ADEQUACY OF MENTAL EXAMINATION IN GUARDIANSHIP PROCEEDINGS

IN THE MATTER OF THE GUARDIANSHIP OF WALTER S. TYRRELL, ALLEGED INCOMPETENT
92 Ohio L. Abs. 253 (1962)

Application was made for appointment of a guardian of the estate and the person of the alleged incompetent on the grounds that he was an incompetent by reason of advanced age, improvidence, mental and physical disability and infirmity.[1] The Probate Court of Preble County found the alleged incompetent, an eighty-five year old man, incompetent by reason of mental illness, and appointed the applicant, a sister, guardian of both the estate and the person.

The probate court relied in part on testimony of two doctors produced by applicant who were permitted to examine the alleged incompetent for fifteen minutes in the jury room. Their testimony, to the effect that there was a need for a guardian because of undue influence, was admittedly based in part on information given them by counsel for the applicant. The court in its decision commented, "It is indeed unfortunate that the medical examiners had a limited time in which to examine the patient."[2] Testimony by the doctor who had attended the alleged incompetent during his tenure at a particular rest home, a period of two years, to the effect that the man was mentally competent is not mentioned in the decision.

The court noted that there was testimony that the alleged incompetent still had good business ability as indicated by transactions in which he had recently contracted for his care for the duration of his life at the rest home, paid for his funeral expenses, purchased a headstone for his and his dead wife's graves, and purchased a ring of some value. But the court observed that the alleged incompetent had apparently given away sums of money without receiving value therefor, especially approximately 2000 dollars to an employee of the rest home. The court also noted:

> With respect to the present status of the individual the Court observed the following: that his smile at times is not normal; his eyes do not focus properly at all times; his gait and reflexes are not normal; and that he is not laying his cane aside, but is dropping it.

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[1] Ohio Rev. Code § 2111.01(D) (Page Supp. 1963) defines incompetent as follows: "'Incompetent' means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental deficiency, lunacy, or mental illness, is incapable of taking proper care of himself or his property. . . ."

Prior to the 1961 amendment, the wording was substantially the same except that mental illness was not in the statutory definition.

[2] *In re* Guardianship Tyrrell, 92 Ohio L. Abs. 253, 254 (1962).

> These are indications of the lessening of the gentleman's mental capacities. Just what has caused this is not known to the Court. Perhaps there has been arteriosclerosis or cerebral accident. In any event, there has been a deterioration which would be called mental illness.[3]

Attempts by applicant to call the alleged incompetent to the witness stand were successfully objected to and the court did not personally interview the alleged incompetent although his counsel requested such an interview.

On appeal, the Court of Appeals for Preble County affirmed the judgment,[4] finding no reversible error in the admission of certain evidence, and applying the rule laid down in *In re Guardianship of Wilson*[5] as to weight of evidence:

> The appointment of a guardian for an incompetent is a matter which lies within the sound discretion of the Probate Court, and the judgment of that court must be affirmed by the appellate court unless it is manifestly against the weight of the evidence.

A motion to certify the judgment as being in conflict with other judgments was overruled.[6] The Supreme Court of Ohio found no debatable constitutional question.[7]

While it may be conceded that a probate court must of necessity be granted great discretion in its dealing with incompetents, that discretion should not be permitted to carry over into the area of determining incompetency. Here the probate court took as the test of incompetency the one prescribed in the *Wilson* case, quoting:

> That the court, before appointing a guardian for an alleged incompetent, should be fully and completely satisfied that the claimed infirmity or infirmities of the alleged incompetent are of such a nature and character as to prevent such person from fully and completely protecting herself and property interests from those about her who would be inclined to and would take advantage of such person in the way of securing her property or means without giving proper service or value therefore.[8]

The court in the instant case quotes no further, but the next sentence in the *Wilson* case is enlightening:

> In other words, it should be found to be to the interest of the person claimed to be incompetent to have such guardianship, and

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[3] *Id.* at 256.

[4] In the Matter of the Guardianship of Walter S. Tyrrell, Alleged Incompetent, Court of Appeals, Preble County, Ohio, No. 142, October 31, 1962.

[5] 23 Ohio App. 390, 155 N.E. 654 (1927).

[6] In the Matter of the Guardianship of Walter S. Tyrrell, Alleged Incompetent, Court of Appeals, Preble County, Ohio, No. 142, January 3, 1963.

[7] 174 Ohio St. 552, 190 N.E.2d 687 (1963).

[8] *In re* Guardianship of Wilson, 23 Ohio App. 390, 155 N.E. 654 (1927).

> if such condition is found, a court should have no hesitancy in promptly appointing a guardian to look after the property and interests of such person.[9]

It would therefore seem that the thrust of the test prescribed by the *Wilson* case goes not to the question of incompetency but rather to the question of whether a guardianship is desirable.[10]

The probate court found the elderly man incompetent because of mental illness without having heard him speak and with very limited medical examination and subsequent testimony of questionable weight, directed not to the mental condition but to the desirability of a guardianship. In its opinion the Court of Appeals for Preble County stated:

> It was the province of the Probate Court to evaluate the conflicting evidence, to penetrate the heavy atmosphere of emotional antagonism which so often attends such cases, and to determine the facts and exercise a sound discretion in arriving at a conclusion in the best interests of the alleged incompetent.[11]

If the court means to imply by such language that the determination of incompetency is a matter of discretion, it leaves far too much to the probate court. If the court does not intend this implication, then the language of the *Wilson* case pertaining to the role of the appeals court should be reappraised and the court of appeals should have no hesitancy in requiring the probate court to take another look, and insure an adequate basis for determining the issue of incompetency before moving on to the issue of the desirability of a guardianship.

In this case the probate court followed the usual procedure and appointed applicant guardian of both the estate and the person of the ward. The immediate effect of such a guardianship is the loss of many of the ward's guaranteed constitutional freedoms, usually on the theory that such losses are necessary for the ultimate welfare of the ward. The ward is placed under the custody of another person and loses the right to control his personal actions:[12] the guardian has the right to determine where the ward shall live; where he shall go. The ward loses the right to control and use his property as he sees fit. He is considered to be under a legal disability in the eyes of the courts.[13]

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[9] *Ibid.*

[10] In Weihofen, "The Definition of Mental Illness," 21 Ohio St. L.J. 1, 15 (1960), the problem of mental illness is summarized as follows:

> In every situation in which the law allows mental illness to have some legal effect, the issue actually has two parts: (a) Was the person at the time in question mentally ill, (b) If so was his mental illness of such a degree or scope as to satisfy the legal criterion for that kind of situation.

[11] *Supra* note 4, at 6.

[12] Ohio Rev. Code § 2111.13 (1953) reads: "When a guardian is appointed to have the custody and maintenance of a ward . . . his duties are: (A) To protect and control the person of his ward. . . ."

[13] Ohio Rev. Code § 2131.03 (1953). A person under legal disability is, of course, protected against the running of statutes of limitation.

In light of the impact upon a person's rights, a declaration of incompetency because of mental illness and the appointment of a guardian raise the question of due process in guardianship proceedings just as strongly as would criminal or commitment proceedings. Although the Ohio Supreme Court found no debatable constitutional question, it would seem that a finding of incompetency based on mental illness, considering the quality and quantity of evidence presented in the instant case as to the alleged incompetent's mental condition, raises a real question as to whether there really was due process or merely a process of going through the procedural formalities.[14]

The effects of a commitment proceeding are much the same as those previously mentioned relating to guardianship proceedings. There is the loss of control of property, the remanding to the custody of another (in this case the head of the admitting hospital) and the legal disability.

The problem of due process in commitment proceedings has been subjected to increasing scrutiny in recent years, and in Ohio has led to the enactment of new statutes pertaining to commitment proceedings.[15] The procedures are defined carefully by these statutes and leave little to the discretion of the court. Once the affidavit is filed, usually accompanied by a doctor's certificate, the court is required to give notice of hearing to the individual, his legal guardian, his spouse, the person filing the affidavit, and anyone else the court thinks should have notice of the hearing.[16] The court is permitted to exercise discretion as to whether or not it wishes to order investigation by a social worker or some like person.[17]

The court may require a medical examination before the hearing and must require it if a medical certificate has not been filed, although hospital records may be substituted if the individual is in the hospital at the time of the hearing.[18] The statute requires the examination to be at a hospital or other medical facility, at the home of the person named in the affidavit or any other suitable place not likely to have a harmful effect on his health.[19]

Although the hearing is somewhat informal, the person must be notified of his right to secure counsel, and the court may appoint at any time in the proceedings an attorney to represent the person named.[20]

In contrast, in guardianship proceedings, after the application is filed, the court is merely required to give notice of the hearing by personal

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[14] For a discussion of a situation where the formalities were followed without apparent content in the area of commitment proceedings, see Kutner, "The Illusion of Due Process in Commitment Proceedings," 57 Nw. U.L. Rev. 383 (1962).

[15] See Haines & Meyers, "Hospitalization and Treatment of the Mentally Ill: Ohio's New Mental Health Law," 22 Ohio St. L.J. 659 (1961), and Kittrie, "Compulsory Mental Treatment and the Requirements of Due Process," 21 Ohio St. L.J. 28 (1960).

[16] Ohio Rev. Code § 5122.12 (Page Supp. 1963).

[17] Ohio Rev. Code § 5122.13 (Page Supp. 1963).

[18] Ohio Rev. Code § 5122.14 (Page Supp. 1963).

[19] Ohio Rev. Code § 5122.14 (Page Supp. 1963).

[20] Ohio Rev. Code § 5122.15 (Page Supp. 1963).

service upon the person named and upon the next of kin residing in the county in which application was made.[21]

The broader discretion implied in guardianship proceedings may in part be traced to the broader definition of what constitutes incompetency, found in Ohio Rev. Code section 2111.01(D). Since the issues are broader, more discretion in procedure may be necessary to adequately develop them. When, however, the court bases the finding of incompetency upon a determination of mental illness, it would seem that a procedure should be followed analagous to the procedure of involuntary commitment proceedings in the determination of mental illness, even though the United States Supreme Court has not held such a procedure essential to due process. This procedure would include adequate medical examination in a place not likely to have a harmful effect upon the health of the alleged incompetent.[22]

In the instant case, the fifteen-minute medical examination by two physicians provided by the applicant in a jury room cannot be defined as an adequate examination. It would also be more consistent with sound procedure for the court to have accepted counsel's offer to allow the court to question the alleged incompetent.

Another reason for requiring the courts to exercise caution in the appointment of a guardian of the estate and person grows directly from the new commitment statutes. Ohio has adopted a procedure for involuntary commitment which is designed to meet the needs of medical and legal protection.[23] This process includes the right to a hearing if demanded in writing,[24] and the requirement, except in certain emergency situations, of a doctor's certificate.[25] Further, the alleged mentally ill person must be mentally ill in accordance with a somewhat restricted definition found in Ohio Rev. Code section 5122.01(B).[26]

The voluntary commitment provisions,[27] however, bypass most of these safeguards,[28] and further provide that the guardian of an incompe-

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21 Ohio Rev. Code § 2111.04 (Page Supp. 1963).

22 There are some indications that a probate court cannot appoint physicians provided by one of the parties as physicians for the court. See *In re Joyce,* 32 Ohio L. Abs. 553(1940). Since the two physicians in the instant case were supplied by the applicant, the examination would have to be done by some other physician or psychiatrist.

23 See Ohio Rev. Code §§ 5122.06-.38 (Page Supp. 1963).

24 See Ohio Rev. Code §§ 5122.06, 5122.11 (Page Supp. 1963).

25 See Ohio Rev. Code §§ 5122.06, 5122.10 (Page Supp. 1963).

26 Ohio Rev. Code § 5122.01(B) (Page Supp. 1963) provides: "Mentally ill individual subject to hospitalization by court order' means a mentally ill individual, who, because of his illness, is likely to injure himself or others if allowed to remain at liberty, or is in need of care or treatment in a mental hospital, and because of his illness lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization."

27 See Ohio Rev. Code §§ 5122.02, 5122.03 (Page Supp. 1963).

28 Ohio Rev. Code § 5122.02 (Page Supp. 1963) merely provides that upon application the person shall be admitted subject to availability of suitable accomodations. There is no provision for doctor's certificates or hearing.

tent may make application for his ward.[29] Further, the much broader definition of mental illness found in Ohio Rev. Code section 5122.01(A) is applicable in the case of voluntary admissions.[30] Combining the much more informal procedure of voluntary commitment with a laxity on the part of the courts in their requirements of proof of mental illness in determining incompetency leads to a means of effectively by-passing the procedural safeguards of involuntary commitment statutes.[31]

Thus it would seem possible for an applicant to have a party declared incompetent on the basis of mental illness with a minimum of proof, then to have the party "voluntarily" committed, even though his condition was such that it would have been impossible for the applicant to have the "incompetent" involuntarily committed. The statutes are such that once the "incompetent" had been made a ward by the probate court, he would be hard pressed to find a way to protest such commitment effectively.[32]

The application in the instant case was apparently aimed at preserving what remained of the alleged incompetent's estate (some ten to twelve thousand dollars worth of bank stock); there seems little question but that he had adequately seen to his physical needs. The court could have accomplished the aims of the application by appointing a guardian of the estate alone, and not of the person. This would, at least, have lessened the empact of the guardianship on Tyrell's personal freedom: he would not have been under the control of the guardian, except to the extent that the guardian's control of the estate limited his personal freedom by limiting the amount of money available to him.

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[29] Ohio Rev. Code § 5122.02 (Page Supp. 1963) reads: "Any person, eighteen years of age or over who is, appears to be, or believes himself to be mentally ill may make written application to the head of a private hospital or a public hospital. . . . Such application may also be made . . . on behalf of an adult incompetent by the guardian or the one having custody of the incompetent."

A question arises whether a guardian of the estate alone could utilize these provisions. It would seem possible to construe the statute as meaning a party charged with the care only, *i.e.* the guardian of the person, not the guardian of the estate. The statute does not, however, specify guardian of the person.

[30] Ohio Rev. Code § 5122.01(A) (Page Supp. 1963) reads: "'Mentally ill individual' means an individual having an illness which substantially impairs the capacity of the person to use self control, judgment and discretion in the conduct of his affairs and social relations, and includes 'lunacy,' 'unsoundness of mind,' 'insanity,' . . ."

[31] It has been suggested that commitment proceedings by a guardian should be considered a separate form of admission apart from the voluntary proceedings. See Ross, "Commitment of the Mentally Ill: Problems of Law and Policy," 57 Mich. L. Rev. 945, 953 (1959).

[32] Ohio Rev. Code § 5122.30 (Page Supp. 1963) provides that the remedy of habeas corpus is available for anyone detained under chapter 5122. Thus the voluntary proceedings come under this provision. The effectiveness of the possible remedy of a ward committed by a guardian is open to question since the courts have held that a writ of habeas corpus is not available as a means of collateral attack on a guardianship. See *In re Clendenning,* 145 Ohio St. 82, 60 N.E.2d 676 (1945).

Walter S. Tyrrell may have been an incompetent person, especially in light of his improvidence in giving away sums of money without receiving value therefore, and the court's decision, at least as to the appointment of a guardian of the estate, may be correct in the ultimate sense. The basis of the decision, the finding of mental illness and the procedures by which that determination was made, are certainly open to challenge.

Since the effects of a guardianship are so similar to those of a commitment, the courts should take a similar attitude with regard to such proceedings and require an adequate basis for the determination of incompetency. Although the provisions in the involuntary commitment statutes do not apply directly to a guardianship proceeding, they would provide guidelines to be followed in the guardianship proceeding to insure the alleged incompetent receives the fair treatment the due process to which he is entitled.