Nos. 08-CV-1571 & 09-CV-744

DISTRICT OF COLUMBIA COURT OF APPEALS

718 ASSOCIATES TRUSTEE
718 NW TRUST,

Appellant,

v.

BRYANT BANKS, *et al.*,

Appellees.

On Appeal from the Superior Court
Of the District of Columbia, Civil Division,
Landlord & Tenant Branch

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, AARP LEGAL COUNSEL FOR THE ELDERLY, UNIVERSITY LEGAL SERVICES, BREAD FOR THE CITY, WASHINGTON LEGAL CLINIC FOR THE HOMELESS, AS AMICI CURIAE IN SUPPORT OF APPELLEES

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RULE 28(a)(2)(B) DISCLOSURE STATEMENT

The Legal Aid Society of the District of Columbia is a District of Columbia non-profit corporation. It has no parents, subsidiaries or stockholders.

Legal Counsel for the Elderly is a non-profit corporation with no parents or stockholders. LCE is an affiliate of AARP, a non-profit corporation with no parents or stockholders.

University Legal Services is a 501(c)(3) corporation. It has no parents, subsidiaries or stockholders.

The Washington Legal Clinic for the Homeless is a private, non-profit legal services and advocacy organization. It has no parents, subsidiaries or stockholders.

Bread for the City is a private, non-profit legal and social services organization. It has no parents, subsidiaries or stockholders.

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INTERESTS OF AMICI CURIAE

The Legal Aid Society of the District of Columbia (Legal Aid) was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal services program in the District of Columbia. Since its inception, Legal Aid has represented numerous indigent tenants and participated as amicus curiae in many appeals involving a landlord's lease with indigent tenants. Legal Aid has an interest in the correct interpretation and effective enforcement of common law rules with respect to contracts and leases in the District of Columbia where one or more parties is declared or found legally incompetent.

AARP Legal Counsel for the Elderly (LCE), founded in 1975, is a non-profit provider of legal services to D.C. residents aged 60 or older and affiliate of AARP. AARP is a membership organization of over 40 million persons, age 50 or older, dedicated to addressing the needs and interests of older persons. AARP Legal Counsel for the Elderly has expertise in District of Columbia consumer, landlord/tenant and probate law. LCE's Alternatives to Landlord/Tenant Court for the Elderly Project integrates social work and legal strategies to assist lower income elderly tenants who are at risk of eviction due to diminished capacity. LCE's Consumer Fraud and Abuse Unit represent District elders who are victims of financial abuse and exploitation. Ensuring that the Superior Court protects District litigants with diminished capacity is of critical importance to LCE's efforts to prevent exploitation and displacement of vulnerable District seniors.

Since 1996, University Legal Services, Inc. (ULS), a private, non-profit legal service agency, has been the federally mandated protection and advocacy (P&A) program for individuals with disabilities in the District of Columbia. Congress vested the P&As with authority and

responsibility to investigate allegations of abuse and neglect of individuals with disabilities. In addition, ULS provides legal advocacy to protect the civil rights of District residents with disabilities. ULS staff directly serves hundreds of individual clients annually, with thousands more benefiting from the results of investigations, institutional reform litigation, outreach, education and group advocacy efforts. ULS staff addresses client issues relating to, among other things, abuse and neglect, community integration, accessible housing, financial exploitation, access to health care services, discharge planning, special education, and the improper use of seclusion, restraint and medication.

The Washington Legal Clinic for the Homeless is a private, non-profit legal services and advocacy organization in the District of Columbia. Its mission is to use law and advocacy to meet the needs and alleviate the suffering of clients who struggle with homelessness and poverty. It provides pro bono legal services to individual clients who are homeless and works through systemic advocacy, litigation, and law reform to improve the programs, benefits, resources, and opportunities available to people who are homeless or at risk of becoming homeless. The Legal Clinic provides representation to many persons with mental disabilities and strives to ensure that the civil and individual rights of people with disabilities are upheld in all areas of their lives.

The mission of Bread for the City is to provide vulnerable residents of Washington, D.C., with comprehensive services, including food, clothing, medical care, and legal and social services. Bread for the City promotes the mutual collaboration of clients, volunteers, donors, staff, and other community partners to alleviate the suffering caused by poverty and to rectify the conditions that perpetuate it. The legal clinic at Bread for the City provides assistance to clients in landlord-tenant disputes, represents claimants who have been denied Social Security disability

benefits, advocates in fair hearings for other public benefits and represents clients in family law matters including child custody, civil protection orders, child support and divorce. Through this work, Bread for the City attorneys regularly encounter and assist people who have been deemed incompetent and have represented their interests in a variety of court proceedings including petitions for guardianship and even serving as guardian in some instances.

INTRODUCTION

The issue for this en banc Court is whether changes in the common law require modification of the 1892 holding in *Sullivan v. Flynn* that contracts of individuals declared or found incompetent are inherently void.

For both legal and practical reasons, this Court should declare the *Sullivan* rule obsolete. The premise underlying that decision – that "a lunatic has no mind" – is no longer accepted in contract law, and is at odds with other legal doctrines addressing mental disability. In its place, the law has adopted a better and more complete understanding of mental disability and of the best way to safeguard persons who may struggle to protect themselves. Contract law has also moved away from a focus on a meeting of minds over a bargain to an approach more attuned to the realities of contemporary transactions in which reliance plays an important role.

The disadvantages of clinging to *Sullivan* are increasing because life expectancy, and therefore age-related challenges, have increased markedly since 1892. Diseases such as Alzheimer's disease that were unknown to science in 1892 are increasingly prevalent in this aging population. With greater numbers of individuals whose capacity may be in question, more contracts, both favorable and unfavorable to those found incompetent, are potentially at issue.[1] The *Sullivan* rule thus creates greater commercial impact on a wide variety of contracts. To balance that impact and continue to protect from exploitation those individuals declared or found mentally incompetent, the vast majority of states have ruled that contracts made by those individuals are not inherently void, but voidable at the election of the person found incompetent or his or her representative.

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[1] This *amicus* brief addresses only those contracts made by persons whom the court has found to be incompetent at the time of contracting. It does not discuss the standard for determining competency. Nor does it address the effect of contracts made by the many persons with mental disabilities who nonetheless are fully competent to enter, perform, and enforce their own agreements.

Amici recommend that the Court adopt the majority rule, which is set forth and explained in detail in the Restatement (Second) of Contracts § 15 (1981). The Restatement rule balances protection of individuals against exploitation and the need for greater commercial certainty in transactions. In contrast, the *Sullivan* rule has two undesirable weaknesses. First, it places at risk all contracts with the individuals declared or found incompetent, including beneficial contracts for important life activities including the purchase or rental of housing, the ability to contract for assisted living, the purchase of health or life insurance, and the availability of credit on agreed terms. Declaring such contracts "inherently void" permits the other contracting party to avoid them at will, even if the person found incompetent has already performed and even if that person or her representative has affirmed the agreement. The *Sullivan* rule also permits a third party, like the appellant 718 Associates Trust, to set aside as void contracts in which the complaining third party had no interest of record at the time the contract was made.

Second, the *Sullivan* rule offers insufficient protection for the security of commercial transactions, particularly bona fide real estate purchases. If contracts by found incompetent persons are inherently void, then even an innocent purchaser, many years later, may find herself without valid title to her property. Under the Restatement rule, on the other hand, these and other contracts are only voidable, not void, and even then only if avoidance would not be inequitable.

The rule set forth in Restatement Section 15 strikes the proper balance between protection of the individuals declared or found mentally incompetent and the interest in relying on the certainty of commercial transactions. Amici urge the Court to adopt this rule in place of the obsolete *Sullivan* doctrine, and hold that a contract with a person declared or found mentally incompetent is voidable at the election of that individual rather than inherently void.

STATEMENT OF THE CASE

This Court, by per curiam Order dated December 15, 2011, granted en banc review, vacating the panel opinion of June 23, 2011. The Court ordered that the briefs shall address the following question:

> Whether contracts of mentally incompetent persons should continue to be inherently void in the District of Columbia, *see Sullivan v. Flynn,* 20 D.C. (9 Mackey) 396 (1892) and *Martin v. Martin,* 270 A.2d 141 (D.C. 1970), or should be considered voidable.

Undersigned amici urge the Court to adopt the "voidable" rule for those declared or found to have been legally incompetent at the time of the contract. Specifically, amici urge the Court to adopt the formulation of the rule set forth in Section 15 of the Restatement (Second) of Contracts.

Amici express no views on other factual and legal issues raised and briefed by the parties to this appeal.

STATEMENT OF FACTS

This appeal involves a dispute over real property owned by the Appellant, 718 Associates Trustee/718 NW Trust, and rented by the Appellees, tenants Bryant and Sheila Banks.[2] Mr. and Mrs. Banks became tenants of the property on March 17, 2001, when they signed a lease with the former owner, Patricia Speleos. In November 2001, the Probate Division of Superior Court found Ms. Speleos to be incompetent and appointed a conservator to manage her affairs. Seven years later, in the course of this landlord-tenant action, the trial court below found her to have lacked capacity at the time she signed the lease with Mr. and Mrs. Banks.

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[2] All facts summarized in this Statement of Facts are found in the careful and detailed Findings of Fact, Conclusions of Law, and Order of Judgment in Favor of Defendants (Nov. 6, 2008) by the court below.

After being appointed in November 2001, the conservator, acting in Ms. Speleos' interest, sought to invalidate several deeds to real property that Ms. Speleos had executed in the same month, March 2001, as the lease to the Banks. The court granted the request and voided those deeds, expressing concerns about the inadequacy of the consideration received by Ms. Speleos for her conveyance of these properties. The conservator did not press to invalidate the Banks' lease, however, and the probate court did not rule on the validity of that contract. The trial court in this case ultimately concluded that the conservator had never disaffirmed the lease agreement on Ms. Speleos's behalf.

Meanwhile, appellant 718 Associates purchased the property at a tax sale for $2,109, and received a deed on August 24, 2001. The new owner eventually brought this landlord-tenant action, seeking a non-redeemable judgment for possession of the property against Mr. and Mrs. Banks. In their defense, the tenants claimed that their tenancy with Ms. Speleos survived the tax sale and that, pursuant to *Administrator of Veterans Affairs v. Valentine*, 490 A.2d 1165 (D.C. 1985), they were entitled to remain as tenants of the new owner, 718 Associates.

The trial court conducted a seven day non-jury trial in 2008. At its conclusion, the court held in a written opinion that the lease between Ms. Speleos and the Banks was voidable, not void, and that neither the conservator nor the estate had disaffirmed the lease. Based on that and other conclusions, the trial court ruled in favor of the tenants and denied the owner's claim for possession. 718 Associates appealed.

On June 23, 2011, a division of this Court reversed, concluding that it was bound by *Sullivan v. Flynn* – an 1892 decision of a predecessor court – to hold that the tenants' 2001 written lease agreement was void *ab initio*. The division acknowledged that the majority of

modern decisions disagreed. This Court vacated the Division's opinion and scheduled the case for rehearing *en banc*.

ARGUMENT

I. *SULLIVAN V. FLYNN* IS OUTDATED AND SHOULD BE ABANDONED.

Continued adherence to the 1892 rule of *Sullivan v. Flynn* is substantially out of step with the evolution of the common law. First, as early as 1901, the Supreme Court declined to follow the precedent on which *Sullivan* rests, holding that the deed of an "insane" person was not inherently void, but rather voidable at that person's election.[3] Subsequent case law has applied that rationale in a variety of contexts involving contracts by persons declared to be incompetent.

Second, the rule that such contracts are inherently void rests on an obsolete understanding of both mental disability and the importance of protecting the interests of persons found mentally incompetent. At the time this Court's predecessor decided *Sullivan*, the rationale for declaring such contracts void *ab initio* was that "a lunatic, or a person non compos mentis, has nothing which the law recognizes as a mind," and therefore, "he cannot make a contract which may have any efficacy as such." *Dexter vs. Hall*, 15 U.S. (Wall.) 9, 20 (1872). The law no longer characterizes "lunatics" in this way; and the more modern view, as reflected in the Restatement (Second) of Contracts, is that persons declared incompetent may make valid contracts in some circumstances and that it is in their interests that those contracts be enforceable.

A. The legal foundation of *Sullivan v. Flynn* has been repudiated.

This Court's predecessor in *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396 (D.C. 1892), held that "the deed of an insane person is void and therefore cannot be ratified by acts *in pais*." *Sullivan* did so solely "on the authority of *Dexter vs. Hall*, 15 Wall. 9 (1872)." Other than the

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[3] Amici recognize that the use of this term and others used by prior courts is offensive to many. It is only quoted here to ensure accuracy for purposes of legal interpretation.

citation to *Dexter*, a pre-*Erie* federal common law decision which involved not a deed but a power of attorney by an "insane" person, this Court's predecessor advanced no policy reason for its choice of rule, nor for equating a power of attorney with a deed to real property.[4]

Nine years after *Sullivan* was decided, the Supreme Court rejected the very proposition for which it stands. In *Luhrs v. Hancock*, 181 U.S. 567 (1901), the Court considered a deed executed by a person later determined to be incompetent. Notwithstanding *Dexter*, the Court held that "the deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside." *Id.* at 574. In so ruling, the Supreme Court adopted the same common-law doctrine that Amici urge for the *en banc* Court here. Thus, the doctrinal foundation of *Sullivan* vanished more than a century ago. Had this Court reviewed this change in the federal common law prior to *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), there can be no doubt that it would have conformed the law in the District to the rule set forth in *Luhrs* that contracts made by declared incompetent persons are voidable and not inherently void.

Although the District had no such pre-*Erie* opportunity to reconsider the question, numerous other courts did so, adopting the *Luhrs* rule as the modern common law. In the leading pre-*Erie* case of *Beale v. Gibaud*, 15 F.Supp. 1020 (W.D.N.Y. 1936) (quoted with approval in *United States v. Manny,* 645 F.2d 163, 168-69 (2d Cir. 1981)), the district court in New York analyzed what it called the "early case" of *Dexter v. Hall* and concluded that its holding was "contrary to the great weight of authority *today* [1936] as is evident by many

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[4] It should be noted that *Sullivan*'s adoption of the *Dexter* rule was curious, given that at the time, Maryland – to whose common law the District has long looked in the absence of D.C. law on point, *see Brown v. United States*, 99 F.2d 131, 132 (D.C. Cir. 1938) – had deemed contracts by found incompetent persons to be voidable and not inherently void. *See Key's Lessee v. Davis*, 1 Md. 32 (Md. 1851). The *Sullivan* court did not explain why it chose to adopt *Dexter v. Hall*, which involved a power of attorney and not a deed, rather than the more directly applicable Maryland rule.

opinions and the text-books of many well-known authorities on the subject of contracts." 15 F.Supp. at 1027 (citations omitted). The court correctly held instead that *Luhrs* "states the true rule of law to be followed in this case . . . 'the deed of an insane person is not absolutely void; is only voidable; that is, it may be confirmed or set aside.'" *Id.* (citations omitted).

Similarly, *Levine v. Whitney*, 9 F.Supp. 161 (D.R.I. 1934), rejected *Dexter* on the authority of *Luhrs*. It held "the reasoning of the court in *Dexter v. Hall* would not now be applied by that court in a transaction such as the one before us. I am satisfied that the Supreme Court would hold that this transaction was not void nor even voidable by the petitioners here." 9 F.Supp. at 162. Citing *Luhrs v. Hancock*, 181 U.S. 567 (1901), the district court concluded that the deed of an "insane" person is only voidable rather than absolutely void. *Id.* Likewise, in *Kevan v. John Hancock Mut. Life Ins. Co.*, 3 F.Supp. 288 (W.D.Mo. 1933), the district court concluded that *Dexter v. Hall* applied, if at all only to powers of attorney and not to contracts generally. *See* 3 F.Supp. at 290.

In the years since *Erie*, this Court has only once applied *Sullivan* and *Dexter*'s rule that a declared incompetent person's contracts are inherently void. *See Martin v. Martin*, 270 A.2d 141 (D.C. 1970). That case, however, presented no opportunity to consider the continuing validity of the *Sullivan* rule – whether in light of *Luhrs* or due to other developments in the common law – because the question did not affect the analysis the case. In *Martin*, a husband, having recovered from a period of found incapacity, annulled the marriage he had entered during that time and sought to recover veterans' benefits that had been paid on his behalf. *See id.* at 142. Claiming that he lacked capacity to authorize the assignment of benefits, the husband contended that any "actions resulting in payments" to his wife were void. Citing *Dexter* and *Sullivan*, this Court agreed. *See id.*

Because *Martin* concerned an effort by the formerly incapacitated person himself to avoid the transaction, the court did not have to consider the conflict between *Dexter* and *Luhrs*: whether the transaction was inherently void or "merely voidable" at the declared incompetent person's election. Even under the latter rule – the *Luhrs* doctrine – the husband would have been entitled to avoid his own assignment and cancel the benefits. This Court therefore had no reason to address whether *Sullivan* was still valid after *Luhrs*, or whether it still held any appeal as a matter of public policy. Nor has any other case, until this one, presented the Court with those questions.[5]

B. Modern contract law has rejected the *Sullivan* rule.

The modern law of contracts no longer treats as "inherently void" contracts made by persons who are declared incompetent. Instead, "[t]he vast majority of courts more commonly express the view that an incompetent person's transactions are voidable." *Williston on Contracts*, § 10:3 (collecting cases). This is so for two reasons. First, the notion that "a lunatic has no mind" has given way to a more nuanced understanding of competence and capacity, and courts have recognized that a person who is declared incompetent "may be subject to varying degrees of infirmity or mental illness, not all equally incapacitating." *Id.*; *see, e.g.*, *Cudnick v. Broadbent*, 383 F.2d 157, 160 (10th Cir. 1967) (recognizing "different degrees of mental competency" in the question of whether a contract could be voided for lack of capacity). As a result, it is now accepted that a person who lacks the ability to understand the nature and consequences of the contract nonetheless may make an agreement that inures to his benefit, and

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[5] *Mead v. Phillips*, 77 U.S. App. D.C. 365, 135 F.2d 819 (D.C. Cir. 1943) also cited *Dexter v. Hall* for the proposition that an act performed by an "incompetent widow . . . would be ineffective . . . ." 135 F.2d at 828 n.54. This decision of the D.C. Circuit rendered prior to February 1971, along with decisions of this Court, "constitute the case law of the District of Columbia." *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). The *Mead* panel did not address the conflict between *Dexter* and *Luhrs v. Hancock*, 181 U.S. 567 (1901).

should be permitted to ratify or reject that contract at his option. *See Williston on Contracts*, § 10:5 (noting that "the authorities almost uniformly support" ratification by a declared incompetent person or his representative) (citing cases).

Second, the courts have recognized that declaring contracts by persons found incompetent inherently void – without any provision for the equities of the matter – is, in many cases, unfair to the other contracting party. Where the other party had no reason to know of the individual's capacity issues, and particularly where the contract has been partially or fully performed, declaring the contract void *ab initio* may lead to inequitable results. *Williston*, § 10.6 (collecting cases). To avoid this unfair result, the modern rule abandons the strict view that such contracts are void, and instead holds that they are only voidable, depending on the circumstances of the case.

These changes in the law are encapsulated in the Restatement (Second) of Contracts, which provides as follows:

> Section 15 Mental Illness or Defect
>
> (1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect:
>
> (a) He is unable to understand in a reasonable manner the nature and consequences of the transaction, or
> (b) He is unable to act in a reasonable matter in relation to the transaction and the other party has reason to know of his condition.
>
> (2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.

Restatement (Second) of Contracts § 15. The rationale for the rule notes that although "it has been said that a lunatic has no capacity to contract because he has no mind," this view "has given

way to a better understanding of mental phenomena and to the doctrine that contractual obligation depends on manifestation of assent rather than on mental assent." *Id.* cmt. a. Put another way, the Restatement, like the cases discussed above, rejects the outdated notion that a contract made by one declared incompetent is no contract at all. Instead, its obligations may be enforced if either the found incompetent person ratifies it, or avoidance would be unduly unfair to the other party.

The District of Columbia should join the majority of states in adopting the rule set forth in the Restatement of Contracts. This Court has noted that because the Restatement is "a codification and explanation of the applicable common law principles as distilled from the case law of the nation," adoption of its guidance is appropriate "in the absence of any current well-developed doctrine in our jurisdiction." *Ellis v. James V. Hurson Assocs.*, 565 A.2d 615, 618 (D.C. 1989); see *District of Columbia v. Tulin*, 994 A.2d 788, 797 n.10 (D.C. 2010) ("Although we are not required to follow the Restatement, we should generally do so 'where we are not bound by the previous decisions of this court or by legislative enactment, . . . [for] by so doing uniformity of decision w[ill] be more nearly effected.'" (quoting *Smith v. Normart*, 51 Ariz. 134, 75 P.2d 38, 42 (1938)).[6] And, for the reasons explained above, the 1892 precedent of *Sullivan v. Flynn* is not even arguably a "current well-developed" doctrine in this jurisdiction. The precedent on which *Sullivan* rests was repudiated shortly after the case was decided; and in 120 years, the doctrine has been applied only twice, the last time in a 1970 case that did not require the Court to consider the rule's continuing validity. In its brief here, the Appellant offers no evidence that the *Sullivan* rule is integral to the current practice or understanding of contracts

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[6] This Court has already cited with approval and adopted as District of Columbia law other comments from the same § 15 of the Restatement (Second) of Contracts. *See, e.g., Butler v. Harrison,* 578 A.2d 1098, 1100-1101 (D.C. 1990) (discussing capacity to contract and citing, *inter alia,* Restatement (Second) of Contracts § 15, cmts. b and c).

generally in the District of Columbia, a factor that might weigh in favor of maintaining a minority and outdated doctrine such as this one. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980) ("When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.").[7]

Finally, as explained below, public policy concerns support abandoning the *Sullivan* precedent in favor of a rule making contracts by found incompetent persons voidable at the election of those individuals or their representatives. *See* Part II, *infra.*

In short, adoption of Section 15 of the Restatement (Second) of Contracts would modernize this portion of the District's common law and bring our jurisdiction into conformity with the vast majority of states to have considered the question. Both *Sullivan v. Flynn* and the foundation on which it stands are outmoded, and this Court should decline to retain them as the rule for contracts in the District of Columbia.

II. AS A POLICY MATTER, THE "VOIDABILITY" RULE BETTER BALANCES THE COMPETING INTERESTS AT STAKE.

As the Restatement recognizes, "[a] contract made by a person who is mentally incompetent requires the reconciliation of two conflicting policies: the protection of justifiable expectations and of security of transactions, and the protection of persons unable to protect themselves against imposition." Restatement (Second) of Contracts § 15, cmt. a. The Restatement's rule better serves both of these interests than does a doctrine making such

[7] The District has not followed the *Sullivan* rule consistently. In 1951, Congress adopted legislation declaring void contracts made by those declared incompetent subsequent to the filing of a conservatorship petition, if the petition was sustained. *See* Pub. L. 196, 65 Stat. 608-09 (Oct. 24, 1951), initially codified at D.C. Code §§ 21-507 (1958 Supp.). The statute, in substantially this form, remained law in the District until 1987, when it was repealed for reasons unrelated to the question presented in this case. *See* D.C. Law 6-204 (1987). For 36 years, that statute therefore voided only a subset of the transactions that are void under *Sullivan.* During the period the law was in effect, the only contracts by found incompetent persons that were inherently void, at least by statute, were those made *after* the filing of a conservatorship petition.

contracts inherently void. The rule offers better protection for found incompetent persons by permitting them to ratify, at their option, contracts that redound to their benefit; it also prevents the other contracting party, or third parties, from taking advantage of the "void" doctrine to invalidate contracts that otherwise would be enforceable. And the modern rule safeguards commercial expectations and transactions by limiting or precluding avoidance where voiding the contract would be inequitable.

A. The Restatement rule best protects the interests of persons found incompetent.

Under the modern rule, a contract made by a person found to lack capacity will be valid and enforceable unless that person, or her representative, seeks to disaffirm it. *See* Restatement (Second) of Contracts § 15; *Williston on Contracts*, § 10.5 ("[T]he authorities almost uniformly support the validity of such ratification if the incompetent was not under guardianship.") This rule is sound for several reasons. First, many contracts made by those found or declared incompetent carry advantages, and that individual or her representative may have every reason to ratify the bargain and accept its benefits. *See, e.g.*, *Blinn v. Schwarz*, 177 N.Y. 252, 263, 69 N.E. 542 (N.Y. 1904) ("The right of election implies the right to ratify, and it may be greatly to the advantage of the insane person to have that right ... [i]f voidable, the lunatic, upon recovering his reason, can hold on to the bargain if it is good and let go if it is bad. This option is valuable, for it gives him the power to do as he wishes, and to bind or loose the other party at will."); *Breckenridge's Heirs v. Ornsby*, 24 Ky. 236, 239 (Ky. 1829) (analogizing declared incapacity to minority and finding that such contracts should be voidable, not void, because otherwise "their legal disability would then be the opposite of what it was intended to be. It would be a handcuff instead of a shield."). For example, a tenant may wish to continue residing in her apartment under a lease; a health insurance customer may want to continue paying his premiums and receiving insurance coverage. There is no reason to deprive such individuals of the opportunity

to participate in transactions like these, if they or their representatives believe the contract is a good one and want to have it enforced.

Second, by limiting the ability to void a contract to those found or declared incompetent or her representatives, the modern rule protects against cases in which the other contracting party seeks to take advantage of an individual's declared incapacity to avoid an otherwise fair and enforceable contract. "[I]f the 'contracts' of an insane person are void, they cannot be ratified . . . the competent party to a bargain with a mentally ill person could repudiate it although the incompetent person has performed, or is ready to perform, the bargain." *Williston*, § 10:2; *cf. Reynolds v. Earley*, 241 N.C. 521, 85 S.E.2d 904 (1955) (rejecting, in an action by the assignee of an option, efforts by the owners of the land to avoid selling the land on the ground that the assignor was allegedly incompetent at the time he assigned his option to buy it). In the health insurance example noted above, for instance, the *Sullivan* rule would permit the insurer at any point to deny coverage on the ground that the contract was void *ab initio*. Similarly under *Sullivan*, a life insurer could refuse to pay a deceased person's estate, claiming that the person lacked capacity to enter the contract; or a buyer of property could cancel the contract before closing even if the sale benefits the person found to be incompetent. Likewise, the *Sullivan* rule puts at risk otherwise routine contracts for critical services such as pre-paid funeral expenses, durable medical equipment (i.e. wheelchairs), medical care and home health care.

There is no reason for this Court to continue to embrace a rule that would permit such inequitable results. The modern rule fully protects those who for reasons of declared incapacity cannot fully safeguard their own interests. Although the *Sullivan* rule arguably provides even greater protection – by voiding all contracts without regard for the interests of the competent party – it also provides far more opportunity for predatory practices against vulnerable

individuals. Instead of leaving the decision about avoidance to the person declared or found incompetent or her representative, the *Sullivan* rule allows the other party to the transaction – one with its own, presumably contrary interests – an equal say in whether the contract will be enforced. Such a rule does nothing to serve the goal of protecting vulnerable individuals.

Finally, as this case itself illustrates, the *Sullivan* rule empowers third parties with *no* relationship to the original transaction to void contracts that are inconvenient to their own interests. The appellant in this case, 718 Associates, purchased the property at issue at a tax sale. Its sole reason for seeking to void the contract here is so that it may terminate the Banks' occupancy rights and take possession of the property. 718 Associates never had any relationship with Patricia Speleos, the person whose capacity to contract was in question; it has no interest either in protecting Ms. Speleos from exploitation or in ensuring the security of the Banks' transaction with her. To the contrary, 718 Associates is a stranger to the contract it now seeks to void. And while the appellant is certainly entitled to pursue its own economic interests, its agenda has little weight as this Court chooses between *Sullivan* and the modern rule.

B. The Restatement rule creates greater certainty for real property transfers and other commercial transactions.

In addition to better protecting persons found or declared incompetent, the modern rule also best safeguards the security of transactions, particularly in the context of real property. An unfortunate consequence of the *Sullivan* rule is that "if a deed is absolutely void, a subsequent bona fide purchaser obtains nothing despite his innocence." *See Nevins v. Hoffman*, 431 F.2d 43, 47 (10th Cir. 1970). For this reason – with the goal of avoiding unfairness to innocent buyers of real estate – numerous states to have considered the void/voidability question have declined to find contracts made by persons found or declared incompetent to be void *ab initio*. In Maryland, for example, as discussed in Part I, as early as 1851 the state's highest court rejected the notion

that a deed made by a person found incompetent was inherently void. *See Key's Lessee v. Davis*, 1 Md. 32 (Md. 1851). Assessing a chain of title that originated with a transfer from a owner found to lack capacity, the court, for reasons grounded both in English common law and in public policy, determined that "upon no grounds of reason and justice could we regard the case now before us as an absolutely void act." *Id.* at 43. The court noted that the deed in question "is nearly fifty years old" and that "the party who claims under it is an innocent purchaser, with a number of deeds and conveyances, intervening between the deed under which he got possession and the one which is alleged to be defective, and with no charge or intimation that he had any knowledge of the alleged defects in his title." *Id.* For these reasons – the interests of the bona fide purchaser, and of the security of real estate transactions generally – the court concluded that the deed was only voidable. And because it was a third party and not the person declared incompetent himself (then deceased) who sought to avoid the transaction, the court held the deed to be valid. *See id.*

Numerous other states have similarly adopted the voidability rule so as to protect the security of real estate transactions. *See, e.g.*, *W.T. Smith Lumber Co. v. Foshee*, 277 Ala. 71, 76, 167 So.2d 154 (Ala. 1964); *Manhattan State Bank v. McLaren*, 112 Kan. 538, 211 P. 633 (1923); *Goldberg v. McCord*, 251 N.Y.28, 31-32, 166 N.E. 793 (N.Y. Ct. App. 1929); *Gaston v. Copeland*, 335 S.W. 2d 406, 409 (Tex. Civ. App. 1960). And while not explicitly stating as much, *Luhrs v. Hancock* – the case in which the Supreme Court repudiated the foundations of the *Sullivan* rule – applied the same reasoning to hold that "[t]he deed of an insane person is not absolutely void; it is only voidable." 181 U.S. at 574. Because the party holding title was in essence a good-faith purchaser at a foreclosure sale, his deed "[could] not be attacked collaterally" by asserting the alleged incapacity of the original grantor. *Id.*

Beyond real estate transactions, the modern Restatement rule enhances the security of commercial transactions by precluding avoidance where "the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust." Restatement (Second) of Contracts § 15(2). Under the *Sullivan* rule, because a declared incompetent person's contract is void *ab initio*, the other contracting party has no recourse against avoidance, regardless of the inequities.[8] *See, e.g.*, *Metropolitan Life Ins. Co. v. Bramlett*, 224 Ala. 473, 475, 140 So. 752 (Ala. 1932) (holding that because the contracts of "an insane person" are absolutely void, "one who contracts with an insane person takes nothing, though ignorant of his insanity, and though he paid value, and his contract is valid for no purpose"). The modern rule, by contrast, permits such contracts to be enforced "as justice requires," including where the other party has substantially performed; cannot recover his consideration; or would otherwise suffer hardship. *See, e.g.*, *Hedgepeth v. Home Sav. & Loan Ass'n*, 87 N.C. App. 610, 611-13, 361 S.E.2d 888 (N.C. App. 1987) (declining to allow a declared incompetent person's guardian to void a deed of trust because, *inter alia*, the other party had paid out loan funds that could not be returned); *Davis v. Colorado Kenworth Corp.*, 156 Colo. 98, 103, 396 P.2d 958 (Colo. 1964) (enforcing contract for machinery made by a declared incompetent person because the person had used the machinery, derived benefit from it, and could not return it to the seller in the same position); *Charles Melbourne & Sons, Inc. v. Jesset*, 110 Ohio App. 502, 509, 163 N.E.2d 773 (Ohio App. 1960) (enforcing contract for funeral services); *see also* Restatement (Second) of Contracts § 15, cmt. f & illustrations thereto (discussing situations in which avoidance would be inequitable).

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[8] While the other party still might have some remedy under quasi-contractual principles such as quantum meruit or unjust enrichment, he or she would be unable to rely on the contract as negotiated.

For all of these reasons, the Restatement rule is more flexible, more sensible, and more fair than the 1892 doctrine set forth in *Sullivan v. Flynn*. Declaring contracts made by declared incompetent persons to be void *ab initio* benefits neither those individuals, the parties with whom they contract, nor third parties such as bona fide purchasers for value. *Amici* urge this Court to join the majority of states and adopt the Restatement rule as the law in the District of Columbia.

CONCLUSION

Amici urge that this Court abandon *Sullivan v. Flynn* and adopt the Restatement (Second) of Contracts, Section 15 with regard to contracts made by declared incompetent persons. The Court should hold that the contract of a declared incompetent individual is voidable at the individual's election, but not inherently void.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Amici Brief to be delivered by first class mail postage prepaid this 28 th day of February 2012 to each of the following:

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