incompetency should not be conclusive on the subject.

V. Advantages of the Minority Approach

Because it terminates the rights and obligations of the marriage,[87] divorce has a crucial impact on the property rights of the spouses. The minority courts recognize that the ward may be subject to significant property loss if the action may not be brought on his behalf. An unscrupulous spouse may seek to retain the financial benefits of continuing the marriage relation while having abandoned all sense of obligation to the incompetent.

Property consequences of divorce vary greatly among the jurisdictions, though there are many common aspects. In general, vested rights of the spouses are not affected by the divorce decree, but one spouse's interest in the other's property is terminated.[88] The right to inherit from the former spouse or to take a statutory share[89] of his estate is terminated since the divorcee is no longer a surviving spouse.[90] Moreover, in some states the divorce decree modifies "by circumstances" the wills of the spouses, rendering ineffective any disposition favorable to the former spouse.[91]

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83. Griffin v. Beddow, 268 S.W.2d 403, 405 (Ky. 1954). *See generally The Right of the Mentally Disabled, supra* note 2.

84. *See* Glendon, *supra* note 82 at 670; Lazerow, *supra* note 14, at 455. *See generally* R. ALLEN, *supra* note 3, at 299-313.

85. R. ALLEN, *supra* note 3, at 74.

86. *Id. See* notes 129-35 and accompanying text *infra*.

87. 27A C.J.S. *Divorce* § 160 (1959).

88. *Id.* at § 180. *See, e.g.*, PA. STAT. ANN., tit. 23, § 55(3) (Purdon Supp. 1977).

89. By statute in most states the surviving spouse may elect to take a specific share of the other spouse's estate rather than taking what is given in the will. 97 C.J.S. *Wills* § 1258 (1957). *See, e.g.*, 1978 Pa. Legis. Serv. Act No. 1978-23, ch. 22, § 2203 (to be codified in 20 PA. CONS. STAT. ANN. § 2203).

90. Since an incompetent may have testamentary capacity, he may choose not to make a disposition to his spouse in his will as a result of his spouse's misconduct. Yet, if he cannot obtain a divorce, the other spouse may elect to take the statutory share. Hence, there would be no effective way of disinheriting an unfaithful spouse.

91. *E.g.* 20 PA. CONS. STAT. ANN. § 2507 (Purdon 1975) provides as follows:

> Wills shall be modified upon the occurrence of any of the following circumstances, among others:
>
> * * *
>
> (2) Divorce. If the testator is divorced from the bonds of matrimony after

A divorce decree transforms all property held as tenants by the entireties to a tenancy in common[92] thus destroying the right of survivorship.[93] This change also permits division and sale of the property without the other spouse's permission[94] and prevents an unfaithful spouse and his paramour from enjoying the use of the marriage property to the exclusion of the incompetent when his disability requires his institutionalization.[95] If a divorce is permitted, however, the incompetent's guardian may obtain the incompetent's separate share.[96]

The minority approach also prevents the extremely unjust results that may occur when the incompetent is not permitted to counterclaim for divorce when sued by an unfaithful spouse for support or divorce.[97] The grant of the divorce to the prevailing party may provide important implications for the subsequent property settlement. In some states the culpable party[98] in the divorce decree is divested of any interest in property bought solely with the funds of the innocent spouse.[99] Furthermore, many state divorce statutes provide that the homestead may be awarded to the innocent party, either absolutely or for a limited time.[100] In states having such laws, it is extremely unfair to deny the incompetent the right to counterclaim

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making a will, all provisions in the will in favor of or relating to his spouse so divorced shall thereby become ineffective for all purposes.

See generally 95 C.J.S. *Wills* § 293 (1959).

92. *See, e.g.*, Wife W. v. Husband W., 307 A.2d 812 (Del. Super. 1973), *aff'd*, 327 A.2d 754 (Del. Super. 1974); Kover v. Kover, 29 N.Y.2d 408, 278 N.E.2d 886, 328 N.Y.S.2d 641 (1972). *See generally* McLaughlin, *Divorce and the Tenancy by the Entirety*, 50 MASS. L.Q. 45 (1965).

93. G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, §§ 1784, 1792, 1793 (1961).

94. *Id.* at § 1793.

95. This concern was raised in the early English case of Baker v. Baker, [1880] L.R., 5 P.D. 142, 151.

96. *See, e.g.*, CAL. PROBATE CODE §§ 1500-1574 (West Supp. 1971); 20 PA. CONS. STAT. ANN. § 5521 (Purdon 1975).

97. *See* Mohrmann v. Kob, 291 N.Y. 181, 51 N.E.2d 921 (1943) (incompetent sued for support under a separation agreement could not counterclaim for divorce of grounds on adultery); Clarady v. Mills, 431 S.W.2d 63, 64 (Tex. Civ. App. 1968) (incompetent sued for divorce could not bring independent cross-petition for divorce).

98. In states providing for divorce only on "fault" grounds the plaintiff must be the injured or innocent spouse to be entitled to a divorce. Mirarchi v. Mirarchi, 226 Pa. Super. Ct. 53, 311 A.2d 698 (1973). In those states the competent spouse may be unable to bring an action in divorce because he is without ground unless he resides in a state in which permanent insanity is a ground for divorce.

99. *See* Note, *Divestiture Through Divorce of Guilty Spouse's Interest in Property Purchased Solely with Funds of the Innocent Spouse,* 73 DICK. L. REV. 660, 666 (1969). *See also* Wallace v. Wallace, 123 Ind. App. 461, 111 N.E.2d 90 (1953) (court has authority to direct transfer of entireties property to husband when he had originally owned it and wife was guilty party); 24 AM. JUR. 2d *Divorce and Separation* § 930 (1966).

100. 24 AM. JUR. 2d *Divorce and Separation* § 931 (1966). The innocent party may be awarded the homestead for life, even when the homestead has been selected from the separate property of the offending spouse. In addition, the value of the homestead need not be limited to the amount of the statutory exemption from forced sale by creditors. *See, e.g.*, Burham v. Burham, 33 Cal. 2d 416, 202 P.2d 289 (1949); Taylor v. Bukowski, 19 Ill. 2d 586, 169 N.E.2d 89 (1960).

for divorce and permit a guilty spouse to obtain more than that to which he or she is legally entitled. The guardian should be permitted to bring the action in divorce to protect the incompetent's property interests.

Another inequity remedied by the minority approach is the competent spouse's ability to enforce rights for support against the incompetent spouse.[101] In *Mohrman v. Kob*[102] a wife sued her incompetent husband for money allegedly owed under a separation agreement,[103] which was executed at a time when the husband was competent. The agreement provided in part, "If the . . . [wife] shall commit any act which shall entitle "the [husband] to a divorce under the laws of the State of New York, then upon such divorce being obtained, the provisions herein shall be null and void."[104] At the time the action was brought, the husband had been adjudicated insane, and the wife had been living in open adultery. When the wife sued for nonsupport, the incompetent husband's guardian counterclaimed for divorce on the ground of the wife's adultery. The New York Court of Appeals reversed a lower court decision in favor of the incompetent and held that the counterclaim could not be brought.

This result is unjust and harsh. As the dissenting judge noted, "the limitation imposed by the court produces absurd consequences and flagrant injustice."[105] Under a rule designed to protect the incompetent, the court permitted an adulterous spouse to make use of the incompetent's legal disability to obtain support for herself and her paramour. Had the divorce action been permitted, the husband's support obligation would have terminated.[106]

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101. The obligation to support a spouse ceases when conduct that is a ground for divorce occurs, even if the divorce is not obtained. Commonwealth v. Young, 213 Pa. Super. Ct. 515, 516, 247 A.2d 659, 660 (1968). Condonation, however, is a full defense available to the guilty party. Commonwealth v. Sanders, 187 Pa. Super. Ct. 494, 498, 144 A.2d 749, 751 (1958). A major reason behind the majority approach is that the incompetent spouse is not given the opportunity to condone the offense. Such an argument is equally applicable to an action in support brought by a "guilty" spouse against an incompetent. Similar to the divorce rationale, the guardian would have no authority to condone or not to condone the offensive act. Thus, the question arises whether the "guilty spouse" has a right to support until the incompetent has the ability to exercise the personal choice required to condone the offense. In view of the majority's position permitting a separation action, however, it seems likely that the majority courts would permit the guardian to take such an action because the marriage bond would not be broken. *See* notes 44-46 and accompanying text *supra*.

102. 291 N.Y. 181, 51 N.E.2d 921 (1943).

103. Because the duty to support a spouse terminates upon adulterous conduct, *see* note 101 *supra*, the incompetent's duty of support would end in some states even without the divorce action. Thus, the duty of support would likely continue only under a factual setting such as that found in *Mohrmann*, in which a separation agreement was present.

104. 291 N.Y. at 184, 51 N.E.2d at 922.

105. *Id.* at 195, 51 N.E.2d at 927 (Thatcher, J., dissenting). *See also* 56 HARV. L. REV. 310, 311 (1943).

106. 27A C.J.S. *Divorce* § 160 (1955).

Moreover, a former wife is not entitled to inherit or take a statutory share of the husband's estate. *See* notes 89-91 and accompanying text *supra*.

VI. Proposed Solutions—Ad Hoc Approach

A. The Minority View: Modification Required to Protect Personal Rights

The minority approach is not a panacea. Although it protects the incompetent's legal interests by permitting a guardian to sue for divorce on his behalf, it creates the potential for the abuse of this power.[107] Like the majority view, the minority approach can deny the adjudicated incompetent the opportunity to control his marital affairs, even when he possesses the requisite capacity to make personal decisions. Through the addition of certain safeguards to the minority approach, however, proper protection of the personal interests of the incompetent is possible. Such an approach must accommodate the majority's concern for a personal decision[108] to obtain a divorce with the minority's concern for the prevention of injustice.[109]

1. Ad Hoc Determination of Capacity to Sue for Divorce.[110]—An adjudicant who possesses sufficient capacity to make the personal decision may elect not to sever the marriage tie despite his spouse's misconduct. His guardian, however, may wish to bring the action believing it financially desirable.[111] When this conflict occurs, the incompetent's personal rights must be preserved, for in no case should a guardian be permitted to bring an action in divorce against the wishes of an incompetent who is found to have the requisite capacity to make his own decision.[112]

When the incompetent chooses divorce, however, the determination of the incompetent's capacity to make the personal decision must be based upon a separate hearing rather than a conclusive presumption that he lacks capacity because of a prior adjudication of incompetence.[113] Those who are adjudicated incompetent but who

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107. *See* Johnson v. Johnson, 294 Ky. 77, 79, 170 S.W.2d 889, 890 (1943) (the continuance or dissolution of the marriage relationship should not depend on the pleasure or discretion of a legal representative).

108. *See* notes 38-43 and accompanying text *supra*.

109. *See* note 61 and accompanying text *supra*.

110. *See* notes 130-35 and accompanying text *infra*.

111. Cohen v. Cohen, 73 Cal. App. 2d 330, 166 P.2d 622 (1946). The facts in *Cohen* are complex. In substance, the court held that a cross-complaint for divorce instituted by the guardian ad litem against the wishes of the ward was invalid. The court observed:

> Assuming that situations could or should arise in which consent to a divorce might be given by a guardian in behalf of an incompetent, the present case is not one of them. . . . It was the privilege of [the incompetent] as the alleged aggrieved party to decline to seek a divorce . . . it was not within the province of her counsel, her guardian or the court to force one upon her.

Id. at 335, 166 P.2d at 625. This decision is, therefore, authority for the proposition that a person who has the requisite capacity, though represented by a guardian, must be permitted to make the personal decision to bring an action in divorce.

112. The denial of the right to make such a decision when the individual has the capacity may rise to constitutional proportions. *See* note 71 *supra*.

113. *See* Ertel v. Ertel, 313 Ill. App. 326, 40 N.E.2d 85 (1942), in which an incompetent's

still possess the requisite capacity to make personal decisions should be permitted to do so. The requirement of an independent ad hoc determination of such capacity would insure that a prior adjudication of incompetence does not eliminate the ward's control over his marital affairs.[114]

2. No Reasonable Likelihood of Recovery of Requisite Capacity.— A guardian should be permitted to bring an action in divorce on behalf of an incompetent who is unable to make the decision only if no reasonable likelihood exists that the ward would regain the capacity to make such a choice. A similar rule is applied in many states when the defendant in a divorce action is insane.[115] Medical testimony[116] should be adduced on this issue to determine the probability that the incompetent would ever again have sufficient capacity.[117] If it is improbable that the incompetent will ever regain competence, the guardian may be permitted to act on his behalf to protect his interests. Such a rule would greatly reduce the likelihood that an incompetent would recover sufficient capacity to find that his guardian had acted contrary to his wishes by terminating his marriage.[118]

3. Judicial Determination that the Action is in the Best Interests of the Ward.—To further safeguard the incompetent who is unlikely ever to recover sufficient capacity to choose divorce, the guardian should only be permitted to bring the action if he can establish[119]

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conservator brought an action to annul the ward's marriage against the conservator's wishes. The court found that the ward had the requisite mental capacity to understand the nature and obligations of the marriage contract and that each case involving marriage capacity must be decided on its own facts. Since the jury found the incompetent had the required capacity for wedlock, the marriage was valid and could not be annulled at the instance of the conservator.

114. The burden of proof in establishing incapacity is upon the party alleging a lack of capacity. Ertel v. Ertel, 313 Ill. App. 326, 334, 40 N.E.2d 85, 89 (1942).

115. *See, e.g.*, 12A CAL. CIV. CODE § 4510 (1970); PA. STAT. ANN. tit. 23, § 10(4) (Purdon Supp. 1977).

116. *See* Weihofen, *supra* note 68, at 213 (some types of mental disabilities are more stable than others).

117. *See* Comment, *The Development of the "Substitute Judgment" Rule and its Application in N.Y. As a Vehicle for Estate Planning for Incompetents*, 33 ALB. L. REV. 597 (1969) [hereinafter cited as *Development of Substitute Judgment*]. One safeguard could be provided by "a judicial redetermination of a person's incompetency or of his incurability" before such a distribution is authorized. *Id.* at 608. Authorizing the making of a gift or the bringing of an action in divorce are both personal acts important to the incompetent's welfare. Before such actions are undertaken it should be determined that the incompetent is unlikely ever to exercise such volition. If it is reasonable to assume the incompetent will regain such capacity, the decision should be reserved for him. If not, the courts, through a guardian, should act in the best interests of the incompetent. *See also*, R. ALLEN, *supra* note 3, at 325.

118. Only in the rarest circumstances would recovery occur, and in even fewer, one may surmise, would the guardian's action be different from that which the incompetent would have chosen. The slight chance that such an eventuality may arise should not place the incompetent at the "mercy" of the other spouse. McRae v. McRae, 43 Misc. 2d 252, 250 N.Y.S.2d 778 (1964).

119. The determination whether an action is in the best interests of the incompetent could be combined with the hearing regarding the incompetent's capacity. If the court found both

that a divorce is in the best interests of the ward.[120] Hence, the court should use its equitable power to act for the protection of incompetents in a manner similar to that employed in the medical consent cases.[121] If, after a consideration of all the circumstances, the court finds the divorce necessary to protect the incompetent, it should authorize the guardian to bring the action on his ward's behalf. For example, the courts may properly act to protect the incompetent's property and legal interests from impairment at the hands of an unscrupulous spouse.

Thus, through the adoption of the minority approach with the addition of the safeguards here suggested, the legitimate concerns of the majority and minority positions may be reconciled. Extensive protection is provided for the ward's right to make a personal choice to end the marriage relation, while a person who is truly incapacitated is not rendered the helpless victim of a designing spouse.

B. A Proposed Modification to the Application of the Majority View: The Ad Hoc Approach

Many courts following the majority view may be unwilling to repudiate the personal choice doctrine,[122] choosing instead to continue the requirement that the plaintiff have sufficient capacity in every case to choose to terminate the marital relation before he may maintain a proceeding in divorce. These courts, if they will not permit a guardian to sue for divorce for an incompetent who is unable to make the personal decision, should at least discard the adjudication of incompetency as a conclusive index of the ward's ability to make a personal choice to dissolve the marital relationship. The test for incompetence should be responsive to the reason for the prohibition.[123] Therefore, an ad hoc approach should be adopted based on the particular purpose of determining the ability of the alleged incompetent to make a personal choice.[124] This requires the development of a general test to determine competence to bring an action in divorce, applied on an individual case basis.

Because the decision to seek a divorce is qualitatively similar to the decision to marry, the test for capacity to divorce should be simi-

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that the adjudicant lacked the requisite capacity and that he was unlikely to regain it, the burden would shift to the guardian to establish that the action was in the best interests of the ward.

120. The incompetent is a ward of the court and the guardian is the court's bailiff. *In re* Gerlach's Estate, 127 Pa. Super. Ct. 293, 300, 193 A. 467, 470 (1937).

121. *See* note 168 *infra*.

122. *See* notes 38-43 and accompanying text *supra*.

123. Lazerow, *supra* note 14, at 459; *The Right of the Mentally Disabled*, *supra* note 2, at 468.

124. R. ALLEN, *supra* note 3, at 251-52. The authors argue that there should be no single criterion of incompetency applicable to all legal functions. They recommend that definitions of incompetency be ad hoc determinations for specific purposes.

lar to that for marriage. The universal test for marriage capacity is whether the supposed incompetent had capacity to understand the nature and obligations of marriage and whether he was able to consent voluntarily.[125] A like test for divorce would serve as a guide by which the courts could determine a person's capacity to bring the action.[126]

A hearing, similar to that for an adjudication of incompetency or insanity, should be held when the defendant can raise a bona fide question of the plaintiff's capacity.[127] The court could accept testimony, including that of medical experts, relating to the plaintiff's ability[128] to make the personal choice rather than rely on a past adjudication in an unrelated matter.

This approach would be consonant with the modern legal recognition of various degrees and types of incompetency.[129] More im-

125. Lazerow, *supra* note 14, at 456; *see, e.g.*, Vitale v. Vitale, 147 Cal. App. 2d 665, 305 P.2d 690 (1957); Davis v. Seller, 329 Mass. 385, 108 N.E.2d 656 (1956); Ivery v. Ivery, 258 N.C. 721, 129 S.E.2d 457 (1963).

126. The test could be formulated as follows: does the plaintiff understand the nature and effects of a divorce suit, and is he capable to voluntarily choosing to bring the action? *See* Stephens v. Stephens, 143 Neb. 711, 715, 10 N.W.2d 620, 622 (1943).

In *Stephens* the trial judge applied a similar test when the defendant, himself a former psychiatric patient, alleged that plaintiff was mentally deranged and unable to maintain the action. Although the wife-plaintiff had not been adjudicated incompetent or insane, her behavior was at times bizarre. She had written letters to and attempted to telephone another man with whom she claimed to be in love, but whom she had never met nor talked to before. Furthermore, her mother had been insane and had been institutionalized, believing that she was in love with, and actually married to, a man other than her husband, even though the man rejected her.

The trial judge held that these facts did not establish the plaintiff's insanity or incapacity to bring the action in divorce. He applied the following test:

> If a plaintiff in an action for divorce reasonably understands the nature and purpose of such action, the effect of his acts with reference thereto, and has the will to decide for himself whether or not such action should be brought, he has sufficient mental capacity to maintain such action.

Id. at 715, 10 N.W.2d at 622.

127. The hearing could proceed in several ways. For example, the question could be tried to the jury or by the court, Shenk v. Shenk, 100 Ohio App. 32, 36, 135 N.E.2d 436, 439 (1954), although the latter would use judicial resources more efficiently. In any case, the trial judge should call for necessary medical testimony relating to the plaintiff's capacity. *See* Stevens v. Stevens, 266 Mich. 446, 254 N.W. 162 (1934) (appellate court concluded plaintiff had capacity because trial judge had seen and heard plaintiff testify as a witness and permitted the action to continue). Turner v. Bell, 198 Tenn. 232, 279 S.W.2d 71 (1855) (same as *Stevens*, except plaintiff had been adjudicated incompetent).

128. Shenk v. Shenk, 100 Ohio 32, 36, 135 N.E.2d 436, 437-38 (1954). In *Shenk* the court used an approach similar to the one suggested here for courts committed to the majority approach because it was unwilling to abandon the personal choice doctrine, finding that marriage "cannot be dissolved except by the consent and intelligent exercise of the will of the parties." *Id.* Defendant raised a bona fide question as to plaintiff's sanity, although plaintiff had never been adjudicated incompetent. The appellate court ordered the lower court to determine the sanity either by impanelling a jury or by trying the issue himself. The only flaw in this approach was that the question for trial should have focused on whether plaintiff had the capacity to bring the action, rather than the more general question of the plaintiff's sanity. *See* State v. Johnson, 418 P.2d 337 (Okla. 1966) (person under guardianship specifically limited to his estate, not insane, may bring divorce action).

129. At common law a person who was insane or *non compos mentis* was legally disqualified from marrying, Middlecoff v. Middlecoff, 167 Cal. App. 2d 698, 335 P.2d 234 (1959); Wilson v. Mitchell, 10 Misc. 2d 559, 169 N.Y.S.2d 249 (Sup. Ct. 1957); Imhoff v. Witmer's

portantly, the suggested approach would keep the law of divorce consonant with the law of marriage.[130] Courts have long held that a person who has been adjudicated incompetent may marry.[131] For purposes of obtaining an annulment, a prior adjudication of incompetence is considered at most prima facie evidence of incapacity.[132] Moreover, since the right of various types of incompetents to marry is increasingly being recognized,[133] a concomitant right to divorce for these parties is necessary to maintain a logical symmetry[134] in the law and to avoid absurd results. Without this recognition, an incompetent could marry, but not be able to terminate the relationship. In addition, the suggested approach would permit those who are adjudicated incompetent subsequent to marriage to exercise personal volition to dissolve the relationship.[135]

VII. Pennsylvania Law: A Lack of Clarity

The Pennsylvania Supreme Court has never addressed the question whether an adjudicated incompetent may maintain an action in divorce *a.v.m.*, and the few appellate courts that have addressed the issue have done so only in dicta.[136] Two Pennsylvania trial courts, however, have recently examined the problem, reaching different conclusions.

In *Krukowsky v. Krukowsky*[137] a husband who had been adjudicated incompetent brought an action in divorce and annulment against his wife. The court examined the legislative history of the

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Adm'r., 31 Pa. 243 (1858) (man under guardianship for inebriety incompetent to bind estate by contract but not to marry), making a will, Groseclose v. Rice, 366 P.2d 465 (Okla. 1961); Mohler's Estate, 343 Pa. 299, 22 A.2d 680 (1941), or testifying in court, J. WIGMORE, II WIGMORE ON EVIDENCE § 492 (3d ed. 1940); *see* R. ALLEN, *supra* note 3, at 327-43. The almost complete disability was attributable to an historical misunderstanding of mental illness and deficiency. *Id.*, at 328; *see* 81 AM. JUR. 2d *Witnesses* § 80 (1976) "Owing to imperfect understanding of the nature of insanity . . . it was considered at early common law that every insane person was wholly and absolutely non compos mentis. . . ." *Id.*

130. *See generally* R. ALLEN, *supra* note 3, at 299-313; *The Right of the Mentally Disabled, supra* note 2.

131. *See* note 129 *supra*.

132. Middlecoff v. Middlecoff, 160 Cal. App. 2d 22, 324 P.2d 669 (1958); Wilson v. Mitchell, 10 Misc. 2d 559, 169 N.Y.S.2d 249 (Sup. Ct. 1957); R. ALLEN, *supra* note 3, at 313.

133. *See* note 129 *supra*.

134. Wilkinson & White, *supra* note 46, at 576 (questioning logic of freely granting right to marriage while restricting right to dissolve a marriage).

135. Various jurisdictions have recognized the propriety of an ad hoc determination of divorce capacity. *E.g., In re* Marriage of Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973) (spouse under conservationship may maintain divorce action through her guardian ad litem); State v. Johnson, 418 P.2d 337 (Okla. 1960) (individual under a guardianship limited to his estate was permitted to bring a divorce action); Turner v. Bell, 198 Tenn. 232, 279 S.W.2d 71 (1955) (recognizing a divorce granted to a wife who had been adjudicated insane after finding that the prior adjudication did not mandate a conclusive presumption that she lacked either the volition to seek a divorce or the capacity to take the required oath).

136. Baughman v. Baughman, 34 Pa. Super. Ct. 271 (1905) (suit by competent spouse against incompetent on grounds of insanity); Hickey v. Hickey, 138 Pa. Super. Ct. 271, 11 A.2d 187 (1940) (action by competent spouse against incompetent).

137. 49 Pa. D. & C.2d 651 (C.P. Del. 1970).

divorce statute and the sparse case law on the subject[138] and concluded that although an action in annulment could be maintained on behalf of the incompetent, an action in divorce *a.v.m.* could not.[139] The court based its decision on a putative unwritten law in Pennsylvania that an action in divorce may not be maintained on behalf of an incompetent.[140]

In *In re Estate of Ronald Carver*,[141] on the other hand, the court, in a well-reasoned opinion, concluded that a guardian may bring an action for divorce on behalf of his ward. Relying on the United States Supreme Court decision *Stanley v. Illinois*,[142] the court concluded that prohibiting an incompetent access to the courts to redress his grievances would deny him due process and equal protection. Thus, the *Carver* court held, a case by case determination of the incompetent's capacity to understand the basic nature of the divorce process must be made.[143] Although the court was "not unmindful of the dangers of allowing incompetents to sue for divorce through guardians,"[144] it concluded that a "careful and cautious" review by the trial judge could prevent abuse. So reasoning, on the facts in the record, the court found that the ward had the requisite capacity to make a decision to seek a divorce even though he had been adjudicated incompetent. Since the evidence also indicated that the incompetent did in fact desire a divorce, the court appointed a guardian ad litem to prosecute the action on his behalf.[145]

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138. In 1843 the legislature authorized a relative or next friend of a lunatic or *non compos mentis* wife to bring an action in divorce on her behalf. Act of April 13, 1843, P.L. 235, § 8. In 1907 the superior court in Baughman v. Baughman, 34 Pa. Super. Ct. 271 (1907) extended the right to maintain an action in divorce to a *non compos mentis* husband on the basis of a 1905 amendment to the divorce law. Act of April 18, 1905, P.L. 211. A subsequent superior court ruling, however, reversed that decision. In Hickey v. Hickey, 138 Pa. Super. Ct. 271, 11 A.2d 187 (1940), the court found that the 1905 amendment pertained only to the procedure to be applied when the respondent was insane and did not extend the right to bring an action in divorce to a *non compos mentis* husband. *Id.* at 274-75, 11 A.2d at 188. Moreover, the right of the *non compos mentis* wife to bring an action in divorce was not included in the divorce law that was enacted in 1929.

In the original draft of the Divorce Law of 1929 the legislators restated the provisions of the Act of 1843, providing a *non compos mentis* wife with the right to bring an action in divorce. Before passage, however, this section was deleted, which created the question whether the legislature intended to return to the law of 1843 or concurred in the judicial extension of the right. Some courts have ruled that the failure to reenact the section providing for the *non compos mentis* wife's right to bring the action indicates legislative intent that the action may not be brought by either an incompetent husband or wife. Hickey v. Hickey, 138 Pa. Super. Ct. 271, 11 A.2d 187 (1940) (dicta); Krukowsky v. Krukowsky, 49 Pa. D. & C.2d 651, 651-52 (C.P. Del. 1970).

139. 49 Pa. D. & C.2d at 652-53.

140. A. FREEDMAN, LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA § 504 (1957).

141. 5 Pa. D & C.3d 743 (O.C. Adams 1977). The first decision the court rendered followed *Krukowsky*, but was later changed after the petitioner filed exceptions and there was a change in judges.

142. 405 U.S. 645 (1972).

143. 5 Pa. D. & C. 3d at 755.

144. *Id.*

145. *Id.* This point, appearing in 14 Adams L. J. 194, 198 (O.C. Pa. 1978), has apparently

A. The Ad Hoc Approach and Pennsylvania Law

Since Pennsylvania legislative and judicial pronouncements have not clearly adopted the majority or minority approaches, an innovative use of the minority position would not represent a marked departure from precedent and, therefore, would be desirable. It is suggested, however, that if Pennsylvania courts feel compelled to follow the majority approach, they should adopt the reasoning in *Carver* and not conclusively presume that a person who is adjudged incompetent is unable to make a personal choice. Indeed, the definition of an incompetent in Pennsylvania mandates no such presumption.

> Incompetent means a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety:
>
> (1) is unable to manage his property, or is likely to dissipate it or become the victim of designing persons; or
>
> (2) lacks sufficient capacity to make or communicate responsible decisions concerning his person.[146]

This definition, like those of the other jurisdictions, is extremely broad and bears no necessary connection to a person's ability to make a personal choice to dissolve a marriage. The statute creates two classes of persons, those unable to manage property affairs, and those unable to manage personal affairs.[147] At the very least, application of the majority approach in Pennsylvania would classify only the second group incompetent to bring an action in divorce.

At present, although the courts have not distinguished[148] degrees of competency, there is ample authority in Pennsylvania for individual determinations of capacity. The courts have recognized that an adjudication of incompetence does not make a person incompetent for all purposes. In *Yacabonis v. Gilvickas,*[149] a case interpreting Pennsylvania's deadman's statute,[150] the supreme court recognized that an adjudication of incompetency is not the same as an adjudication of lunacy. Thus, Pennsylvania's statute, which disqualifies a witness from offering testimony against a deceased or insane party, did not apply. Furthermore, Pennsylvania courts have recognized that a person adjudged insane may be a witness if the

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been deleted from the opinion reported in 5 Pa. D. & C.3d, though it can still be found in headnote 4.

146. 20 PA. CONS. STAT. ANN. § 5501 (Purdon 1975).

147. Prior Pennsylvania law did not clearly define incompetents as falling into two classes. *See* PA. STAT. ANN. tit. 50, § 3102(3) (Purdon 1969). It did, however, provide for the appointment of either a guardian of the estate or of the person of the incompetent. *Id.* at § 3301.

148. *See* note 25 *supra.*

149. 376 Pa. 247, 101 A.2d 690 (1954).

150. *See* PA. STAT. ANN. tit. 28, § 322 (Purdon 1958).

trial judge finds he has the required capacity.[151]

More importantly, a conclusive determination that an adjudication of incompetence indicates the ward's inability to make a personal choice to seek a divorce diverges from the Pennsylvania law of marriage capacity. The marriage law contains restrictions on the issuance of a marriage license to those who are weakminded, insane, of unsound mind, or under guardianship as a person of unsound mind.[152] Nevertheless, the license may be issued if a judge of the Orphans' Court decides the marriage is in the best interest of the incompetent.[153] A provision permitting a judge to order issuance of a marriage license to an epileptic has also been interpreted to authorize the courts to conduct case by case determinations of license issuance.[154]

The most persuasive argument for ad hoc determination of competency in divorce cases is the Pennsylvania Supreme Court's recognition that a person may be incompetent for purposes of entering into normal civil contracts while retaining the capacity to marry.[155] As long as the person understands the nature and obligations of the marriage contract he has capacity to enter into the relationship even though he has been adjudged weakminded and placed under a guardianship.[156] An adjudication of weakmindedness, though it raises a rebuttable presumption of incapacity, does not prevent an inquiry into capacity at the time of marriage.[157] Certainly, a situation in which a person may be competent to marry in Pennsylvania and yet not have the capacity to bring a divorce action is an absurd incongruity.

B. Prospects for Complete Reform in Pennsylvania: The Modified Minority View

As previously mentioned,[158] adoption of the minority position in Pennsylvania should be preferred to the majority position because it would present no problems to Pennsylvania precedent and allows a flexible approach to the right of incompetents. A more utilitarian reason for adopting the minority approach, however, is that Penn-

151. McClaney v. Scott, 188 Pa. Super. Ct. 328, 335, 146 A.2d 653, 656 (1958); Commonwealth v. Kosh, 305 Pa. 146, 157 A. 479 (1931).

152. PA. STAT. ANN. tit. 48, § 1-5 (Purdon Supp. 1977).

153. *Id.*

154. F.A. Marriage License, 4 Pa. D. & C.2d 1, 6 (O.C. Phila. 1955); *see also* E.P. Marriage License, 8 Pa. D. & C.2d 598 (O.C. Phila. 1957). These and other Pennsylvania cases are discussed in *The Right of the Mentally Disabled, supra* note 2, at 473-74.

155. Nonnemacher v. Nonnemacher, 159 Pa. 634, 636, 28 A. 439, 440 (1894). *See also* notes 82-84 and accompanying text *supra*.

156. Parrish v. Parrish, 86 Pitts. L.J. 23 (Pa. C.P. Alleg. 1936); Imhoff v. Witmer's Admr., 31 Pa. 243, 245 (1858) (but incompetent to contract for estate due to habitual drunkenness).

157. *In re* Hoffman's Estate, 209 Pa. 357, 58 A. 665 (1904).

158. *See* notes 110-20 and accompanying text *supra*.

sylvania's procedural and substantive rules could readily accommodate ad hoc adjudications under the minority position.

1. Procedure Established.—The Pennsylvania Rules of Civil Procedure contemplate the possibility of an incompetent being a plaintiff in a divorce suit.[159] The rules provide that the complaint in a divorce suit shall set forth the incompetency of either the plaintiff or the defendant and the name and address of any guardian. Similarly, the rules dealing with incompetents as parties provide for representation of the incompetent by a guardian or guardian ad litem in any case in which the incompetent is a plaintiff.[160] Thus, although the rules may not modify the substantive rights of any litigant,[161] they do establish an available procedure for the right of an incompetent to bring an action in divorce were such a right found to exist.

2. Traditional Powers of the Guardian.—In Pennsylvania, as in most states, the guardian of an incompetent may exercise many powers on behalf of his ward. In general, a guardian of an incompetent has the same powers and duties as the personal representative of a decedent's estate and a guardian of a minor's estate.[162] Among these powers is the authority to sell real estate or personal property,[163] to continue or incorporate a business, to require specific performance of contracts, or to take other actions by order of court. The guardian may also maintain civil actions on behalf of the incompetent.[164] Given these powers a Pennsylvania court, by construing the statutory authorization for guardianships in *pari materia* with the divorce statute as the Alabama courts have done,[165] may reasonably hold that an incompetent's right to a divorce may be asserted by his guardian.

3. Equitable Power of the Courts Over Divorce and Incompetents.—The Pennsylvania legislature has explicitly authorized the courts to exercise full equitable power in divorce cases. The divorce law specifically provides that:

> In all matrimonial causes *the court shall have full equity power* and jurisdiction, and may issue injunctions and other orders which are *necessary to protect the interests of the parties* or to effectuate the purposes of this act, and may grant such other relief or remedy *as*

159. PA. R. CIV. P. 1126.

160. PA. R. CIV. P. 2053.

161. The Rules must be "consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant." PA. CONST. art. 5, § 10(c).

162. 20 PA. CONS. STAT. ANN. § 5521 (Purdon 1975).

163. *See In re* Pritchard, 359 Pa. 315, 59 A.2d 101 (1948).

164. Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955); Kaplan v. Kaplan, 256 N.Y. 366, 176 N.E. 426 (1931); Campbell v. Gasparini, 171 Pa. Super. Ct. 173, 90 A.2d 251 (1952).

165. *See* Hopson v. Hopson, 257 Ala. 141, 57 So. 2d 505 (1952); Campbell v. Campbell, 242 Ala. 141, 5 So. 2d 401 (1941).

equity and justice require.[166]

Moreover, the doctrine of substituted judgment[167] provides ample authority for Pennsylvania courts to order that a personal action be undertaken on behalf of an incompetent when such action is in his best interest. The doctrine provides that if an act is in the best interests of the ward, a guardian may exercise his judgment and undertake the act on behalf of the ward even though the ward is under no legal obligation to perform the act.[168]

When first adopted in Pennsylvania in 1883,[169] the doctrine of substituted judgment was considered a "sound and just" rule; the court had a duty to do what it might reasonably be supposed the

166. PA. STAT. ANN. tit. 23, § 55(2) (Purdon Supp. 1977) (emphasis added).

167. The doctrine first arose in England in 1816 in the case of *In re* Whitbread, 35 Eng. Rep. 878 (1816). In that case the court authorized the guardian of a wealthy incompetent to make a financial allowance for relatives of the incompetent to whom the incompetent owed no legal duty of support. The rule was subsequently adopted in the United States, in *In re* Willoughby, 11 Paige Ch. 257 (N.Y. 1844), and was extended to include allowances for friends of the incompetent and to make gifts to charitable or religious institutions. *See, e.g.*, Harris v. Harris, 57 Cal. 2d 367, 369 P.2d 481, 19 Cal. Rptr. 793 (1962). Moreover, many courts now have recognized the use of the doctrine purely for estate planning purposes. *In re* Christiansen, 248 Cal. App. 2d 348, 56 Cal. Rptr. 505 (1967); *In re* Dupont, 41 Del. Ch. 300, 194 A.2d 309 (1963). *See Development of Substitute Judgment, supra*, note 117, at 597; Comment, *The Application of the Substitute Judgment Doctrine in Planning an Incompetent's Estate*, 16 VILL. L. REV. 132, 133 (1970) [hereinafter cited as *Application of Substitution of Judgment*]. The rationale behind the doctrine of substituted judgment is that the incompetent is a ward of the court, *see In re* Gerlach's Estate, 127 Pa. Super. Ct. 293, 193 A. 467 (1937), and the court should exercise its discretion and assert its judgment on behalf of the incompetent. *Application of Substituted Judgment, supra* at 133.

168. *Application of Substituted Judgment, supra*, note 167, at 132.

In Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1970), the court authorized a kidney transplant *from* an incompetent adult *to* his competent brother. The incompetent had a mental capacity equivalent to that of a child of about six years and was completely unable to consent. The court concluded that despite the medical risks to the incompetent, the kidney transplant was in his best interests as well as in his brother's.

The *Strunk* court relied on the doctrine of substituted judgment as authority for its decision to permit the operation and noted that "[t]his rule has been extended to cover the personal affairs of the incompetent." *Id.* at 147. The court found that it was a "universal rule of equity" that courts would protect the interests of those who could not protect themselves. *Id.*

The New Jersey Supreme Court reached a similar conclusion in *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976). The incompetent had suffered severe brain damage and appeared to be permanently comatose and dependent upon artifical life support apparatus for survival. The court concluded that the incompetent's "right of privacy may be asserted on her behalf by her guardian," *id.* at 41, 355 A.2d at 664, giving the guardian the authority to order the removal of the medical apparatus. The decision, in effect, authorized a guardian to make the very personal decision necessary to the exercising of the incompetent's "right to die."

The courts in both *Strunk* and *Quinlan* recognized the personal nature of the actions undertaken on behalf of the incompetent, but nevertheless, believed that the best interests of the ward would be served by use of substituted judgment. The personal choices exercised in these cases go far beyond that required to authorize a divorce. In *Strunk* the ward was exposed to a medical risk while in *Quinlan* the incompetent was likely to die as a result of the decision. Surely a court possessing equitable authority to authorize those decisions also has the power to permit an incompetent to sue for divorce when the circumstances demonstrate that the suit is in his best interest, especially if the safeguards suggested here are adopted. *See* notes 110-20 and accompanying text *supra*.

169. Hambleton's Appeal, 102 Pa. 50, 53-54 (1883). For a history of the application of the doctrine of substituted judgment in Pennsylvania see *Application of Substituted Judgment, supra* note 167, at 142-44.

incompetent would have done.[170] Since that time Pennsylvania courts have generally applied the doctrine in a manner similar to the traditional application of the rule throughout the nation,[171] although the doctrine has also been extended beyond its traditional bounds. In *Groff Estate,*[172] for example, the court permitted an incompetent's estate to make gifts for the purpose of reducing taxes.[173] And in *In re Null,*[174] the court permitted the guardian of the person of an incompetent adult to consent to a medical procedure to prevent the incompetent from having additional children. The *Null* court, relying heavily on a finding that the medical procedure was in the best interests of the ward, appointed a guardian of her person and authorized the guardian to consent to the procedure.[175]

The *Null* decision, although it admittedly goes very far in permitting substituted consent for an incompetent, does illustrate that Pennsylvania courts have ample power to act on behalf of an incompetent in matters of personal choice when the best interests of the incompetent are determinative. Indeed, the courts need not go as far into the realm of personal choice to authorize an action in divorce *a.v.m.* for an incompetent as the court did in *Null*, and if the suggested safeguards[176] are followed, the personal choice of the incompetent would rarely be contravened.

Thus, the Pennsylvania courts have sufficient authority to act on behalf of incompetents to authorize an action in divorce *a.v.m.* Moreover, the Pennsylvania legislature has specifically authorized courts to issue orders in divorce cases "necessary to protect the interests of the parties" and to "grant such other relief or remedy as equity and justice require."[177] When a person truly lacks the capacity to make the necessary decision to bring an action in divorce, "equity and justice" may, in some cases, require the courts to act on his be-

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170. Hambleton's Appeal, 102 Pa. 50, 53 (1883).

171. *Application of Substitution of Judgment, supra* note 167, at 132-35. The courts have extended the doctrine to include such things as payment of money to an adult daughter for use as a dowery in accordance with the religious tradition of the incompetent's faith. *In re* Mechlowitz Estate, 71 Pa. D. & C. 469 (C.P. Lack. 1949); *see also* Kelly's Estate, 34 Pa. D. & C. 166 (C.P. Schuyl. 1938) (allowance for incompetent's mother).

For present purposes, the most important extension of the doctrine of substituted judgment in the United States has been in the field of medical consent. Substituting their own consent for that of the guardian, several courts have recently authorized incompetents to undergo medical procedures that required choices of a personal nature. The courts in the exercise of their *Parens patriae* responsibilities over incompetents have made these medical decisions using the doctrine as authority. *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (1977); *cf.* Hart v. Brown, 29 Conn. App. 368, 289 A.2d 386 (1972) (court authorized parents of minor twins to consent to kidney transplant from one to the other).

172. 38 Pa. D. & C.2d 556 (O.C. Montg. 1965).

173. *See Application of Substituted Judgment, supra* note 167, at 132.

174. 55 Wash. 45, 25 Pa. Fiduc. Rep. 1 (C.P. 1974).

175. *Id.* at 48, 25 Pa. Fiduc. Rep. at 5.

176. *See* notes 110-20 and accompanying text *supra.*

177. PA. STAT. ANN. tit. 23, § 55(2) (Purdon Supp. 1977).

half to prevent injustice.[178]

VII. Conclusion

Most American jurisdictions preclude spouses who have been adjudicated incompetent from initiating divorce proceedings. That rule is inequitable and inappropriate because many incompetents possess sufficient capacity to decide to seek a divorce.

Moreover, even when a person is found to lack the capacity to choose divorce, courts should *in some cases* authorize that an action in divorce be brought on his behalf to avoid unjust results. As the minority courts have recognized, an incompetent's legal and property interests may be jeopardized if the remedy of divorce is unavailable to him. By adopting the minority approach with the addition of suggested safeguards,[179] and by permitting a guardian to act on behalf of the incompetent,[180] such injustice can be avoided. When the capacity to make personal decisions is irretrievably lost, it is unreasonable to permit the devolution of an incompetent's estate under the guise of protecting his personal choice.

Finally, the state's interest in preserving the stability of the marriage is not so great that it may foster the continuation of harmful relationships.[181] "Despite the public interest in the stability of the marriage status, the adulterous spouse should not be given an indefeasible right to support and inheritance by denying to the incompetent the right to acquire a divorce."[182]

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178. If the courts conclude that they lack the authority to make such a decision, the legislature could readily amend the divorce law incorporating the suggested substantive right and safeguards.

179. *See* notes 110-20 and accompanying text *supra*.

180. *E.g.*, Newman v. Newman, 42 Ill. App. 2d 203, 191 N.E.2d 614 (1963). "[W]hen the exercise of a particular power, right, or election—though personal in some sense—can be shown to be beneficial to the maintenance and welfare of the ward, courts have, in proper cases, permitted such rights to be exercised on behalf of the ward." *Id.* at 213, 191 N.E.2d at 619.

181. Turner v. Bell, 198 Tenn. 232, 280, 279 S.W.2d 71, 79 (1955).

182. 56 HARV. L. REV. 310, 311 (1943).