"It is well settled that the paramount and controlling concern - the polestar - in every child custody case is the best interests and welfare of the child . . . (citations omitted.) In determining what are the best interests and welfare of the child, all the circumstances which may affect the determination are admissible, including, inter alia, the character and fitness of the petitioners, their respective homes, their ability to take adequate care of as well as to financially provide for the child, their church affiliations, and every factor which may affect the physical, mental, moral, and spiritual well-being of the child."

After weighing and analyzing the facts in the case at bar, we conclude that the best interests and welfare of Monica Rudy Scheeler and Monte Edward Scheeler require us to award custody to the petitioner, Donna Lee Scheeler. Where both parents love the subject children and are capable of providing them with a home, our determination and decision is made much more difficult. We find that the facts show that the petitioner offers a more stable home atmosphere, and for that reason she is awarded custody.

Since neither party introduced any evidence concerning visitation, and it appears the parties have been able to work out satisfactory visitation arrangements in the past, we will not at this time include in the Order of Court any provisions for visitation rights. It has long been the policy of this Court to favor reasonable visitation rights for the parent out of custody, and we do urge the parties and their counsel to seek to work out a reasonable and realistic visitation schedule for the benefit of their children. If the parties are unable to reach an amicable agreement on visitation, the Court will entertain an application for hearing as promptly as possible and enter an appropriate order.

ORDER

NOW, this 28th day of July, 1977, the petition of Donna L. Scheeler is granted. Primary custody of Monica Rudy Scheeler and Monte Edward Scheeler is granted to their mother, Donna L. Scheeler.

Exceptions are granted the respondent.

KOONTZ v. PARMER, C. P. Fulton County Branch, No. 31 January Term, 1974

Equity - Pre-Trial Conference Memorandum - Adequacy of Consideration - Mental Incapacity

1. Where defendant did not plead additional consideration for a deed, defendant was permitted to present evidence on that issue due to its inclusion in the court's Pre-Trial Conference Memorandum.

2. A pre-trial conference memorandum, when based on stipulation of counsel, is a binding order which may serve to fix the issue even though not pleaded, and affect the admissibility of evidence.

3. The Court will overturn a transaction due to inadequacy of consideration only when the presence of undue influence is an issue.

4. Mental competence to do business is presumed and evidence to the contrary must be clear and compelling before a transaction will be overturned.

5. Mental incapacity must be shown to exist at the time the transaction was consummated and not only at some time in the past or future.

Stewart L. Kurtz, Esq., Counsel for Plaintiff
Merrill W. Kerlin, Esq., Counsel for Plaintiff

Lawrence C. Zeger, Esq., Counsel for Defendant
Dennis A. Zeger, Esq., Counsel for Defendant

ADJUDICATION AND DECREE

KELLER, J., July 20, 1977:

This action in equity was tried on March 25 and 26, 1976, and the Adjudication and Decree Nisi filed on June 22, 1976. Exceptions were filed by the plaintiff on July 10, 1976; the official transcript was certified on March 11, 1977; and the matter was argued before the Court en banc on April 19, 1977. It is now ripe for disposition.

I

WHETHER THE COURT ERRED IN PERMITTING DEFENDANT TO INTRODUCE EVIDENCE THAT

CONSIDERATION IN ADDITION TO THAT STATED IN THE DEEDS WAS PAID TO CLAIR W. KOONTZ BY THE DEFENDANT.

Paragraph 7 of the plaintiff's complaint alleges:

> "In the deed executed and recorded on April 5, 1972, Clair W. Koontz conveyed to Woodrow W. Parmer a two and eighty-three hundredths (2.38) acre parcel of land situated in Belfast Township, Fulton County for a stated consideration of One Thousand Five Hundred ($1,500.00) Dollars."

Paragraph 7 of the defendant's answer alleges: "The averments of Paragraph 7 are admitted."

Paragraph 9 of plaintiff's complaint alleges:

> "In the deed executed April 20, 1972, and recorded April 22, 1972, Clair W. Koontz conveyed to Woodrow W. Parmer a one and seventy hundredths (1.70) acre parcel of land situated in Belfast Township, Fulton County for a stated consideration of Eight Hundred ($800.00) Dollars."

Paragraph 9 of the defendant's answer alleges: "The averments of Paragraph 9 are admitted."

The plaintiff contends that defendant's failure to plead specifically the payment of additional consideration barred him from introducing evidence of such fact at trial.

A Pre-Trial Conference was held on January 19, 1976, and attended by both attorneys for the plaintiff and both attorneys for the defendant. A Pre-Trial Conference Memorandum was prepared by the Court which provided inter alia:

> ". . . the following matters were agreed upon: 2. Counsel for the defendant contend the plaintiff is not entitled to the relief prayed for on the grounds that:
>
> (b) The consideration paid by the defendant for the real estate was not inadequate and to the contrary additional consideration was paid to or on behalf of the plaintiff by the defendant."

thence North 16 degrees 09 minutes East 131.51 feet to an iron pin at the southwest corner of Lot No. 1, Section F, on said plan of lots; thence by the same North 76 degrees 59 minutes East 110.9 feet to an iron pin on the westerly side of Monta Vista Drive; thence by the same South 13 degrees 01 minutes East 114.83 feet to an iron pin the place of beginning. Being Lot No. 18, Section F as laid out for Monta Vista Realty Company Inc., by John H. McClellan, C.S. under date of September 9-10, 1965, recorded in Franklin County Draft Cabinet Drawer 7.

The mortgage is recorded in Franklin County (Pa.) mortgage Book Volume 312, Page 295.

And erected thereon a single family dwelling of Split Level Design with a concrete block foundation, full basement, cement floor. Exterior walls are of brick veneer and beveled alum. siding and asphalt shingle roof. Interior walls are plastered, heated by Electric and has a fire place.

Seized and taken in Execution as the real estate of George F. Warford and Constance S. Warford, his wife, under Judgement No. A.D. 1977-361.

Pursuant to Writ of Execution issued on Judgment A.D. 1977 296 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, September 30, 1977 the following real estate improved as indicated:

The land subject to the mortgage is all the following real estate lying and being situate in Montgomery Township, Franklin County, Pennsylvania, bounded and described as follows:

BEGINNING at an iron pin on the eastern right of way line of Pennsylvania Legislative Route 28047 at corner of lands now or formerly of Hilda Reese; thence by said eastern right of way line North 34 degrees 15 minutes West 100 feet to an iron pin at the southern right of way line of a street 50 feet in width; thence by said southern right of way line North 49 degrees 8 minutes East 200 feet to an iron pin at lands now or formerly of Reginald R. Miller and Dora C. Miller, his wife; thence by the latter South 34 degrees 15 minutes East 100 feet to an existing iron pin at the corner of said lands now or formerly of Hilda Reese; thence by the latter South 49 degrees 8 minutes West 200 feet to the iron pin, the place of beginning, containing .455 acres according to the survey of Albert M. Larsen, Registered Professional Engineer, dated March 8, 1976, which was reviewed by the Franklin County Planning Commission on March 19, 1976, and approved by the Board of Supervisors of Montgomery Township, Franklin County, Pennsylvania, on April 5, 1976, a copy of which, with said municipal subdivision approvals thereon is attached to the hereinafter recited deed.

The above described real estate is the same real estate which Reginald R. Miller and Dora C. Miller, his wife, by their deed dated April 30, 1976 and recorded in the Recorder's Office of Franklin County, Pennsylvania in Deed Book Volume 725, Page 607, conveyed to Raymond Ellis Lee and Judith Linn Lee, his wife, Mortgagor herein.

SUBJECT TO the reservation of a portion of said real estate at the corner of Legislative Route 28047 and the aforementioned 50 foot street, shown on said subdivision plan as lying outside of a curve having a radius of 40 feet in width, for use as part of said 50 foot street.

And having erected thereon a Trailer with a 12 ft. by 44 feet addition.

Seized and taken in Execution as the real estate of Raymond Ellis Lee and Judith Linn Lee, his wief, under Judgement No. A.D. 1977-296.

TERMS: The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additional costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay $20.00 for preparation, acknowledgement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on October 12, 1977, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before October 21, 1977, distribution will be made in accord therewith.

September 2, 1977

FRANK H. BENDER, Sheriff of Franklin County, Pennsylvania

(9-9, 9-16, 9-23)

On January 21, 1976, copies of the Pre-Trial Conference Memorandum prepared by the Court were forwarded to the four attorneys with a covering letter which included the statement:

> "Would you please examine the same and if you have any requests for additions or corrections, please advise me by January 28, 1976."

None of the attorneys made any request to the Court for additions or corrections, and the original Pre-Trial Conference Memorandum was filed.

Notwithstanding the failure of plaintiff's counsel to object to the Pre-Trial Conference Memorandum, when specifically requested to do so by the Court, they now contend their failure to object does not bar them or the plaintiff from objecting to the introduction of evidence of additional consideration at trial. We do not believe this is the law in Pennsylvania.

Pa. R.C.P. 212 provides inter alia:

> "Rule 212. Pre-Trial Conference
>
> In any action the court, of its own motion or on motion of any party, may direct the attorneys for the parties to appear for a conference to consider:
>
> (a) The simplification of the issues;
>
> (b) The necessity or desirability of amendments to the pleadings;
>
> (c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (d) The limitation of the number of expert witnesses;
>
> (e) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (f) Such other matters as may aid in the disposition of the action.

> The court may make an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and limiting the issues for trial to those not disposed of by admissions or agreements of the attorneys. Such order when entered shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice. . . ."
>
> "Note: Rule 212 adopts almost verbatim Rule 16 of the Rules of Civil Procedure for the District Courts of the United States."

In Goodrich-Amram 2d Sect. 212.9.1, pp 153-154 appears:

> "Particularly when based upon stipulations of counsel at the conference, the order of the pre-trial conference court is a binding judgment. It will regulate the subsequent trial, and will affect the admissibility of evidence and the right or duty to produce witnesses or to raise issues . . . ."

Pa. R.C.P. 1029 provides inter alia:

> "(a) A responsive pleading shall admit or deny the averments of fact in the preceding pleading or part thereof to which it is responsive. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth.
>
> "(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivision (c) of this rule, shall have the effect of an admission."

The plaintiff relies upon Pa. R.C.P. 1029(b), supra, in his contention that evidence of additional consideration was inadmissible over counsel's objection in the absence of an amendment of defendant's answer alleging such additional consideration. While we feel it would have been much better pleading on the part of the defendant had he asserted in his paragraphs 7 and 9 that he had paid consideration in excess of the amounts alleged by the plaintiff; nevertheless we must acknowledge the correctness of defendant's argument that

plaintiff chose to use the words "stated consideration" in paragraphs 7 and 9 of the complaint, and attached as exhibits to the complaint copies of the deeds which, indeed, did show the "stated consideration" to be as pleaded by the plaintiff. Thus, the defendant argues he admitted the "stated consideration", but did not preclude himself from showing that the actual consideration was in a substantially different amount.

In *Wagner v. Studt*, 60 D&C 2d 743 (1973), the Honorable Alton A. McDonald held that even though the plaintiff had pleaded a negligence rather than a strict liability theory in his complaint, where the pre-trial conference had clearly shown reliance on strict liability, then strict liability could be used at the trial and be the basis of the verdict, even where not pleaded. He found that without regard to the averments in the pleadings, the recital at the pre-trial conference may serve to fix the issues and the nature of the party's claim. "To now hold it was insufficiently pleaded would exalt form over substance." (p746)

In 22 A.L.R. 2d 607 appears:

> "Where an issue is not raised by the pleadings, it is nevertheless a real issue in the case if the pre-trial order says so, even though the pleadings are not amended to reflect what the court and parties have done. It is accordingly held that evidence in support of an issue stated in the pretrial order but not included in the pleadings cannot be excluded as a variance from the pleadings."

In *Basista v. Weir*, (C.A. 3 Pa.) 340 F.2d 74 (1965), the Circuit Court of Appeals held:

> "What was said by counsel at the pretrial conference was made the subject of the pretrial order under the practice of the court below. It is, of course, established law that a pretrial order when entered limits the issues for trial and in substance takes the place of pleadings covered by the pretrial order."

In our judgment one of the essential purposes of a pretrial conference is to identify and, if possible, limit the trial to those issues actually in dispute without impairing the basic rights of the litigants. If the conference is to serve any useful purpose the order or "Pre-Trial Conference Memorandum" as it is called in this Judicial District, must be binding upon the parties and

establish the format for trial, so long as it does not create any injustice. Otherwise the value of the conference is lost and the time of the Court and counsel totally wasted.

In the case at bar, counsel for the plaintiff were put on notice at the pre-trial conference that the defendant proposed to rebut plaintiff's contention of inadequate consideration by proving additional consideration was paid to or on behalf of the plaintiff by the defendant. Counsel for the plaintiff were made aware of the Court's understanding that the consideration paid by the defendant would be an issue at trial by the Court's Pre-Trial Conference Memorandum. Counsel for the plaintiff were given an ample opportunity to direct the Court's attention to any error in the momorandum framed at the pre-trial conference, and they failed to do so. We cannot believe experienced counsel such as those representing the plaintiff were not aware of the binding effect of the Pre-Trial Conference Memorandum. It was incumbent upon them to call any error in the memorandum to the attention of the Court.

We conclude the Court did not err in admitting into evidence testimony concerning additional consideration paid by the defendant for the real estate in question, when plaintiff's counsel were made fully aware of the fact that the consideration paid would be one of the issues for trial.

II

DID THE COURT ERR IN FINDING THAT THE PLAINTIFF FAILED TO ESTABLISH THAT THE CONSIDERATION PAID TO CLAIR W. KOONTZ WAS INADEQUATE OR THAT A WANT OF CONSIDERATION EXISTED?

The law is well settled that inadequacy of consideration can only be a factor to be considered in determining the presence of undue influence. Since no evidence of undue influence was presented by the plaintiff, it must therefore follow adequacy of consideration will not be considered. "The adequacy of consideration will not be gone into by the court in the absence of fraud." *Wilson v. Viking Corp.*, 134 Pa. Super. 153, 3 A. 2d 180 (1938).

> "It is an elementary principle that the law will not enter into an inquiry as to the adequacy of consideration. This rule is almost as old as the law of consideration itself."

Hillcrest Foundation v. McFeathers, 332 Pa. 497, 2 A. 2d 775 (1938).

> "Ordinarily courts do not go into the question of equality or inequality of considerations but act upon the presumption that parties capable to contract are capable as well of regulating the terms of their contracts, granting relief only when the inequality is shown to have arisen from mistake, misrepresentation or fraud .... A very slight advantage to one party or trifling inconvenience to the other is sufficient consideration to support a contract when made by a man of good capacity who is not at the time under the influence of any fraud, imposition, or mistake."

Erie Forge Co. v. Iron Works Co., 22 Pa. Super. 500, 555 (1903).

We did not find and remain unpersuaded that the consideration paid by the defendant herein was grossly disproportionate so as to shock the conscience of the Chancellor, as it must in order to defeat the contracts. See *Payne v. Clark*, 409 Pa. 557, 187 A. 2d 769 (1963). Inadequacy of consideration is primarily a factual question and as related in our findings of Fact in the original Adjudication, we did not find the plaintiff sustained his burden of proving such inadequacy of consideration.

The plaintiff did not plead want of consideration as a theory of action. It was not raised as an issue at the pre-trial conference. There was no evidence of want of consideration.

The second exception is dismissed.

III

WHETHER THE COURT ERRED IN FINDING THAT THE PLAINTIFF FAILED TO ESTABLISH BY CREDIBLE EVIDENCE THAT CLAIR W. KOONTZ WAS INCOMPETENT WHEN HE EXECUTED THE DEEDS TO DEFENDANT.

A duly executed and recorded deed is presumed to be valid and the burden of disproving it's validity is on the party alleging it. See *Walkinshav's Estate*, 275 Pa. 121, 118 A. 766 (1922).

> "In the light of the presumption of validity, a deed cannot be overcome on the ground of mental incapacity in the absence of clear and unquestionable evidence going beyond a showing of old age, sickness, distress, or debility of body."

12 P.L.E. Deeds, Sect. 71, p. 78.

In *Hagopian v. Eskandarian*, 396 Pa. 401, 403, 404, 153 A. 2d 897 (1959), the Supreme Court of Pennsylvania stated:

> "Mental competence to do business is presumed and the burden lies on him who denies it. The evidence to show incompetence must be clear and unquestionable, positive, strong, clear, and compelling. Contracts made with the incompetent before his adjudication as weakminded are voidable and can be avoided only on proper showing that he was in fact incompetent at the time. . . .Further, we can take judicial notice of the fact that not all forms of mental illness hit one like a bolt of lightening, but are often a matter of growth and clouding over. Expert testimony is needed when transactions fall within the penumbra between competence and incompetence, when the light of reason may come and go unbidden."

In *Hagopian v. Eskandarian*, supra, records showed that the plaintiff had been hospitalized from June 4 to June 21, 1935 and diagnosed incompetent - just three weeks before the first transaction. The records were held to be inadmissible and the Supreme Court stated:

> "Even if these records had been admitted, they would not cover the critical dates of July 13 and September 3, 1935. On their face they do not show a static mental condition between June and November, and there is no evidence that the named disease is unrelieved by lucid intervals." (p. 406).

The court also observed that the plaintiff, "gave ample evidence that he understood his affairs and knew what he was about," because he drove up the price for his interest. (p. 407).

NOTICE OF PUBLIC HEARING, Cont.

interested persons or agencies and shall receive, make known and consider recommendations in writing with reference to: 1. The Amended Redevelopment Proposal, dated August, 1977, for the Buchanan Homes Redevelopment Area, prepared by the Redevelopment Authority of the County of Franklin. 2. The Relocation Program for the Buchanan Homes Redevelopment Area as prepared by the Redevelopment Authority of the County of Franklin.

The Redevelopment Authority proposes to acquire property in the project, to demolish or remove buildings and improvements and make land available for development or redevelopment by private enterprise or public agencies as authorized by law, and to constitute a program of public improvemnet.

The Redevelopment Proposal and the Relocation Program will be available for inspection for the ten (10) days immediately preceding the public hearing at the Office of the Chief Clerk, located in the County Court House, Memorial Square, and the Borough Hall, 100 South Second Street, Chambersburg, Pennsylvania.

By Order of the Council of
the Borough of Chambersburg
Julio Lecuona
Borough Secretary

By Order of the Commissioners
of the County of Franklin
Linford S. Pensinger
Chief Clerk
(9-30)

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION
(Required for Second Class Mailing Permit, under 39 U.S.C. 3685)

1. Title of Publication: Franklin County Legal Journal;
2. Date of Filing: 9/20/77;
3. Frequency of Issue: weekly 3A. No. of issues published annually; 3B. Annual subscription price: $20.00 regular, $15.00 Bar members;
4. Location of Known Office of Publication: 164 Lincoln Way East, Chambersburg, Pa. 17201, c/o Kenneth E. Hankins, Jr.;
5. Location of Headquarters or general business offices of publisher: same at #4, above;
6. Publisher: Franklin County Legal Journal, 164 Lincoln Way East, Chambersburg, Pa. 17201; Edtior: Kenneth E. Hankins, Jr., 164 Lincoln Way East, Chambersburg, Pa. 17201; Managing Editor: Same as Editor;
7. Owner: (organized on a non-stock basis) Franklin County Legal Journal, a nonprofit corporation owned by the members of Franklin County, Pa., Bar Association; Address: 164 Lincoln Way East, Chambersburg, Pa. 17201;
8. Known bondholders, mortgagees, and other security holders: None;
9. The purpose, function, and nonprofit status of this organization and the exempt status for Federal Income Tax purposes have not changed during preceding 12 months (I do not know whether we have exempt status.);

10. Extent and Nature of Circulation	Average No. Copies Each Issue During Preceding 12 months (12 wees)	Actual No. Copies of Single Issue Published Nearest to Filing Date
A. Total No. Copies Printed (Authorization Granted for 8/12/77; started publishing July 1, 1977)	139.6	139
B. Paid Circulation		
1. Sales Through Dealers and Carriers, Street Vendors and Counter Sales	1	1
2. Mail Subscriptions (First Class, only, used until 8/12/77)	58.8	85
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1. Office Use. Left Over, Unaccounted, Spoiled After Printing	56.9	51
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11. I certify that the Statements Made by me above are correct and complete

Signature and Title of Editor, Publisher, Business Manager, or Owner:
/s/ KENNETH E. HANKINS, JR.
Managing Editor

12. In accordance with the provisions of this statute, I hereby request permission to mail the publication named in item 1 at the phased postage rates presently authorized by 39 U. S. C. 3626.

Signature and Title of Editor, Published, Business Manager, or Owner:
/s/ KENNETH E. HANKINS, JR., Managing Editor

(9-30)

In *Mulholland v. Pittsburgh National Bank*, 418 Pa. 96, 209 A. 2d 857 (1965), the apellee was addicted to excessive use of alcohol, was hospitalized on at least five occasions during the period from 1943 to April 30, 1951, covering the dates of execution of certain disputed documents. On one occasion a Pennsylvania court found the appellee to be an "inebriate" and committed her as such for six months; and thereafter she continued to drink excessively. She continued her drinking but was not adjudged by the Florida court to be incompetent by reason of inebriacy until ten (10) months after the challenged instruments were executed. Mr. Justice Jones stated:

> "There is no suggestion whatsoever that appellee was mentally deranged, a lunatic or mentally defective; on the contrary, whatever behavior she exhibited was due to the excessive use of alcohol . . . . (n.7) It is of interest to note that the Pennsylvania Mental Health Act of 1951 (Act of June 12, 1951, P.L. 533, Sect. 101-1002, 50 P.S. Sect. 1071-1622) expressly excludes 'inebriety' from the term 'mental illness' and makes the same distinction as to competency shown by this record."

The appellee was found to be competent, regardless of the fact that she engaged in excessive drinking on the rebound from which she would excessively use drugs and her behavior, following such excessive use of alcohol required that she be frequently hospitalized. She also engaged in "orgies and occasional violence constituting anti-social psycopathy."

In the case at bar, the qualifications of Dr. McLucas as a general practitioner were conceded by the defendant and he did testify as a general practitioner. He did not testify as a specialist and as the defendant correctly noted in his brief, the doctor's opinion concerning the plaintiff's incompetency was not entitled to the weight that the opinion of an expert in mental diseases would be given. The witnesses for the defendant testifying as to the competency of the plaintiff qualified under the rule of *Elcessor v. Elcessor*, 146 Pa. 359, 23 A. 230 (1892) which held:

> "As evidence of such capacity, it is settled that opinions of witnesses that knew him are admissible, but only opinions founded on facts which would first be given to the jury that they may determine the weight to be given to the opinions founded on them. They must, therefore, be facts that offered

a fair foundation for an opinion on the particular point in dispute."

Here, the plaintiff's expert testified to a physician-patient relationship over an eighteen (18) year period, the opinion that the plaintiff had suffered from chronic alcoholism during all of those years (though that was not borne out by his records), that the plaintiff's brain damage had existed during the entire month of April 1972, and that the plaintiff was incompetent as a result of the chronic alcoholism on April 25, 1972 to comprehend the legal effect of a deed, the sale of land or the value of real estate. To the contrary, the defendant's evidence was:

1. Given by the notary public who acknowledged the first deed on April 5, 1972, that if he had observed any bizarre conduct on the part of Mr. Koontz, he either would not have acknowledged the deed or made a note of it in his ledger and there were no such notes. (Finding of Fact 23.)

2. By the testimony of Mrs. Myers, notary public and secretary to defendant's attorney, that she noticed nothing unusual about Mr. Koontz, conversed with him and was satisfied that he knew what he was doing and wanted to sell his property to his friend. (Finding of Fact 27.)

3. By the testimony of the defendant and his housekeeper, Mrs. Earnest, that Mr. Koontz' conduct was always normal except when he had too much to drink and that he had nothing to drink on April 5, 1972, or on April 20, 1972. (Finding of Fact 28.)

In the judgment of this court the specific evidence of the mental condition of Mr. Koontz on the critical dates April 5, 1972, and April 20, 1972, effectively rebuts the opinion evidence given by plaintiff's expert witness. The testimony of the lay witnesses coupled with the facts that:

1. Mr. Koontz first leased the main tract to the defendant on January 7, 1972, and then on February 24, 1972, entered into an agreement to sell that tract to the defendant for $1,500.00 because it was not livable.

2. It was the preference of Mr. Koontz to keep the stated consideration low and have his debts forgiven for tax purposes.

3. Mr. Koontz had the presence of mind to reserve an access right-of-way to his home;

effectively and persuasively established his competency to convey the property to the defendant.

We, therefore, do not find the Court erred in finding that Mr. Koontz was competent when he executed the deeds to the defendant and the exception is dismissed.

We do not reach the defendant's assertion of the "two witness rule", Act of 1913, May 28, P.L. 358, Sect. 1; 12 P.S. Sect. 1222. However, we do note that there is substantial authority for the position that this rule does not apply in an action in which it is sought to set aside a writing entirely and not merely to vary its terms. See *Leschkee v. Leschkee*, 59 Lanc. Rev. 409, 415 (1965); *Oke v. Krzyzanowski*, 150 Pa. Super. 205, 211, 27 A. 2d 414 (1942); *Wenclawiak v. Sieracki, et ux.*, 282 Pa. 256, 258, 127 A. 625 (1925).

We also do not reach the defendant's contention of laches, but we note that a delay of fifteen months from the time of appointment of the guardian-plaintiff to the entering of this action would, in all probability, not constitute laches. There is no fixed rule for the length of delay that will prevent the plaintiff from proceeding. Each case must be considered on an ad hoc basis. *Alker v. Philadelphia National Bank*, 372 Pa. 327, 93 A. 2d 699 (1953). Laches depends on whether due diligence has been shown and, if not, whether the delay has been prejudicial to the adverse party. *McGramm v. Allen*, 291 Pa. 574, 140 A. 552 (1928). The determination of the existence of laches is addressed to the discretion of the chancellor. *Sourber v. Gitt and Delones' Executors*, 55 York L.R. 177 (1942). Defendant herein had already completed the renovating and refurbishing of the premises and had moved in by the time of the appointment of the guardian--plaintiff, so he suffered no prejudice by the delay.

DECREE

NOW, this 20th day of July, 1977, the plaintiff's exceptions are dismissed.

Costs to be paid by the plaintiff.