IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1994 Term

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No. 22008

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STATE OF WEST VIRGINIA, EX REL. TOM SHAMBLIN,
Petitioner,

v.

EMILY G. COLLIER AND THE COUNTY COMMISSION
OF JACKSON COUNTY, A CORPORATION
Respondents

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Writ of Habeas Corpus

WRIT GRANTED AS MOULDED

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Submitted: January 11, 1994
Filed: ____

Daniel F. Hedges
Charleston, West Virginia
Counsel for Petitioner

Leah Taylor
Assistant Prosecuting Attorney
for Jackson County
Ripley, West Virginia
Counsel for Jackson County Commission

JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS

1. Because a finding of incompetency involves deprivation of an individual's exercise of liberty and property rights, a determination of incompetency under West Virginia Code § 27-11-1 (1992) cannot be summarily made; such finding must be reached through clear and convincing evidence.

2. The statutory requirements for making a determination of incompetency pursuant to West Virginia Code § 27-11-1 (1992) are not met simply by a showing of advanced age and past physical problems.

Workman, Justice:

Petitioner, Tom Shamblin, invokes the original jurisdiction of this Court seeking a writ of habeas corpus to dissolve the committee appointment of Petitioner's daughter, Emily G. Collier, following a determination of his incompetency by the Jackson County Commission ("Commission"). He also challenges the limited legal representation provided for incompetents by appointed guardian ad litems. Having reviewed this matter, we remand this case to the Jackson County Circuit Court for additional proceedings for the purpose of determining whether Petitioner is actually incompetent within the meaning of West Virginia Code § 27-11-1 (1992).

See supra, notes 12 and 13.

West Virginia Code § 27-11-1(d) provides, in pertinent part, that:

> the county commission may find that (1) the individual is unable to manage his or her business affairs, or (2) the individual is unable to care for his or her physical well-being, or (3) both, and is therefore incompetent, or (4) that the individual is competent.

Petitioner is eighty-five years old and submits that he is alert, rational, and competent to handle his own affairs. On October 13, 1992, Emily Collier filed a form "petition for hearing on competency" seeking to have her father declared incompetent. The only reasons cited by Ms. Collier in her petition as grounds for a determination of incompetency were: "Mr. Shamblin is 84 years of age. His health has deteriorated with age. He has breathing problems and is very susceptible to pneumonia."

A copy of the "notice of petition" was served on Petitioner in person at his then-current address on October 22, 1992, by a sheriff's deputy. Additionally, a copy of the notice was served on Petitioner's son, Darrell Shamblin, by certified mail and was signed for by him on October 24, 1992. Petitioner does not read and claims to have been unaware of the incompetency proceeding. Kennad L. Skeen was appointed as guardian ad litem for Petitioner sometime in October or November 1992.

The hearing on Ms. Collier's petition was held before the Commission on November 10, 1992. Petitioner was not present at the hearing. Ms. Collier was the only relative of Petitioner who attended the hearing. After what appears to have been a proceeding

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In an affidavit submitted as a part of the record of this case, Mr. Skeen stated that he is "appointed as guardian-ad-litem in most of the committeeship proceedings before the County Commission of Jackson County."

limited in both duration and scope, the Commission entered an order finding Petitioner to be incompetent and appointing Ms. Collier as committee for Mr. Shamblin.

In his petition, Mr. Shamblin raises numerous issues, both substantive and procedural, regarding his competency proceeding and competency proceedings in general. Additionally, Petitioner raises serious concerns regarding the perfunctory representation provided by guardians appointed to represent individuals who are the subjects of these proceedings.

With specific reference to his case, Petitioner argues that the termination of his substantial rights and the unnecessary restriction on his personal freedom based merely on advanced age and a past physical illness violates his right to liberty as guaranteed by Article III, Section 10 of the West Virginia Constitution. Furthermore, he contends that a proceeding such as that which occurred in his case which does not set forth facts demonstrating incompetency violates the intent of West Virginia Code § 27-11-1(d) as well as the due process rights afforded individuals under the state constitution.

The perceived perfunctoriness of the proceeding is further supported by the transcriber's note just prior to the finding of incompetency, "[t]he statement of findings, from here on, is spoken rapidly and sounds as if it were being read." (emphasis in original).

The transcript from the incompetency hearing reveals that the evidence presented before the Commission and upon which the finding of competency was made was minimal, at best. Mr. Skeen, the guardian ad litem, testified, based on one visit with Petitioner, that Mr. Shamblin knew his age, his children's names, and the name of the President of the United States. Mr. Skeen further testified that Petitioner was unable to name the lady that was providing care to him in a group home and that he had some difficulty identifying the correct date, although he did know what year it was. Mr. Skeen focused on the fact that Petitioner had what he described as either a nervous disorder or obsessive-compulsive behavior based on a scratching problem. Mr. Skeen concluded, somewhat summarily, that based on Petitioner's advanced age, his inability to read and write, and his weight of ninety-four pounds, he was necessarily unable to manage his affairs.

Petitioner's daughter provided the only other testimony regarding her father's condition. Ms. Collier offered the fact that her father had on occasion given her children $50 or $100 at a time when he lived on a fixed income of $890 per month, as an indication that he was unable to manage his affairs. The primary concern which surfaced from her testimony, however, was the perceived escalating

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Petitioner was ultimately diagnosed with a dry-skin disorder which is reportedly now under control.

costs of providing care for her father. Ms. Collier offered no testimony whatsoever regarding her father's current physical condition. The record contains one reference to the fact that Petitioner had a past case of pneumonia and that he required oxygen at some point, but there was no indication that this was a continuing need.

The only other evidence submitted was a physician's affidavit, signed by a treating physician of Petitioner, Dr. Casto. The affidavit consisted of three checked boxes on a form, and conclusorily stated that Petitioner was unable to manage his business affairs, unable to care for his own physical well-being, and unable to attend the hearing. No reason was ever offered as to why Petitioner was unable to attend the hearing. He, of course, claims to have been unaware of the hearing until after its occurrence.

To reach a determination of incompetency under the statute, the Commission is required to find both that an individual is unable to manage his business affairs and unable to care for his physical

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Ms. Collier testified that in the past month she had spent $250 of her own money on prescriptions for her father. She noted that, "I can't do this every month, you know. And then, besides, he's not even on very much medication right now. If it accelerates, we could really be in trouble."

The record indicates, however, that he was personally served with notice of the petition by a sheriff's duty on October 22, 1992. The notice stated the date and time of the hearing.

well-being. W. Va. Code § 27-11-1(d), supra note 1. These terms are defined as follows:

> 'Unable to manage one's business affairs' means the inability to know and appreciate the nature and effect of his or her business transactions, notwithstanding the fact that he or she may display poor judgment.
>
> 'Unable to care for one's physical well-being' means the substantial risk of physical harm to himself or herself as evidenced by conduct demonstrating that he or she is dangerous to himself or herself, notwith-standing the fact that he or she may display poor judgment.

W. Va. Code § 27-11-1(d).

It is axiomatic that a declaration of incompetency and the resulting appointment of a committee, guardian, or conservator to oversee an individual's affairs may affect constitutionally-guaranteed liberty interests:

> One of the historic liberties which is protected by the due process clauses . . . is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. Appointment of a guardian results in a massive curtailment of liberty, and it may also engender adverse social consequences. The guardian becomes the custodian of the person, estate and business affairs of the ward; the guardian dictates the ward's residence; the ward's freedom to travel is curtailed; and the ward's legal relationship with other persons is limited.

In re Guardianship of Deere, 708 P.2d 1123, 1125-26 (Okla. 1985) (footnotes omitted); see also O'Connor V. Donaldson, 422 U.S. 563 (1975) (recognizing substantial restraint on incompetent's personal

freedom); Fla. Stat. Ann. § 744.1012 (West Supp. 1993) (recognizing as the legislative intent of the Florida Guardianship Law "that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all his civil and legal rights"). In view of the serious limitations on an individual's exercise of his constitutional rights which accompany a declaration of incompetency, Petitioner argues that the proffered justifications for the appointment of a committee must be strictly scrutinized. Petitioner contends that if the individual is sufficiently competent to manage on his own, the state has no legitimate purpose in curtailing the citizen's liberty and additionally, that the least restrictive alternative must be utilized.

In this case, it can hardly be argued that the Commission was presented with sufficient evidence of incompetency to warrant its finding against Petitioner. At best, testimony was offered suggesting that Petitioner demonstrated poor judgment in giving his

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Petitioner submits that there is a constitutional mandate which requires use of the least restrictive alternative when incursions upon individual liberty interests are involved. See Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267-70 (1974) (right to travel); O'Brien v. Skinner, 414 U.S. 524, 533-35 (1974) (Marshall, J., concurring) (right to vote); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 642-49 (1974) (right to procreate); Carrington v. Rash, 380 U.S. 89, 95-97 (1965) (right to vote); West Virginia Citizens Action Group, Inc. v. Daley, 174 W. Va. 299, 306-07, 324 S.E.2d 713, 721 (1984) (door-to-door canvassing and solicitation).

grandchildren larger amounts of his money than he could afford and that he had experienced prior health problems with some resulting weight loss. Regarding the large increments of the gifts to his grandchildren, the statute clearly provides that: "Evidence of mere poor judgment or of different life style shall not be competent evidence upon which to base a finding of incompetency." W. Va. Code § 27-11-1(d).

As far as the physical basis for a determination of incompetency, the statute requires that "No appointment of a committee shall be made on evidence which is uncorroborated by the testimony of a medical expert or by a certified statement upon affidavit as hereinafter provided." W. Va. Code § 27-11-1(e). That provision further provides that:

> Any physician duly licensed to practice medicine in this state or any state contiguous to this state who is currently treating the individual alleged to be incompetent may file with the county commission his or her certified statement upon affidavit stating that he or she is currently treating the individual and setting forth his or her opinion of the individual's ability to manage his or her business affairs and care for his or her physical well-being, and stating in detail the grounds for the opinion.

Id. (emphasis supplied). In this case, the treating physician was not at the hearing and the only evidence submitted from this physician was a form document which provided no details to support his

conclusions regarding Petitioner's inability to manage his affairs, take care of his physical well-being, or his inability to attend the hearing. Surely, the intention of the Legislature was to require more than a form with three checked boxes to support a determination of an individual's incompetency.

Moreover, a past physical ailment or general infirmity cannot be the sole basis for a finding of incompetency. As discussed in In re Estate of McPeak, 53 Ill. App. 3d 133, 368 N.E.2d 957 (1977),

> In the case at bar, the petitioner's evidence merely established the respondent's weakening of vigor, skill and acuity which is a normal concomitant to advanced years. That respondent also suffered from a heart ailment and a shortness of breath is undisputed by her. However, to simply establish certain disabilities is alone insufficient to support the determination of incompetency, the evidence must also show the respondent's incapability of managing her person or estate. The record is barren of any such evidence. In this regard, the unsubstantiated opinions of petitioner's witnesses, that respondent was not capable of taking care of herself or her affairs, without any reasons given for such conclusions, will not support an adjudication of incompetency. . . . The capability to manage one's person does not resolve itself upon the question of whether the individual can accomplish tasks without assistance but rather whether the individual has the capability to take care and intelligently direct that all his needs are met through whatever device is reasonably available under the circumstances.

Id. at 136, 368 N.E.2d at 960 (citation omitted).

At the center of Petitioner's concerns is the issuance of a finding of incompetence by a county commission when in fact the individual is neither physically nor mentally incompetent. In the instant case, such an injustice may have occurred. A statement dated November 12, 1993, signed by two treating physicians at the Eldercare facility, states:

> Tom Shamblin is alert, oriented and has the capacity of making informed decisions. He is capable of caring for himself at home, with minimal assistance through home health services and community agencies, such as the Meals on Wheels program and Commission on Aging transportation service. He has stated numerous times over the past ten months that he wishes to return home, however his committee will not agree to this. This man is being kept in this facility against his will and could benefit from community services offered in his home, rather than at this facility.

In striking down an Oklahoma statute which permitted the appointment of a conservator whose function is similar to that of a committee, the court observed:

> If the only purpose of the statute is to allow a person who is, by reason of advanced age or physical incapacity, unable to manage his own property, to voluntarily apply to the court to have a conservator appointed, it is constitutional. <u>If a purpose of the statute is to allow involuntary intervention in the property affairs of citizens, absent a finding of mental incompetence, it is unconstitutional as it is a clear violation of the State and Federal Constitutional provisions which guarantee every citizen the right to life, liberty and property</u>.

In re Conservatorship of Goodman, 766 P.2d 1010, 1011-12 (Okla. Ct. App. 1988) (emphasis supplied).

Given the serious implications of an incompetency finding, it has been recognized that:

> The determination of incompetency would seem most inappropriate for summary disposition. 'This proceeding is one of utmost seriousness, involving, as it does, depriving one of the free and normal exercise and use of his personal conduct, liberty and property, and, in the very nature of things, great care should be taken to protect the alleged incompetent and to guard him against being deprived of such substantial and basic rights upon insufficient and unjustified grounds and to guard him against the schemes of designing individuals. Matter of Burke, [125 A.D. 889] 891, 110 N.Y.S. 1004.'

In re Von Bulow, 122 Misc. 2d 129, ___, 470 N.Y.S.2d 72, 73 (1983) (quoting In re Ginnel, 43 N.Y.S.2d 232, 235 (Sup. Ct. N.Y.Co. 1943)). We similarly conclude that because a finding of incompetency involves deprivation of an individual's exercise of liberty and property rights, a determination of incompetency under West Virginia Code § 27-11-1 cannot be summarily made; such a finding must be established through clear and convincing evidence. See In re Conservatorship of Edelman, 448 N.W.2d 542, 546 (Minn. Ct. App. 1989); In re Von Bulow, 122 Misc. 2d at ___, 470 N.Y.S.2d at 73-74 (1983); In re Forward, 86 A.D.2d 850, 447 N.Y.S.2d 286 (1982)

(standard for appointment of a conservator under New York law is clear and convincing proof).

Petitioner submits that age and physical infirmity alone are not sufficient grounds as a matter of constitutional due process to justify a finding of incompetency. Numerous tribunals have concluded that the combination of age and infirmity alone are insufficient from a constitutional standpoint to deprive an individual of his rights of freedom and liberty. See In re Estate of McPeak, 53 Ill. App. 3d at 136, 368 N.E.2d at 960 (appointment of conservator not justified by advanced age combined with physical problems); In re Estate of Wagner, 220 Neb. 32, ___, 367 N.W.2d 736, 739 (1985) ("'guardian should not be appointed . . . simply because . . . [person] is aged or infirm or because his mind is to some extent impaired by age or disease'") (quoting Cass v. Pence, 155 Neb. 792, 796-97, 54 N.W.2d 68, 73 (1952)). Likewise, we hold that the statutory requirements for making a determination of incompetency pursuant to West Virginia Code § 27-11-1 are not met simply by a showing of advanced age and past physical problems.

Petitioner attempts to broaden the relief at issue here by suggesting the need for statutory revision, arguing that effective

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He further contends that to the extent the statutory definition of "unable to care for one's physical well-being" does not require a finding of mental incompetency, the statute is overbroad and unconstitutional. W. Va. Code § 27-11-1(d).

representation is denied to an alleged incompetent under the current statutory scheme. This unconstitutional representation occurs, according to Petitioner, because the appointed attorney functions in a circumscribed role rather than as a zealous advocate representing the needs and desires of the individual. Petitioner submits that the Commission expects only that the guardian ad litem conduct a short interview with the individual who is the subject of the proceedings and then prepare a perfunctory report from such interview. Because of the limited duties expected of a guardian ad litem by the Commission, Petitioner maintains that Mr. Skeen did not: (1) contact caseworkers, relatives, and other persons who had knowledge of Mr. Shamblin; (2) conduct interviews of potential witnesses; (3) pursue discovery of evidence; (4) file motions for or seek independent psychological or medical examinations; (5) subpoena witnesses for the hearing; (6) prepare testimony or cross-examination of witnesses; (7) produce any evidence on Mr. Shamblin's behalf; (8) apprise the Commission of Mr. Shamblin's wishes; or (9) make any argument to limit the amount of intervention (i.e., less than a complete abrogation of Petitioner's rights).

Petitioner argues that in many cases a committee is needed only for property management and in other cases, only some limited supervision over the person is necessary.

As support for his position that counsel appointed to represent an alleged incompetent should have expanded duties, Petitioner cites this Court's recent decision in In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993), wherein we surveyed the duties of an attorney appointed to represent a child in an abuse and neglect proceeding and adopted guidelines for such representation. Petitioner submits that the very duties enumerated in that opinion such as client and witness interviewing, pursuing discovery, preparation of appropriate motions, monitoring the individual's situation, maintaining adequate records, subpoenaing witnesses, apprising the court of the individual's wishes, and informing the individual of his right to appeal, are all duties that should be required of an attorney appointed to represent an alleged incompetent. The guidelines announced in In re Jeffrey R.L., concerning the duties of a guardian ad litem, where adaptable, are equally applicable to guardian ad litem representation in cases other than abuse and neglect. See 190 W. Va. at ___, 435 S.E.2d at 178-80.

Because the guidelines adopted in In Re Jeffrey R.L. pertain specifically to abuse and neglect cases, there will be certain aspects of the guidelines which are inapplicable (e.g. contacting caseworker, interviewing the child, etc.) However, the guidelines as they pertain to preparation for and representation at hearings are extremely useful in delineating the expected role of counsel appointed to represent an alleged incompetent.

Although the Petitioner would have us believe that the statute at issue is in need of extensive revision on the issue of representation, we do not find this to be the case. The statute currently provides that an alleged incompetent "shall be accorded the right to subpoena witnesses, to be confronted with witnesses and the right to cross-examine witnesses. . . ." W. Va. Code § 27-11-1(b). The statute further designates that "a competent attorney practicing before the bar of the circuit court of the county wherein the hearing is to be held" be appointed "as guardian ad litem for the purpose of representing the interest of the [alleged incompetent] . . ." Id. Obviously, there is nothing in the statute that precludes appointed counsel from undertaking each of the above-delineated duties that Petitioner suggests should be statutorily required. Moreover, such duties are implicitly, if not explicitly, required by the effective representation standard to which all counsel are subject.

Petitioner observes that the statutory trend is towards making counsel in cases such as these a zealous advocate charged with representing the proposed ward's wishes in an active and adversarial manner. See D.C. Code Ann. § 21-2033(b) (1981) (appointed counsel's duty is to "represent zealously that individual's legitimate interests" which includes "[s]ecuring and presenting evidence and testimony and offering arguments to protect

the rights of the subject of the guardianship or protective proceeding and further that individual's interests"); Fla. Stat. Ann. § 744.102(1) (West Supp. 1993) (defining appointed counsel as an attorney who "represent[s] the expressed wishes of the alleged incapacitated person"); Wash. Rev. Code Ann. § 11.88.045(1)(b) (West Supp. 1994) (counsel is directed to act as an advocate and, as expressly differentiated from a guardian ad litem, to promote the client's expressed preferences as opposed to best interests).

Our statute, while somewhat silent on the nature of the representation, appears to be rooted in the concept of promoting the best interests of the alleged incompetent, as opposed to the stated preferences of the alleged incompetent. This is demonstrated both by the usage of the term guardian ad litem and the language which states that the guardian ad litem's appointment is "for the purpose of representing the interest of the [alleged incompetent] . . ." W. Va. Code § 27-11-1(b).

The final concern raised by Petitioner is that the Commission is not the proper body to be making determinations of incompetency. Citing the Judicial Reorganization Amendment of 1974, Petitioner argues that all judicial duties were vested exclusively in judicial officers. While the legislature did permit the county commissions to continue appointing committees on an interim basis until provided otherwise, Petitioner submits that the Legislature is long overdue

to remedy this wrongful assignment of powers. In support of his position, Petitioner cites this Court's recent decision of Williams v. Skeen, 184 W. Va. 509, 401 S.E.2d 442 (1990), wherein we ruled that the circuit court is the proper forum to resolve whether a will renunciation should be ordered on behalf of an incompetent. Id. at 513, 401 S.E.2d at 446.

After reviewing the Petitioner's claims, we conclude that insufficient evidence was adduced at the hearing before the Commission to render a finding of incompetency concerning Mr. Shamblin. Accordingly, we remand this matter to the Commission for further proceedings to permit a redetermination of the issue of competency. As to the larger issues raised by the Petitioner, we recognize the validity of the concerns presented by those issues and agree they should be addressed. It would be preferable for the legislature, rather than this Court, to address those issues.

Through H.B. 4508, passed on March 11, 1994, the Legislature repealed article eleven, chapter twenty-seven and article ten-a, chapter forty-four of the code and enacted in their place a new chapter, designated chapter forty-four-a, relating to the appointment of guardians and conservators for persons in need of protection. Chapter 44A, entitled the West Virginia Guardianship and Conservatorship Act (the "Act"), contains comprehensive and far-reaching changes to the prior system of guardian appointment. The Act vests in the circuit courts exclusive jurisdiction from the effective date of Chapter 44A "of all matters involving determinations of mental incompetency, mental retardation or mental handicap, including the jurisdiction of any proceedings pending as of such effective date." W. Va. Code § 44A-1-2(c). In addition to setting forth at length the duties expected of a guardian or

Consequently, we decline to do so at this time in order for the legislature to have an opportunity to study and address these issues.

Based on the foregoing opinion, the writ of habeas corpus is granted to permit the case to be remanded to the Jackson County Circuit Court for further proceedings consistent with this decision.

Writ granted as moulded.

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conservator, the Act requires that such individuals complete mandatory educational training within thirty days of the court's determination that the individual who is the subject of proceedings under the Act is a protected person. W. Va. Code § 44A-1-10.

Based on the enactment of Chapter 44A of the West Virginia Code, the circuit courts now have exclusive jurisdiction of matters such as these involving the appointment of guardians or conservators. See W. Va. Code § 44A-1-2(c).