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Juvenile Law: Guardship: New Grounds for Termination

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Guardianship Law: New Grounds For Termination. In *Guardianship of Claus*,[1] a ward seeking termination of the guardianship over her estate was held to have the right to challenge the jurisdiction of the court which made the original guardianship appointment. The trial court, in the hearing on the petition for termination of the guardianship, terminated the guardianship over the person of the ward but continued the guardianship over the estate and denied a motion questioning the jurisdiction of the court in appointing the guardian. This denial was challenged on the appeal from that portion of the order continuing the guardianship over the estate. The Wisconsin Supreme Court reversed and remanded the case, stating that the denial of the motion "would limit the scope of the hearing on a petition for termination to the question of return to competency."[2] The court was unwilling to so limit the scope of the hearing, and, by refusing to do so, expanded the grounds for termination beyond those set forth in the Wisconsin Statutes.[3]

Authority for a court in a hearing on a petition for termination of guardianship to review the jurisdiction of the court making the appointment was found in *Guardianship of Nelson*.[4] In that case, which was an appeal from a hearing to settle the final account of the guardian, a challenge to the jurisdiction of the court making the guardianship appointment was not allowed. The Wisconsin Supreme Court, in commenting on such a challenge, reasoned that there was ample opportunity to consider both the wisdom and the jurisdictional prerequisites of the appointment prior to the time of the final account. Discussing underlying policy for not allowing such attacks, the court stated: "As long as an interested party could at any time challenge the validity of the guardian's appointment, the uncertainties relating to the transfer of title of the ward's estate created by this situation would make intelligent, prudent management impossible."[5] However, in commenting on the propriety of challenging the appointment at an *earlier* time, the court said:

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[1] 45 Wis. 2d 179, 172 N.W.2d 643 (1969).

[2] *Id.* at 183, 172 N.W.2d at 644.

[3] WIS. STAT. § 319.26(2) (1967); A guardianship of the estate shall terminate: (a) When a minor ward attains his majority. (b) When a minor ward lawfully marries and the court approves such termination. (c) When the court adjudicates a former incompetent or a spendthrift to be capable of handling his property. (d) When a ward dies (unless the estate can be settled as provided by § 319.28). This ground for termination of a guardianship is also an expansion beyond those set forth in the Model Probate Code. L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 218 § 234 (1946).

[4] 21 Wis. 2d 24, 123 N.W.2d 505 (1963).

[5] *Id.* at 29, 123 N.W.2d at 508.

> This is not to say that the original determination of incompetency is not open to review. In addition to a direct appeal of the initial order, any interested party at any time during the guardianship may petition for a rehearing seeking revocation of the guardian-ward status. At this rehearing an attack may be made both upon the jurisdiction of the court making initial appointment and upon the sufficiency of the evidence support a finding of incompetency.[6]

The last sentence quoted above, standing as mere dicta in *Nelson,* was based on the authority of *Guardianship of Warner.*[7] However, in *Warner,* no question of jurisdiction was ever raised or decided. The result of *Warner* was a reversal of a judgment denying the petition to set aside the guardianship, with directions to enter judgment *declaring the ward mentally competent,*[8] and ordering the guardian discharged. But the rather tenuous dicta of *Nelson* which first suggested the validity of a jurisdictional attack on rehearing has now, in *Claus,* become the law applicable to a hearing on a petition for termination.

The seriousness of a determination of incompetency and appointment of a guardian has long been recognized.[9] The intent of the court, in protecting the person and interests of the ward, has been to leave open as many avenues of review of such proceedings as feasible. Also, the court has commended the practice of appointing a guardian *ad litem* in these proceedings where the alleged incompetent is not present.[10] In *Claus* the absence of the alleged incompetent from the original guardianship hearing was the asserted jurisdictional defect which the trial court ruled could not be raised. Also, there was no guardian *ad litem* for the alleged incompetent at the original hearing and it was within this set of circumstances that the Wisconsin Supreme Court held that an attack on jurisdiction in the original guardianship hearing could be made at a hearing on a petition for termination. However, the broad language of the court does not preclude a jurisdictional attack on an appointment even if the alleged incompetent was present or was represented by a guardian *ad litem.*

The court, in its zealous efforts to protect the rights of the ward, appears to have inadvertently created a potential problem for guardians and for third parties seeking to transact business with

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[6] *Id.*

[7] 232 Wis. 467, 287 N.W. 803 (1939).

[8] A finding that the ward has returned to competency is one of the statutory grounds for termination of guardianship of the estate. *See* note 3, *supra.*

[9] *See, e.g., In re* Guardianship of Welch, 108 Wis. 387, 390, 84 N.W. 550, 551 (1900), where the Court stated, "Only with great hesitation should courts, by the appointment of a guardian, interfere with the discretion of elderly people, owing no legal duty of support to any one, in devoting the property accumulated by them to their comfort according to their own tastes."

[10] Guardianship of Nelson, 21 Wis. 2d 24, 30, 123 N.W.2d 505, 509 (1963).

them. The court did not state the effect of a successful jurisdictional attack on transactions undertaken by a guardian ousted in this manner. The statutes are also silent in this regard and thus the question of the validity of such transactions remains unanswered.

As a result, the guardian whose appointment is successfully attacked on jurisdictional grounds is apt to find himself caught between a *bona fide* purchaser for value seeking to enforce a transaction and a disgruntled ward seeking to have the transaction declared void. The resolution of such a situation hinges on the determination of whether a guardian appointed by a court found to be without jurisdiction in making the appointment can validly act on behalf of the ward. At least as to transactions in real estate, which are subject to court approval,[11] it would appear at first glance that this is a moot question in that the statutes provide:

> Every deed, mortgage, lease or other conveyance made in good faith by the guardian of a minor or incompetent person, pursuant to any order or judgment of the county or circuit court or the presiding judge of either, made under the provisions of this chapter, shall be as valid and effectual as if made by such minor when of full age or by such incompetent person when of sound memory and understanding.[12]

However, this statute seems to presume a valid guardianship and concerns itself with transactions undertaken by a proper guardian. Thus the effectiveness of the statute in instilling confidence in the capacity of a guardian to effect transactions on behalf of the ward is questionable as a result of allowing jurisdictional attacks on guardianship appointments because a successful attack may result in the guardianship being held to be void *ab initio*.

A lack of confidence in a guardian's ability to transact business is inevitable under the decision in *Claus*. The court recognized this in *Nelson* when it stated, "A prospective purchaser of the ward's real or personal property might be hesitant to execute a sale if he knew that subsequent litigation might be necessary to establish him as a *bona fide* purchaser for value."[13] For the third party the problem might also arise if the former ward attempts to set aside a transaction.[14] The third party purchaser might therefore have to initiate proceedings to quiet title to the purchased real estate or he might be forced to defend his title to real estate or chattels purchased from a guardian.

[11] WIS. STAT. § 296.11 (1967).
[12] WIS. STAT. § 296.15 (1967).
[13] 21 Wis. 2d 24, 28-29, 123 N.W.2d 505, 508.
[14] In Hammond v. Gibbs, 176 So. 2d 465, (La. App., 2d Cir. 1965) the ward-children successfully nullified the sale of their property by their father as tutor on the grounds that the proceeding appointing him tutor and authorizing the sale were brought in the wrong county and were therefore null and void.

The guardian's position is weakened by the *Claus* decision. His duty to manage the ward's estate[15] may now become more difficult to carry out. His authority will be suspect, at least until he renders his final account. Under the present state of the law he runs the risk of being placed in the precarious position of a *guardian de son tort*[16] and of being exposed to the liabilities of that status.[17]

Construing a successful jurisdictional attack on the guardianship appointment as affecting the guardian's capacity to manage the ward's estate is detrimental to the guardian and to third parties. Furthermore, little can be said to demonstrate any advantages or safeguards to the ward from such a construction. The loyal fulfillment of the guardian's duties is safeguarded by judicial review during the course of the guardianship[18] and the time the guardian renders his final account.[19] The ward would not benefit if his guardian's capacity was affected by such an attack. Presumably, the court did not intend such results. A different approach would be advisable, but the court has failed to suggest one.

A more satisfactory approach to interpreting the effect of a successful jurisdictional attack would be to view it as bringing the guardianship to an end without affecting the validity of the guardians prior transactions. This is the attitude of the court in the analogous situation of an administrator of an estate being appointed by a court which lacks jurisdiction.[20] The legislature also appears to favor this approach as to administrators of estates whose status is revoked.[21] Certainly the effect of this approach, if applied to guardianship law, is more desirable from the viewpoint of all parties involved.

Support for recognizing a successful jurisdictional attack on an appointment as merely ending the status can be gleaned from the Wisconsin Supreme Court's disapproval of the possibility of litigation arising out of a court-approved transaction.[22] The legislature has also recently spoken on the topic of court-approved transactions and has taken the position that purchasers for value in such affairs may conclusively rely on a court's judgment.[23]

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[15] WIS. STAT. § 319.19 (1967).
[16] Rear v. Olson, 219 Wis. 322, 263 N.W. 337 (1935).
[17] *See* 12 WIS. L. REV. 71 (1947).
[18] WIS. STAT. § 319.25.
[19] ". . . the legislature intended that the only question reviewable in a proceeding to settle the final account is, Did the guardian loyally discharge his position of trust . . .?" 21 Wis. 2d 24, 29, 123 N.W.2d 505, 508.
[20] Estate of Eannelli, 274 Wis. 193, 80 N.W.2d 240 (1956).
[21] WIS. STATS. §§ 311.12, 311.13, 311.14 (1967) restated in Wis. Laws 1969, ch. 339, as § 857.19 effective April 1, 1971.
[22] Simpson v. Cornish, 196 Wis. 125, 218 N.W. 193 (1928).
[23] Wis. Laws 1969, ch. 339, to be § 863.31(2).

Such an approach will not in any way defeat the intent of the court in protecting wards. If an attack is viewed as merely terminating the guardianship, the proceeding to settle the guardian's final account must still follow.[24] At this proceeding, the question whether the guardian loyally discharged his position of trust would be taken up.

The unsettling effect of the *Claus* decision on the certainty of a guardian's ability to transact business indicates the need for clarification of the effect of a successful jurisdictional attack on his appointment. Awaiting clarification by the Wisconsin Supreme Court may impede guardians in the discharge of their statutory duties until such time as an appropriate case is appealed. Such delay will be detrimental to the administration of a ward's estate. The legislature would be the more desirable body to deal with this problem and could easily solve it by declaring a successful jurisdictional attack on the guardian's appointment to have no effect on transactions undertaken prior to the attack.

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[24] WIS. STAT. § 319.27 (1967).