

As America Ages: Changing the Domicile of the Incompetent Challenges Diversity Jurisdiction [Acridge v. Evangelical Lutheran Good Samaritan Society, 334 F.3d 444 (5th Cir. 2003)]

Ryan S. Vincent*

I. INTRODUCTION

With rapid advancements in health, medicine, and science, Americans live longer than ever.¹ Seventy-seven million baby boomers will soon join the ranks of the forty million seniors already in the United States.² Along with this rise in the elder population comes an increase in Alzheimer's, dementia, and other incapacitating diseases common to the aged.³ Frequently elderly parents choose their adult children as their primary caretakers.⁴ Therefore, in this age of geographic mobility, children often must make arrangements for their parents to relocate to the state where the children live.⁵ As America ages and the number of incompetent people being relocated across state lines by their guardians increases, the ramifications on diversity jurisdiction compound.⁶

In *Acridge v. Evangelical Lutheran Good Samaritan Society*,⁷ the United States Court of Appeals for the Fifth Circuit examined the effects of aging on diversity jurisdiction, holding that the guardian of an incompetent person may change that person's domicile for diversity purposes if it is in the incompetent's best interests.⁸ This ruling upsets the certainty and defeats the historical purpose of diversity jurisdiction. *Acridge* allows the guardians of non-diverse plaintiffs to

* B.A. 2002, Washburn University; J.D. Candidate 2005, Washburn University School of Law. My thanks go out to Professor James Concannon and the editors of the *Washburn Law Journal* for all of their assistance. I dedicate this comment to Melissa and my family, who have supported me all of the way.

1. See Richard Bales & Sarah Nefzger, *Employer Notice Requirements Under the Family and Medical Leave Act*, 67 Mo. L. REV. 883, 883 (2002).

2. Kevin P. Kane, *Selecting a Nursing Home: Elder Abuse Detection and Prevention*, 44 ORANGE COUNTY LAW. 15, 15 (2002).

3. Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 697-98 (1991).

4. *Id.* at 702.

5. See *id.* at 703.

6. "By definition, incompetence is a '[i]lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation; to show want of physical or intellectual or moral fitness.'" Anna Schork Fraleigh, Note, *An Alternative to Guardianship: Should Michigan Statutorily Allow Acute-Care Hospitals to Make Medical Treatment Decisions for Incompetent Patients Who Have Neither Identifiable Surrogates Nor Advance Directives?*, 76 U. DET. MERCY L. REV. 1079, 1081 (1999) (quoting BLACK'S LAW DICTIONARY 526 (6th ed. 1990)).

7. 334 F.3d 444 (5th Cir. 2003).

8. *Id.* at 450.

manufacture diversity while preventing legitimate diversity plaintiffs from having their day in federal court. The ramifications of this decision will only escalate with the graying of society. Therefore, the United States Supreme Court should adopt a per se rule that guardians do not change the domicile for diversity purposes of their wards by moving them across state lines. This will provide certainty in jurisdiction, limit the manufacture of diversity, and guarantee genuinely diverse parties federal jurisdiction. By adopting a per se rule, the court will be more prepared for the aging of America.

II. CASE DESCRIPTION

Louis and Mary Acridge had lived in New Mexico since 1968, where Louis served as a sheriff.⁹ By 1996, Louis' Alzheimer's disease forced Mary to place him in a retirement center in New Mexico.¹⁰ Unhappy with his treatment, Mary transferred Louis to the Farwell Convalescent Center (Center) in Farwell, Texas for better care.¹¹ By the time of the transfer, the disease left Louis completely incompetent.¹² To help pay for his treatment at the Center, Mary applied for Medicaid benefits for her husband.¹³

After a year, the Center moved Louis into a room with another Alzheimer's patient, Henry Plyler.¹⁴ Plyler's history revealed violent and abusive behavior toward roommates.¹⁵ On June 23, 1999, staff at the Center found Louis covered in blood with an ink pen protruding from his eye.¹⁶ Plyler had beaten Louis in the head with a coffee mug and stabbed a pen in his eye.¹⁷ The pen pierced Louis' brain, and he died shortly thereafter due to his injuries.¹⁸

Mary Acridge and her son (Acridge) filed a lawsuit in the United States District Court for the Northern District of Texas.¹⁹ They sued the Center, an administrator named Jerry Adams, and several staff members for negligence, claiming that the defendants failed to protect

9. *Id.* at 446.

10. *Id.*

11. *Id.* Mary remained a resident of New Mexico until her husband's death, when she moved to Colorado. Brief for Appellants at 48, *Acridge* (No. 02-10642).

12. *Acridge*, 334 F.3d at 446-47.

13. *Id.* at 447. Texas' Medicaid statute requires that an individual must be a resident of Texas and intend to remain there in order to be eligible for benefits. 40 TEX. ADMIN. CODE § 15.301 (West 2000).

14. *Acridge*, 334 F.3d at 447.

15. *Id.* This behavior included hitting his roommates, staring at them while they were in bed, and threatening them. Brief for Appellees at 8, *Acridge* (No. 02-10642). Former roommates were so disturbed by Plyler that they dragged their feet in their wheelchairs and slept in the lobby to avoid going into the room with him. *Id.* at 9.

16. *Acridge*, 334 F.3d at 447.

17. *Id.*

18. *Id.*

19. *Id.* at 446-47. Mary Acridge filed suit both individually and as executrix of her husband's estate. *Id.* at 444.

Louis and that the failure constituted the proximate cause of Louis' death.²⁰ Acridge also alleged that the defendants negligently failed to warn Louis' family of his roommate's violent history.²¹ The defendants moved to dismiss, arguing that no federal subject matter jurisdiction existed since the plaintiffs and most of the defendants were domiciled in Texas.²² The district judge denied the motion.²³ The United States Court of Appeals for the Fifth Circuit granted an interlocutory appeal of the summary judgment ruling to the defendants.²⁴

III. BACKGROUND

Under 28 U.S.C. § 1332, the federal courts have subject matter jurisdiction over all controversies exceeding \$75,000 between citizens of different states.²⁵ Additionally, diversity jurisdiction is concurrent—in a controversy where diversity exists, a litigant may choose to bring her suit either in state or federal court.²⁶ The choice of forum has practical and tactical implications, ranging from which court can hear the case more quickly to where a more favorable jury may be found.²⁷ Since 1806, the United States Supreme Court has held that there must be complete diversity between parties in order for the federal courts to have diversity jurisdiction.²⁸ This means that no plaintiff may overlap citizenship with any defendant.²⁹

A. *Development of Diversity Jurisdiction*

Although it was not a major issue of dispute among the framers during the Constitutional Convention, the idea of granting the federal courts jurisdiction over diverse parties developed as early as the Virginia Plan.³⁰ Eventually, the framers included diversity within their grant of federal jurisdiction: "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States."³¹ Historically,

20. *Id.* at 446-47. The suit named Evangelical Lutheran Good Samaritan Society, which operated the Farwell Convalescent Center, as a defendant. *Id.* The staff members that the suit named as defendants were two directors of nursing, Elaine Morrow and Sherri Lunsford Harris. *Id.* at 447 n.1.

21. *Id.* at 447.

22. *Id.*

23. *Id.* The district court also denied the defendants' motions for summary judgment on official immunity and superseding cause grounds. *Id.*

24. *Id.*

25. 28 U.S.C. § 1332(a)(1) (2000). The statute also grants federal jurisdiction to disputes between citizens of (1) a U.S. state and citizens of a foreign state, (2) a U.S. state where there are additional foreign parties, and (3) a U.S. state and a foreign state. 28 U.S.C. § 1332(a)(2)-(4).

26. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 214 (5th ed. 2000).

27. *Id.* at 214-15.

28. *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806).

29. LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 79 (2d ed. 2000).

30. Christine G. Heslinga, Note, *The Founders Go On-Line: An Original Intent Solution to a Jurisdictional Dilemma*, 9 WM. & MARY BILL RTS. J. 247, 248-49 (2000).

31. U.S. CONST. art. III, § 2.

diversity jurisdiction's primary purpose was to prevent prejudice in state courts against out-of-state parties.³² Granting federal jurisdiction provided the litigant "access to an unbiased court" to hear the controversy.³³ According to Adrienne J. Marsh, "The founding fathers apparently were concerned that litigants who were disappointed by judicial decisions in courts of distant states might ascribe their losses to the incompetence or the prejudice of the state courts and would bear ill-will toward the forum state."³⁴

During the ratification of the Constitution, the Federalists argued for broad federal jurisdiction, as they claimed that the state courts were inferior to the federal courts because federal judges had life tenure, more experience, and more freedom to operate.³⁵ Anti-Federalists countered that federal diversity jurisdiction would undercut the state courts and that federal judges would misapply state law.³⁶

Once the Constitution had been ratified with diversity included within the grant of federal jurisdiction, Chief Justice John Marshall defended the use of diversity jurisdiction:

However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the [C]onstitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies . . . between citizens of different states.³⁷

Congress quickly codified diversity jurisdiction in the Judiciary Act of 1789, which allowed the federal courts to hear actions exceeding \$500 between citizens of different states.³⁸ The current codification was laid out by Congress in the Judicial Code of 1948 at 28 U.S.C. § 1332.³⁹

Accompanying the 1948 codification of diversity jurisdiction was Congress' concern that non-diverse parties would manufacture diver-

32. See ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H.R. REP. NO. 95-893, at 2 (1978); Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 *HAMLINE L. REV.* 372, 378 (2001); Heather N. Hormel, *Domicile for the Dead: Diversity Jurisdiction in Wrongful Death Actions*, 2001 *U. CHI. LEGAL F.* 519, 522.

33. See *Ziady v. Curley*, 396 F.2d 873, 875 (4th Cir. 1968). The "principal purpose of diversity jurisdiction was to give a [stranger] access to an unbiased court" in a state where his opponent was a citizen. *Id.*

34. Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 *BROOK. L. REV.* 197, 201 (1982).

35. Heslinga, *supra* note 30, at 250.

36. *Id.* at 250-51.

37. *Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (1809).

38. Heslinga, *supra* note 30, at 251-52.

39. *Id.* at 253. Today the code provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states." 28 U.S.C. § 1332(a)(1) (2000).

sity or create it in order to gain federal jurisdiction.⁴⁰ Congress attempted to address this problem by limiting the opportunity of parties to manufacture diversity in 28 U.S.C. § 1359.⁴¹ Section 1359's purpose is to exclude "purely local controversies with no more than a contrived interstate appearance."⁴²

Many critics have argued that diversity jurisdiction should be abolished,⁴³ claiming that diversity jurisdiction is too costly and that bias against out of state residents does not exist.⁴⁴ Proponents have countered that local bias continues as the "hometown decision" and "one-industry county" remain.⁴⁵ Weighing in on the debate, the House Judiciary Committee amended the diversity statute at 28 U.S.C. § 1332 by passing the Judicial Improvements and Access to Justice Act of 1988.⁴⁶ The Act raised the amount in controversy requirement to \$50,000, eliminated certain cases of alienage jurisdiction, and amended the statute regarding representative actions.⁴⁷ Explaining the reasoning behind the amendments, the Judiciary Committee said it was concerned with the combined effects of inflation, federal court workload, and Congress' unwillingness to create new judgeships.⁴⁸ The purpose of the bill was to "reduce the basis for Federal court jurisdiction based solely on diversity of citizenship."⁴⁹

B. *Domicile of the Mentally Incompetent*

Also relevant to diversity jurisdiction is how diversity addresses the citizenship of the mentally incompetent. This requires a brief understanding of domicile, the basis upon which the courts determine diversity.⁵⁰ Although a person acquires a "domicile of origin" where he is born, that person may create a "domicile of choice" by establishing residence in a different state and intending to remain there indefi-

40. See, e.g., 28 U.S.C. § 1359 (2000).

41. *Id.* "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *Id.*

42. *Lester v. McFaddon*, 415 F.2d 1101, 1104 (4th Cir. 1969); see also *Ferrara v. Phila. Lab., Inc.*, 272 F. Supp. 1000, 1015 (D. Vt. 1967) (citing *Steinberg v. Toro*, 95 F. Supp. 791, 795 (D.P.R. 1951)) (stating that the purpose of the section is to close federal courts to parties who should properly litigate within the state, except where true diversity exists).

43. E.g., *Against Diversity*, 17 CONST. COMMENT. 1, 1 (2000); Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 149 (2003).

44. Grissom, *supra* note 32, at 385.

45. Marsh, *supra* note 34, at 203; David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 330 (1977). These terms refer to a tendency of juries in state courts to protect the local province and influential businesses therein. See *id.*

46. See generally H.R. REP. NO. 100-889 (1988), reprinted in 1988 U.S.C.C.A.N. 5982.

47. See generally *id.*

48. H.R. REP. NO. 100-889, at 45, reprinted in 1988 U.S.C.C.A.N. 5982, 6005.

49. *Id.* at 44.

50. See TEPLY & WHITTEN, *supra* note 29, at 100.

nately.⁵¹ To determine whether a person has changed domicile, courts examine factors such as where political rights are exercised, taxes are paid, property is owned, and employment occurs.⁵²

However, determining the domicile of an incompetent individual by examining intent can be problematic.⁵³ An incompetent person is presumed to lack the necessary intent to change domicile.⁵⁴ Prior to 1988, the domicile of the incompetent person's representative determined her ward's domicile for purposes of diversity jurisdiction.⁵⁵ In the Judicial Improvements and Access to Justice Act, Congress based domicile on the represented, rather than the representative.⁵⁶ Senator Howell Heflin identified a reason for amending the diversity statute—the problem of attorneys manufacturing diversity in order to get into federal court by seeking representatives for their clients from outside of the state.⁵⁷ For example, if an incompetent person's attorney wishes to sue in federal court, he could appoint a representative for his client in a neighboring state.⁵⁸ By doing so, the incompetent person's domicile becomes that of the neighboring state.⁵⁹ Thus, diversity could be easily manufactured through careful selection of a representative.

This forum shopping led Congress to adopt what Senator Heflin called a “sounder policy”: basing the domicile of an incompetent person on the residence of the incompetent, not her representative.⁶⁰ The relevant portion of the Judicial Improvements and Access to Justice Act provides that “the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same [s]tate as the infant or incompetent.”⁶¹ This change brought greater stability to di-

51. *Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000); *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996).

52. *Coury*, 85 F.3d at 251.

53. *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 448 (5th Cir. 2003).

54. *Juvelis v. Snider*, 68 F.3d 648, 655 (3d Cir. 1995).

55. *TEPLY & WHITTEN*, *supra* note 29, at 636.

56. 28 U.S.C. § 1332(c)(2) (2000).

57. 134 CONG. REC. S31,055 (daily ed. Oct. 14, 1988).

58. See David D. Siegel, *Commentary on 1988 Revision*, in 28 U.S.C.A. § 1332, at 6, 9-10 (1993).

59. *Id.*

60. 134 CONG. REC. S31,055 (daily ed. Oct. 14, 1988). Congress based the revisions on the American Law Institute's recommendation. David D. Siegel, *Commentary on 1988 Revision*, in 28 U.S.C.A. § 1332, at 10-11 (1993).

An executor, or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of a decedent shall be deemed to be a citizen only of the same [s]tate as the decedent; and a guardian, committee, or other like representative of an infant or incompetent shall be deemed to be a citizen only of the same [s]tate as the person represented.

AM. LAW INST., *STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 11 (1969).

61. 28 U.S.C. § 1332(c)(2).

versity jurisdiction,⁶² furthering a goal of civil procedure—judicial certainty.⁶³

However, basing diversity on the incompetent's domicile failed to address the issue of whether a guardian could change the ward's domicile by moving the ward to another state.⁶⁴ The circuits are split on this issue.⁶⁵ Various courts and authorities have held that a guardian can change the domicile of his ward by moving him across state lines, so long as it is in the incompetent's best interests.⁶⁶ For instance, the Tenth Circuit reached this conclusion in *Rishell v. Jane Phillips Episcopal Memorial Medical Center*.⁶⁷ In *Rishell*, an Oklahoma woman attempted suicide while hospitalized in Oklahoma.⁶⁸ She survived and was left in a permanent vegetative state.⁶⁹ In order to give her better medical care, her guardian moved her to a care facility in Louisiana.⁷⁰ Her guardian then sued the Oklahoma hospital in federal court, claiming that diversity jurisdiction existed as her ward was now domiciled in Louisiana.⁷¹ The Tenth Circuit held that the guardian could change the domicile of her ward if the move was in the incompetent's best interests.⁷²

The Seventh Circuit took a similar stance in *Dakuras v. Edwards*.⁷³ In *Dakuras*, an incompetent Illinois woman moved to Ohio upon being deceived by her guardian relatives.⁷⁴ The woman's significant other sued her guardians in federal court, claiming that along with the incompetent woman, the relatives had taken valuable property from him.⁷⁵ The district judge found that no diversity existed since the defendant remained a domiciliary of Illinois despite the

62. See 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3640 (3d ed. 1998).

63. See *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996) (“Jurisdictional rules should above all be clear. They are meant to guide parties to their proper forums with a minimum of fuss.”). Although diversity jurisdiction is constitutionally mandated, as with all rules of civil procedure, it should promote efficient and just results. Cf. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 1 (2d ed. 1993) (underlying purpose of civil procedure is to promote just and efficient resolution of disputes). Thus, a goal in the determination and application of diversity jurisdiction is certainty and dependability. Cf. *Long*, 91 F.3d at 647.

64. TEPLY & WHITTEN, *supra* note 29, at 636.

65. See 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15-102 (3d ed. 2003) (comparing the holdings of the Seventh and Tenth Circuits, allowing a guardian to change a ward's domicile, with the Third and Fourth Circuits, denying a guardian this ability).

66. See, e.g., *Dakuras v. Edwards*, 312 F.3d 256, 258 (7th Cir. 2002); *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171, 173 (10th Cir. 1993); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 23 cmt. f (1988).

67. 12 F.3d 171, 173 (10th Cir. 1993).

68. *Id.* at 172.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 173. However, the case was remanded for the district court to determine the incompetent woman's best interests and whether her domicile was changed through operation of law. *Id.* at 174-75.

73. 312 F.3d 256, 258 (7th Cir. 2002).

74. *Id.* at 257.

75. *Id.* at 257-58.

move to Ohio.⁷⁶ The Seventh Circuit reversed and, based upon *Rishell*, held that a guardian may change the domicile of her incompetent ward.⁷⁷

A federal district court in New York decided a similar case in *McEachron v. Glans*.⁷⁸ In *McEachron*, the guardians of a New York resident, incompetent as a result of an auto accident with a New York defendant, brought suit in federal court, alleging diversity jurisdiction.⁷⁹ The guardians had moved the incompetent man to a hospital in Massachusetts and argued that he was now domiciled there.⁸⁰ The court held that a guardian can change the domicile of his ward, so long as it is in the ward's best interests.⁸¹

*Long v. Sasser*⁸² contravenes these decisions.⁸³ In *Long*, a South Carolina citizen became incompetent after suffering a stroke.⁸⁴ His guardian moved him to a nursing home in Virginia and brought a medical malpractice suit against his South Carolina physicians in federal court, claiming that diversity jurisdiction existed.⁸⁵ The Fourth Circuit held that there was no diversity as a guardian cannot change the domicile of an incompetent ward, even if the change of residence is in the incompetent person's best interests.⁸⁶ The court reasoned that to hold otherwise would require "a more speculative inquiry as to whether the ward will remain incompetent in the future, as well as inviting litigation over the 'best interests' of the ward."⁸⁷

Although several circuits and district courts were split on the issue of whether a guardian may change the domicile of his ward, the Fifth Circuit had never addressed the question.⁸⁸ The court weighed in when it decided *Acridge*.⁸⁹

IV. ANALYSIS

The issue in *Acridge v. Evangelical Lutheran Good Samaritan Society* was whether a guardian acting in the best interests of her incom-

76. *Id.*

77. *Id.* at 258. However, the court held that the change in domicile was ineffective due to the deception involved. *Id.* at 259.

78. 983 F. Supp. 330, 334 (N.D.N.Y. 1997).

79. *Id.* at 331, 333.

80. *Id.* at 332-33.

81. *Id.* at 334. However, the court held that there was no permanent intent on the part of the guardians to live in Massachusetts, and therefore, domicile was not created there. *Id.* at 335.

82. 91 F.3d 645 (4th Cir. 1996).

83. *See generally id.*

84. *Id.* at 646.

85. *Id.*

86. *Id.* at 647.

87. *Id.* (citing *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171 (10th Cir. 1993)).

88. *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 449 (5th Cir. 2003).

89. *See generally id.* at 444.

petent ward may change the incompetent's domicile for the purpose of federal diversity jurisdiction.⁹⁰

A. Parties' Arguments

Acridge argued that the district court was correct in denying the defendants' motions for summary judgment for lack of subject matter jurisdiction.⁹¹ Louis' disease left him incapable of forming the necessary intent to establish domicile in Texas, as he was disoriented, confused, oblivious to his surroundings, and suffered from Alzheimer's.⁹² According to Acridge, because mentally incompetent people are presumed to be unable to change their domicile, Louis' domicile should remain his last domicile of choice, New Mexico.⁹³ Citing *Long*, Acridge argued that a guardian cannot change the domicile of an incompetent person.⁹⁴ Thus, Acridge and her son asserted that Mary Acridge was unable to change Louis' domicile from New Mexico to Texas for diversity purposes, and therefore, diversity jurisdiction existed when they sued the Texas defendants.⁹⁵

On the other hand, the defendants contended that the trial judge erred in denying their motion for summary judgment for lack of subject matter jurisdiction.⁹⁶ According to the defendants, there was already a presumption that Louis was domiciled in Texas as he resided at the Center for over two years.⁹⁷ In addition, Mary Acridge acted in her husband's best interests when she moved him from New Mexico to Texas, after being dissatisfied with his care.⁹⁸ Therefore, the defendants argued that the court should follow *Rishell* and hold that an incompetent's domicile for diversity purposes may be changed by her guardian, so long as it is in the incompetent's best interests.⁹⁹

Finally, the defendants argued that Louis' domicile changed to Texas through operation of law.¹⁰⁰ Under Texas Medicaid law, a person must be a Texas resident and intend to remain there in order to

90. *Id.* at 449.

91. *See id.* at 452. The plaintiffs argued that the trial court was correct because a New Mexico state court had found that it had venue while probating Louis' will because he was domiciled in New Mexico. *Id.* at 452. Thus, the plaintiffs argued that collateral estoppel should apply, and the defendants could not re-litigate the question of domicile. *Id.*

92. Brief for Appellees at 8, 57, *Acridge* (No. 02-10642).

93. *Id.* at 58.

94. *Id.* at 57.

95. *Id.* at 58.

96. *Acridge*, 334 F.3d at 446. The defendants also argued that the trial judge erred in denying their motion for summary judgment on official immunity grounds. *Id.* They argued that section 285.072 of the Texas Health and Safety Code Annotated provided protection against liability from lawsuits for a nursing home operator and its staff. Brief for Appellants at 32, *Acridge* (No. 02-10642).

97. Brief for Appellants at 50, *Acridge* (No. 02-10642).

98. *Id.* at 51-52.

99. *Id.* at 51.

100. *Acridge*, 334 F.3d at 450.

receive benefits.¹⁰¹ The defendants asserted that Louis became a domiciliary of Texas when he accepted these restrictions through his guardian, as residence and intent are also the elements of domicile.¹⁰² Thus, the defendants contended that Louis was a Texas domiciliary since Mary relocated him to the state and accepted Medicaid funding for him.¹⁰³ As most of the defendants were also domiciled in Texas, they asserted that complete diversity jurisdiction did not exist for the federal court to hear the case.¹⁰⁴

B. *The Fifth Circuit's Opinion*

Chief Judge Carolyn King, writing for the three-judge panel, found that a representative acting in the best interests of an incompetent ward may change the domicile of the incompetent person.¹⁰⁵ Thus, as there was no doubt that Mary Acridge acted in her husband's best interests when she moved him to Texas, the court determined that Louis became a Texas domiciliary and no diversity existed for federal jurisdiction.¹⁰⁶

The court began by analyzing the circuit split on the issue of an incompetent's domicile, noting the differing decisions of *Long*, *Rishell*, and *Dakuras*.¹⁰⁷ The court then followed the Tenth Circuit, quoting *Rishell*:

To hold that the person charged with making decisions on behalf of an incompetent lacks the authority to change the incompetent's state of domicile in his best interests leaves the incompetent "in a never-ending limbo where the presumption against changing domicile becomes more important than the interests of the person the presumption was designed to protect."¹⁰⁸

The Fourth Circuit's concern in *Long*, that allowing a guardian to determine a ward's domicile introduces speculation into jurisdiction, did not persuade the *Acridge* court.¹⁰⁹ The court asserted that "[n]o more uncertainty exists in determining whether someone is acting in the best interests of an incompetent than exists when a court must consider and weigh the multitude of relevant factors in determining the domicile of a competent adult."¹¹⁰

101. See 40 TEX. ADMIN. CODE § 15.301 (West 2000).

102. See Brief for Appellants at 52-53, *Acridge* (No. 02-10642); Appellants' Reply Brief at 5-6, *Acridge* (No. 02-10642).

103. See Brief for Appellants at 53, *Acridge* (No. 02-10642).

104. *Id.*

105. *Acridge*, 334 F.3d at 446, 450.

106. *Id.* at 453.

107. *Id.* at 449.

108. *Id.* at 450 (quoting *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171, 174 (10th Cir. 1993)).

109. *Id.*

110. *Id.* (citing *Coury v. Prot*, 85 F.3d 244, 251 (5th Cir. 1996)).

Next, the court dismissed the defendants' argument that when Louis accepted Texas Medicaid money, his domicile changed through operation of law.¹¹¹ However, the court found that accepting Medicaid was a factor favoring a changed domicile.¹¹² The court also dismissed Acridge's argument that domicile had been predetermined by the New Mexico state court that probated Louis' will.¹¹³

With these arguments out of the way, the court found that Mary Acridge had been acting in the best interests of her husband in moving him to Texas.¹¹⁴ Since the court determined that a guardian acting in the best interests of an incompetent ward may change the ward's domicile, Louis' domicile was in Texas when he died.¹¹⁵ Therefore, the court held that complete diversity did not exist, as most of the defendants also were domiciled in Texas.¹¹⁶

C. Commentary

The Fifth Circuit's holding in *Acridge* upsets certainty in the rules of diversity jurisdiction. By rejecting a per se rule that an incompetent's domicile for diversity purposes cannot be changed by his guardian, the court subjected already-burdened district courts to lengthy determinations of "best interests." It also injected the possibility of arbitrary rulings into diversity jurisdiction. Additionally, the ruling allows non-diverse plaintiffs to manufacture diversity by moving a ward to a neighboring state in order to sue a party in the former home state. This is contrary to Congress' intent to limit the manufacturing of diversity.¹¹⁷ Finally, the holding deprives federal courts of jurisdiction in legitimate diversity cases where an incompetent person is brought to another state and attempts to sue residents in the new forum. Therefore, the United States Supreme Court should address these problems by adopting a per se rule that guardians cannot change the domicile of their wards for diversity purposes.

111. *Id.* at 450-51. The court held that the Texas Medicaid statute does not create domicile for diversity purposes but rather limits eligibility for the coverage benefits. *Id.* at 451.

112. *Id.* at 451. Under Medicaid regulations, Louis was a domiciliary of Texas for purposes of the program. *Id.*

113. *Id.* at 452. The court held that the New Mexico state court's finding that Louis was a New Mexico domiciliary did not collaterally estop the federal diversity jurisdiction inquiry. *Id.* This is because the domicile issue was not fully litigated in the state court, the domicile issue was not necessary to the probate action, and none of the defendants were a party to the state action. *Id.*

114. *Id.* at 453. The court noted that it was unnecessary to remand this fact-based question to the district court, as the record permitted only one result. *Id.* at 452-53.

115. *Id.* at 450, 453.

116. *Id.* at 453. The court did not address the defendants' official immunity arguments, noting that it was unnecessary as subject matter jurisdiction was lacking. *Id.* at 453 n.4.

117. *See, e.g.,* 28 U.S.C. § 1359 (2000).

1. Jurisdictional Certainty

The Fifth Circuit's decision that a guardian may change the domicile of his incompetent ward upsets well-established certainty in the rules of diversity jurisdiction. The purpose of establishing rules of civil procedure, including those dealing with diversity jurisdiction, is "to promote the just, efficient, and economical resolution of civil disputes."¹¹⁸ The Federal Rules of Civil Procedure state that the rules of civil procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."¹¹⁹ Taken together, these policies imply that jurisdictional rules, including diversity jurisdiction, should provide certainty, dependability, and ease of determination for the judiciary.¹²⁰ According to Chief Judge J. Harvie Wilkinson of the Fourth Circuit, "Jurisdictional rules should above all be clear. They are meant to guide parties to their proper forums with a minimum of fuss."¹²¹

A *per se* rule that the domicile of an incompetent remains where he lost his competency would advance these certainty goals of jurisdiction.¹²² Instead, the *Acridge* view "requires a more speculative inquiry as to whether the ward will remain incompetent in the future, as well as inviting litigation over the 'best interests' of the ward."¹²³ This speculation disrupts the very goals of jurisdiction—certainty and efficiency.¹²⁴ In fact, the Fifth Circuit admitted that analysis of the facts and circumstances of each case allows a court the best opportunity to decide an incompetent's domicile.¹²⁵ This requires an in-depth investigation into jurisdiction, an inquiry that may determine that the court has no jurisdiction, thus wasting judicial time and resources in the process. In addition, various courts may have differing views on what the best interests of incompetent people may be, resulting in arbitrary and inconsistent rulings instead of jurisdictional certainty.¹²⁶

118. FRIEDENTHAL ET AL., *supra* note 63, at 1. Although the Federal Rules of Civil Procedure are subordinate to codified diversity statutes such as 28 U.S.C. § 1332 in the legal hierarchy, the Rules exemplify Congress' purpose and intended administration of jurisdiction. *Cf.* Fed. R. Civ. P. 1 (stating how the rules should be construed and administered).

119. FED. R. CIV. P. 1.

120. *See* FED. R. CIV. P. 1; FRIEDENTHAL ET AL., *supra* note 63, at 1.

121. *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996).

122. *See* TEPLY & WHITTEN, *supra* note 29, at 638.

123. *Long*, 91 F.3d at 647 (quoting *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171, 174 (10th Cir. 1993)).

124. *Cf.* FRIEDENTHAL ET AL., *supra* note 63, at 1.

125. *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 450 (5th Cir. 2003) (noting *Coury v. Prot.*, 85 F.3d 244, 251 (5th Cir. 1996)).

126. *Cf.* David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. CAL. INTERDISC. L.J. 205, 224 (1997) ("Over the past decade, several legal scholars have criticized the best interests standard. . . . [T]he basic point of the critics is that the best interests standard places too much discretion and power in the hands of the judge.").

This time-consuming analysis and potential for arbitrary decisions could be avoided if a per se rule that a guardian cannot change a ward's domicile existed.¹²⁷ This would be in keeping with the goals of civil procedure.¹²⁸

The best interests inquiry that the Fifth Circuit adopted in *Acridge* ignores the policy underlying diversity jurisdiction and introduces uncertainties into diversity.¹²⁹ Determining the best interests of a ward for the purposes of domicile requires the court to determine a "mosaic of circumstances."¹³⁰ These circumstances include the opinion of a guardian acting in good faith, the quality of the incompetent person's attachment to the new domicile, the length of the ward's relationship to the new domicile, and the location of the incompetent person's friends.¹³¹

This lengthy analysis increases the workload on an already-burdened federal court system. Diversity cases now comprise approximately nineteen percent of all federal civil suits.¹³² Since 1970, between twenty and sixty percent of the cases pending in federal court for greater than three years were diversity cases.¹³³ Requiring the federal district courts to complete a lengthy analysis into the facts of each case, to determine whether they even have jurisdiction to hear the case, only increases this burden and disrupts the goal of judicial efficiency.

Dakuras v. Edwards perfectly illustrates this time-consuming analysis.¹³⁴ In *Dakuras*, the court held that a guardian may change the domicile of a ward, so long as the guardian acted in the ward's best interests.¹³⁵ Thus, the court had to analyze the guardian's reasons for moving the incompetent to a different state before it could even determine whether the district court had jurisdiction to hear the case.¹³⁶ If the court had adopted the per se rule that a guardian may not change the ward's domicile for diversity purposes, this analysis could have been averted.¹³⁷

127. See *Long*, 91 F.3d at 647.

128. See TEPLY & WHITTEN, *supra* note 29, at 638.

129. Larry L. Teply, *Elder Law Across the Curriculum: First-Year Courses the Elderly and Civil Procedure: Service and Default, Capacity Issues, Preserving and Giving Testimony, and Compulsory Physical or Mental Examinations*, 30 STETSON L. REV. 1273, 1280 (2001).

130. See *Juvelis v. Snider*, 68 F.3d 648, 655 (3d Cir. 1995).

131. See *id.* at 655-56.

132. Hormel, *supra* note 32, at 519.

133. Thomas Bak et al., *Reducing Federal Diversity Jurisdiction Filings: A Qualified Success*, 39 JUDGES' J. 20, 21 (2000).

134. See generally *Dakuras v. Edwards*, 312 F.3d 256 (7th Cir. 2002).

135. See *id.* at 258.

136. See *id.* at 259.

137. Cf. Herring, *supra* note 126, at 239 (stating that a presumptive rule makes an initial decision and then leaves the subject alone, while a best interests standard must address many factors and leaves further court action open).

Even if a guardian must relocate an incompetent ward to another state for medical purposes or care, this change does not need to affect domicile for the purposes of diversity jurisdiction.¹³⁸ The guardian may still physically move the incompetent person, albeit without changing the incompetent person's domicile.¹³⁹ Thus, the per se rule allows flexibility for the guardian while protecting judicial stability. A per se rule that an incompetent person's domicile remains where she last chose to domicile and lost her competency guarantees the dependability inherent in the purposes of jurisdiction, increases judicial efficiency, and avoids the uncertain results created by *Acridge*.

2. Diversity Manufactured

The impact of *Acridge* will likely go beyond jurisdictional certainty. Although admittedly not the result in *Acridge*,¹⁴⁰ the Fifth Circuit's holding that guardians may change their incompetent wards' domicile now provides an opportunity for non-diverse plaintiffs to manufacture diversity, despite Congress' intent otherwise.¹⁴¹

Historically, the Framers of the Constitution granted federal jurisdiction in diversity cases to "prevent prejudice and bias against out-of-state and foreign citizens."¹⁴² However, under *Acridge*, a guardian may manufacture diversity by moving his ward to a neighboring state.¹⁴³ This allows two parties from the same state to be considered diverse, in sharp contrast to the historical purpose of diversity jurisdiction, since courts within a state would not be biased or prejudiced against their own residents.¹⁴⁴ A guardian who manufactures diversity for his ward by moving him across state lines cannot argue that he is preventing bias as he "rendered himself a foreigner principally in order to obtain the benefits" of diversity jurisdiction.¹⁴⁵

The Framers of the Constitution likely would not have included cases where parties manufacture diversity in their vision of diversity jurisdiction, as a local court would not bear ill will toward either

138. TEPLY & WHITTEN, *supra* note 29, at 638.

139. *See id.* Thus, the Fifth Circuit's concern about leaving "the incompetent 'in a never-ending limbo where the presumption against changing domicile becomes more important than the interests of the person the presumption was designed to protect'" has little weight. *See Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 450 (5th Cir. 2003) (quoting *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171 (10th Cir. 1993)).

140. Louis was moved two years before the cause of action arose. *Acridge*, 334 F.3d at 446-47. Thus, it is evident that Mary did not try to manufacture diversity.

141. *See* 28 U.S.C. § 1359 (2000).

142. Grissom, *supra* note 32, at 379.

143. *See* Gregory P. Joseph, *Recent Circuit Court Rulings on Jurisdiction and Removal Issues May Not Be in Keeping with Congress' Intent in Amending the Law*, NAT'L L.J., Aug. 1, 1994, at B9.

144. *See* Gregory Andrew Yates, *The Appointment of an Out-of-State Representative as a Case of Manufactured Diversity Jurisdiction*, 16 S.D. L. REV. 97, 115 (1971).

145. *Appointment of Non-Resident Administrators to Create Federal Diversity Jurisdiction*, 73 YALE L.J. 873, 879 (1964).

party.¹⁴⁶ In fact, allowing a guardian to determine her ward's domicile by moving the ward to another state runs counter to Congress' intent in amending 28 U.S.C. § 1332 in 1988.¹⁴⁷ The overall purpose of the 1988 amendment to 28 U.S.C. § 1332 was to “*reduce substantially* the incidence of diversity jurisdiction.”¹⁴⁸

Moreover, in codifying 28 U.S.C. § 1359, Congress sought to discourage the manufacturing of diversity.¹⁴⁹ Indeed, Congress meant to exclude purely local conflicts from federal diversity jurisdiction.¹⁵⁰ Congress' concern can also be seen in Senator Heflin's analysis of diversity jurisdiction.¹⁵¹ Senator Heflin advocated basing citizenship for diversity purposes on the represented party's domicile, as that would “implement a sounder policy.”¹⁵² Presumably, this is because parties would no longer be able to manufacture diversity.

The manufacturing of jurisdiction can be seen in the cases that the *Acridge* court cited with approval.¹⁵³ In *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, the Tenth Circuit held that a guardian could change the domicile of her incompetent ward, so long as it was in the ward's best interests.¹⁵⁴ The plaintiff served as guardian for an Oklahoma resident who became incompetent while being hospitalized in the Oklahoma defendant's hospital.¹⁵⁵ The court ruled that the plaintiff could effectively change the incompetent woman's domicile by moving her out of the state, thus creating diversity jurisdiction for the federal court to hear the case.¹⁵⁶ The result was that both parties, who were intricately tied to Oklahoma, could be considered diverse.¹⁵⁷ Although the guardian in *Rishell* likely moved her ward for better medical treatment, she was able to manufacture diversity jurisdiction in the process.

The Fifth Circuit in *Acridge* cited to a similar case, *Dakuras*, with approval.¹⁵⁸ In *Dakuras*, the Seventh Circuit held that a guardian may change the domicile of an incompetent ward.¹⁵⁹ This holding would have allowed the plaintiff, who lived in Illinois with the incom-

146. See also *supra* notes 30–34 and accompanying text.

147. Joseph, *supra* note 143, at B9; FRIEDENTHAL ET AL., *supra* note 63, at 32; see also *supra* notes 55–61 and accompanying text.

148. Hormel, *supra* note 32, at 541 (emphasis added).

149. See *supra* text accompanying notes 46–49.

150. Lester v. McFaddon, 415 F.2d 1101, 1104 (4th Cir. 1969).

151. 134 CONG. REC. S31,055 (daily ed. Oct. 14, 1988).

152. *Id.*; see *supra* text accompanying notes 55–61.

153. See *Dakuras v. Edwards*, 312 F.3d 256 (7th Cir. 2002); *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171 (10th Cir. 1993).

154. *Rishell*, 12 F.3d at 173.

155. See *supra* text accompanying notes 68–72.

156. *Rishell*, 12 F.3d at 173.

157. *Id.* at 174–75.

158. *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 450 (5th Cir. 2003) (citing *Dakuras*, 312 F.3d at 256).

159. *Dakuras*, 312 F.3d at 258.

petent defendant, to be considered diverse from the defendant when the guardian moved the incompetent to Ohio.¹⁶⁰ The effect of this holding is that both parties, who were living in the same home in Illinois “in a simulacrum of marriage” until the incompetence occurred, could be considered diverse for jurisdictional purposes.¹⁶¹ Interestingly, the Seventh Circuit later admitted that “[t]he idea of trundling an incompetent from state to state in search of procedural advantages is distasteful.”¹⁶²

As with the *Rishell* and *Dakuras* decisions cited by the Fifth Circuit in *Acridge*, the same problems are apparent in the holding in *McEachron v. Glans*.¹⁶³ In *McEachron*, the plaintiff operated an auto business in New York, raised four children in the state, and all but briefly resided in the same county when he became incompetent after an auto accident with the New York defendant.¹⁶⁴ Under the district court’s holding, the plaintiff could have been considered diverse when his guardian moved him to a care facility in Massachusetts, had there been the necessary intent to remain in the state.¹⁶⁵ Despite the plaintiff’s long history with New York, he would be considered a diverse party from the New York defendant.¹⁶⁶ Yet this case involved essentially a local dispute between two local parties.¹⁶⁷ Thus, the court’s holding opened the doors for local parties within its jurisdiction to create diversity by relocating their wards.

As seen in *Rishell*, *Dakuras*, and *McEachron*, the *Acridge* decision creates a holding that allows guardians to manufacture diversity jurisdiction.¹⁶⁸ This result contradicts the historical purpose of diversity since there is “little chance of bias within one’s own borders and only the opportunity to forum shop” when a party is allowed to manufacture diversity jurisdiction.¹⁶⁹ Indeed, the *Acridge* holding, which allows the manufacture of diversity in certain instances, does not serve any of the historical purposes of jurisdiction.¹⁷⁰

Additionally, allowing parties to manufacture diversity by moving their ward to a neighboring state does not assist Congress in its goal of reducing the instances of diversity jurisdiction.¹⁷¹ The codification of 28 U.S.C. § 1359, the purpose of the 1988 amendment, and Senator

160. See *supra* text accompanying notes 74-77.

161. *Dakuras*, 312 F.3d at 257.

162. *Bethesda Lutheran Homes & Servs., Inc. v. Leraan*, 122 F.3d 443, 449 (7th Cir. 1997).

163. *McEachron v. Glans*, 983 F. Supp. 330, 334 (N.D.N.Y. 1997).

164. See *supra* text accompanying notes 79-81.

165. See *supra* text accompanying notes 79-81.

166. See *McEachron*, 983 F. Supp. at 334.

167. See *id.*

168. *Acridge v. Evangelical Lutheran Good Samaritan Soc’y*, 334 F.3d 444, 450 (5th Cir. 2003).

169. See Grissom, *supra* note 32, at 387.

170. TEPLY & WHITTEN, *supra* note 29, at 638.

171. See Hormel, *supra* note 32, at 541.

Heflin's concerns about manufacturing diversity for federal jurisdiction led to the conclusion that allowing a guardian to manufacture diversity by changing an incompetent person's domicile is contrary to the intent of Congress.

Rather, in keeping with the intent of Congress to limit the manufacture of diversity, the courts should implement a per se rule against allowing a guardian to determine the domicile for diversity purposes of his ward.¹⁷² The Fourth Circuit affirmed this rule with successful results in *Long v. Sasser*.¹⁷³ In *Long*, the Fourth Circuit held that an incompetent person's domicile cannot change unless he regains capacity.¹⁷⁴ Otherwise, a guardian could manufacture diversity by crossing state lines with her ward.¹⁷⁵ This would not settle with the purpose of diversity—fear of local bias against out of state parties.¹⁷⁶ Indeed, the court noted that the case involved “essentially a local dispute,” as the plaintiff was a long time resident of South Carolina until his guardian moved him, and the defendants were South Carolina doctors.¹⁷⁷ Therefore, the court reasoned that essentially local parties could receive a fair hearing before a local court.¹⁷⁸

In affirming the per se rule against change of domicile for the mentally incompetent, the Fourth Circuit followed Congress' intent in limiting the manufacture and volume of diversity cases.¹⁷⁹ This holding fosters the “sounder policy” that Senator Heflin advocated in the 1988 amendment to 28 U.S.C. § 1332(c).¹⁸⁰

By rejecting a per se rule that a guardian cannot determine for diversity purposes the domicile of his ward, the Fifth Circuit missed an ideal opportunity in *Acridge* to limit the manufacturing of diversity. Instead, the holding provides an opportunity for plaintiffs to go “trundling an incompetent from state to state” to manufacture diversity.¹⁸¹ As the result in *Long* reveals, a per se rule respects Congress' goal in reducing instances of diversity jurisdiction and preserves diversity for its intended purposes.

3. Legitimate Diversity Prevented

The most disturbing impact of allowing a guardian to determine the domicile of her ward is that it closes federal jurisdiction to legiti-

172. See, e.g., *Foster v. Carlin*, 200 F.2d 943, 946 (4th Cir. 1952).

173. See generally 91 F.3d 645 (1996).

174. *Id.* at 647.

175. See, e.g., *Dakuras v. Edwards*, 312 F.3d 256, 258 (7th Cir. 2002); *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171, 173 (10th Cir. 1993).

176. See *Long*, 91 F.3d at 648.

177. *Id.*

178. *Id.*

179. See 28 U.S.C. § 1359 (2000).

180. See *supra* text accompanying note 60.

181. See *Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 122 F.3d 443, 449 (7th Cir. 1997).

mate diversity cases, as can be seen in *Acridge*.¹⁸² Louis Acridge had lived in New Mexico for twenty-nine years, intending to live there permanently.¹⁸³ Unfortunately, Alzheimer's disease interrupted his plans when it stole his competency and compelled his wife to move him to Texas for better medical care.¹⁸⁴ He lived in Texas for two years before his death, completely unaware of his surroundings and still believing he lived in New Mexico.¹⁸⁵ Under the court's holding, Louis was a domiciliary of Texas, and as most of the defendants also were domiciled there, diversity jurisdiction did not exist.¹⁸⁶

The facts in *Acridge* closely pattern the historical justification for diversity jurisdiction—to prevent any “home-town biases that would impede the fair and impartial administration of justice when parties from different states meet in state court.”¹⁸⁷ In fact, *Acridge* exemplifies when diversity jurisdiction is most needed since Louis was essentially not from the forum state.¹⁸⁸ He was not a local resident of Texas, was completely unaware of the few years that he lived there, and intended to live in New Mexico where he had virtually all of his community and family ties.¹⁸⁹ The Center, however, had been in operation in Texas since 1978,¹⁹⁰ presumably employing many of the citizens of Farwell, Texas. The plaintiffs had a strong argument that the defendants in *Acridge* had the home-town advantage and because of this, diversity's purpose would have been fulfilled had jurisdiction been granted.¹⁹¹

If the Fifth Circuit had followed *Long* by adopting the per se rule that an incompetent's domicile cannot be changed, Louis would have remained a domiciliary of New Mexico despite his move to Texas. This result would recognize Louis' long-established ties to his home state. Thus, the per se rule, which provides an opportunity for diversity jurisdiction in cases where genuine diversity exists, reflects the historical justification for protecting against prejudice and local bias.¹⁹² Moreover, the protections of lifetime tenure and guaranteed salary

182. See *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 450 (5th Cir. 2003).

183. Brief for Appellees at 7-8, *Acridge* (No. 02-10642).

184. See *Acridge*, 334 F.3d at 446.

185. Brief for Appellants at 50, *Acridge* (No. 02-10642); Brief for Appellees at 8, 10, *Acridge* (No. 02-10642).

186. See *Acridge*, 334 F.3d at 453.

187. Grissom, *supra* note 32, at 374.

188. See *Acridge*, 334 F.3d at 446-47.

189. See *id.*; Brief for Appellees at 60, *Acridge* (No. 02-10642).

190. *Farwell Convalescent Center Retirement Homes*, at http://www.retirementhomes.com/North_America/USA/Texas/Farwell/Retirement_Homes/Independent_living/Farwell_Convalescent_Center.htm (last visited Jan. 30, 2004).

191. Cf. *Appointment of Non-Resident Administrators to Create Federal Diversity Jurisdiction*, *supra* note 145, at 879 (stating that diversity is justified if a person severs ties with a former state and becomes a citizen of a new state).

192. See *Abolition of Diversity of Citizenship Jurisdiction*, H.R. REP. NO. 95-893, at 2 (1978).

that are afforded federal judges might have insulated the plaintiffs in *Acridge* from any potential local bias or favor that existed.¹⁹³

Unfortunately, the Fifth Circuit's holding in *Acridge* stripped the protections of federal jurisdiction from parties that were truly diverse in all but physical residence. The holding effectively closed the courtroom doors to deserving parties. A per se rule that a guardian cannot change his ward's domicile would prevent these results from occurring. Thus, the United States Supreme Court should adopt the per se rule to ensure that truly diverse parties have their day in federal court.

V. CONCLUSION

As achievements in science and health increase Americans' life spans, instances of incapacitating diseases common to older people will also increase.¹⁹⁴ Therefore, a guardian of an incompetent will increasingly move a ward across state lines for better treatment facilities or convenient care.¹⁹⁵ The impact of this relocation will greatly affect domicile in determining diversity for federal subject matter jurisdiction.¹⁹⁶

The Fifth Circuit's holding in *Acridge* is disturbing precedent on three fronts. First, allowing a guardian to determine the domicile of her ward upsets certainty in the law of domicile. It will require added work on already overloaded federal courts, which now must determine best interests while looking at a "mosaic of circumstances" before they can determine whether they even have subject matter jurisdiction to hear the case.¹⁹⁷ Second, a guardian of an incompetent person now may manufacture diversity by moving the ward to a neighboring state for the purpose of getting into federal courts. Finally, the federal courthouse doors have been closed to genuinely diverse parties who are now deprived of the protection that diversity jurisdiction is intended to provide.

The United States Supreme Court should address the current split in the circuits on this issue. The Court should adopt a per se rule that the domicile for diversity purposes of incompetent persons cannot be changed by their guardian. Proponents of the Fifth Circuit's view argue that denying a guardian the ability to move his ward to a different state where better treatment is available is distasteful.¹⁹⁸ However, opponents of the holding do not advocate that a guardian

193. See Marsh, *supra* note 34, at 210.

194. See *supra* text accompanying notes 1-3.

195. See *supra* text accompanying notes 4-5.

196. See *supra* text accompanying note 6.

197. See *McEachron v. Glans*, 983 F. Supp. 330, 334 (N.D.N.Y. 1997).

198. *Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 122 F.3d 443, 449 (7th Cir. 1997); see also *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 12 F.3d 171, 174 (10th Cir. 1993).

should not be allowed to physically relocate the ward, but rather that the ward's domicile should remain where the competency was lost.¹⁹⁹

As with any per se rule, unique situations will arise that yield undesired results.²⁰⁰ However, rare occurrences must not overshadow this rule that enables certainty in the realm of civil procedure, follows Congress' intent in limiting the manufacture of diversity, and allows genuinely diverse cases to have their day in federal court. Through this rule, the courts will be fully prepared to confront the challenges facing diversity jurisdiction as America ages.

199. See TEPLY & WHITTEN, *supra* note 29, at 638.

200. For example, suppose a husband permanently moves with his incompetent wife to a different state. They are both injured in a car accident by a citizen of the new state. Under the proposed per se rule, the husband's domicile would have changed to the new state, while the incompetent woman's domicile remained where she lost her competency. Thus, the undesired result is that the husband is unable to sue in federal court, while his wife may.