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Guardianship

Interstate Transfer of Guardianships

The case of *In the Matter of the Guardianship of Jane E. P.: Grant County Dep't of Soc. Servs. v. Unified Bd. of Grant and Iowa Counties*, 700 N.W.2d 863 (Wis. 2005) addresses the transfer of guardianship of an incompetent Illinois woman to Wisconsin. The Wisconsin circuit court dismissed the petition because the Wisconsin statute, Wis. Stat. § 55.06(3)(c), required residency in Wisconsin to grant guardianship. The Wisconsin Court of Appeals determined that the Wisconsin statute as applied to the Illinois woman violated her constitutional right to interstate travel, and the court reversed and remanded the case. The Supreme Court of Wisconsin vacated the decision, instead setting forth standards for Wisconsin courts to apply when dealing with transfer of guardianships across states, with the intent of protecting the original determinations of the best interests of a ward.

Facts of the Case

At the time the court's opinion was rendered, Jane E. P. was a 47-year-old woman who had Wernicke's encephalopathy and related inability to attend to her finances, property, or care for herself. Jane had resided at the Galena Stauss Nursing Home in Galena, Illinois for five years before the case was heard. Her sister, Deborah V., was appointed guardian pursuant to an order of the Jo Daviess County Court in Illinois. Jane had relatives in Wisconsin, just across the Illinois line. The relatives in Grant County wanted to move Jane to Southwest Health Center Nursing Home in Cuba City, Wisconsin. It was the Grant County Department of Social Services (Grant County), through counsel, that petitioned for guardianship in a Wisconsin circuit court and petitioned for Jane's placement at Southwest Health Center Nursing Home in Grant County. Deborah V. was nominated to remain Jane's guardian. As part of the proceedings, the circuit court ordered the Unified Board of Grant and Iowa Counties (Unified) in Wis-

consin to make a comprehensive evaluation of Jane. Unified moved to dismiss the guardianship petition because Jane was not a resident of Wisconsin and the Wisconsin statute regarding guardianship, Wis. Stat. § 55.06(3)(c), required Jane to be a resident at the time of filing.

The circuit court agreed with Unified and dismissed the petition because Jane was not a Wisconsin resident. The Wisconsin Court of Appeals reversed the order of the circuit court. The court of appeals determined that the Wisconsin guardianship statute violated Jane's constitutional right to interstate travel. The court of appeals relied on *Bethesda Lutheran Homes and Servs., Inc. v. Leean*, 122 F.3d 443 (7th Cir. 1997), a decision that, though not binding on state courts, said the Wisconsin statute requiring residency compromised the constitutional right to travel. The court of appeals noted that, because Jane was incompetent and not capable of first moving to Wisconsin where she could have a petition for her placement filed, her right to travel was unconstitutionally burdened. Unified appealed to the Supreme Court of Wisconsin.

Ruling and Reasoning

The Supreme Court of Wisconsin vacated the decision of the court of appeals and remanded the case to the circuit court. The case was to be reheard in light of standards the Supreme Court provided as guidance when faced with the transfer of interstate guardianship delineated from a report of the National College of Probate Judges Advisory Committee on Interstate Guardianships (cited as <http://www.nccusl.org/update/>). The court also applied the principles of comity stating the "hallmarks of these standards are communication and notice" (*In re Jane E. P.*, p 871).

The Wisconsin Supreme Court took the opportunity to examine problems associated with the transfer of interstate guardianships. The court presented an overview of emergence of interstate guardianship noting that American society is more mobile and living longer. Aging parents often move to live with adult children, and the court noted that, as a result, interstate guardianships are likely to increase. The interstate transfer of guardianship can be simple when the conclusion is clear, but when complex legal questions arise, such as when relatives in different states vie for guardianship or when family members disagree regarding health care and shop for districts

that have different laws and regulations, transfer-of-guardianship decisions become vastly more complicated. The court cited different cases of examples of these complexities, one involving intrafamilial conflict over the continuation of treatment for a loved one, one involving allegations of a ward's mistreatment in one jurisdiction leading a family member to move the ward to another jurisdiction, and a final case revolving around use of a ward's property. Although these cases raised thorny issues, the court recommended cooperation among courts of different jurisdictions.

In the case of Jane, Unified asserted that the Wisconsin statute was constitutional because it did not burden Jane's right to travel and was a *bona fide* residency requirement. Further, even if Jane's right to travel was burdened, this would be justified by the fiscal implications that Wisconsin counties and the state would suffer by providing services to nonresidents. Grant County argued that the statute acted as a total bar for Jane and other similarly situated individuals to travel.

The court cited cooperation and notice as essential and urged comity. Comity is a practice among political entities (e.g., nations, states, or courts of different jurisdiction) that allows mutual recognition of legislative, executive, and judicial acts. The court said interstate cooperation between courts is vital and noted that in this case the existing laws were insufficient to assist courts and litigants to resolve multi-jurisdictional issues of interstate guardianships. The court provided five standards to follow in interstate transfer of guardianships, taken from the National College of Probate Judges Advisory Committee Report. These standards were to be applied by the circuit court in rehearing the instant case. The five standards articulated included (1) communication and cooperation between courts; (2) screening and review of petition; (3) transfer of guardianship; (4) receipt and acceptance of a transferred guardianship; and (5) initial hearing in the court accepting the transferred guardianship.

In the matter of Jane E. P., the supreme court remanded the case to the circuit court and recommended that Grant County petition the court in Jo Daviess County for transfer of Jane's guardianship, recognizing that the new standards would help Wisconsin courts facilitate geographic mobility of the people that guardianship orders were put in place to protect. The court noted that Grant County should

also petition the court in Grant County for receipt and acceptance of the Illinois woman's guardianship and that, during this process, Grant County should provide notice to all parties of the intended transfer allowing interested persons to make an objection or request a hearing on the matter. If the guardianship transfer were to be approved in Jo Daviess County, the Grant County court should give full faith and credit to the foreign guardianship order, which would mean that Jane could be placed in the Grant County nursing home without a new petition for her placement, while avoiding the residency requirement of Wis. Stat. § 55.06(3)(c).

Dissent

Justice Roggensack concurred in part but dissented in part, noting that the majority opinion made a valiant effort to solve a problematic situation, but proffered what was dangerously close to a statute related to interstate transfer of guardianships. The Justice wrote that the legislature is charged with that function and better equipped to assess all state interests in the creation of such a statute (e.g., funding and resources). The dissent noted that the constitutionality of a law can be determined by the clarity of the statute and its relation to a state interest. In the dissent, the Wisconsin statute, Wis. Stat. § 55.06(3)(c), was thought to be clear and unambiguous regarding the residency requirement, and the state was thought to have a rational basis for the requirement. The residency requirement was shown in testimony to be related to protecting and preserving the county's and the state's ability to provide services to current residents with limited state funds. The dissent noted the heavy burden placed on the challenging party to show, beyond a reasonable doubt, that the statute is unconstitutional.

Discussion

This case presents the potentially thorny issues surrounding the transfer of guardianships awarded in one jurisdiction to a foreign jurisdiction. The population is aging, and the question of the likely increase in requests to transfer guardianship is timely. The Wisconsin Supreme Court chose to address the difficulties of jurisdictional matters and suggested a guide for courts in reviewing transfer of guardianships, stressing comity, and cooperation. The constitutional right to travel was not addressed in the ma-

majority opinion. The dissent remarked that the right to interstate travel is not explicitly mentioned in the constitution. In addition, as noted in the dissent, presuming that Jane has a right to travel, the state may have a right to interfere if it has a rational basis for doing so. The testimony regarding the high cost of accepting and caring for individuals like Jane by the state was viewed by some as rationally related to government interests and thus supportive of the state's mandate for a residency requirement in guardianships. Should laws regarding residency requirement in guardianship be found constitutional, it may have the practical effect of boxing in destitute wards due to these requirements. Wards financially dependent on state support may become a group that cannot be transferred. Transfer of guardianship would be more hospitable for individuals who do not seek state support, thus creating two classes of wards: those who would be a financial encumbrance on a state system and those who would not. The guidelines for transfer of interstate guardianship might only be applied to those who could afford it. If this were to occur, further litigation related to this issue would be likely.

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Malpractice

A Subjective or Capacity-Based Test Should Be Applied When Assessing the Contributory Negligence of Mentally Ill Individuals Who Have Committed Suicide

In *Dodson v. Dep't of Human Servs.*, 703 N.W.2d 353 (2005), the South Dakota Supreme Court (SDSC) considered whether the trial court erred in the jury instructions on contributory negligence in a medical malpractice case involving a patient's suicide. In this case, the burden was on the plaintiff to

show that the instructions were both erroneous and prejudicial. The trial court used the standard of a reasonable person to measure the patient's conduct in committing suicide. The supreme court agreed with the plaintiff, that the jury should have been instructed to consider the decedent's mental incapacity in judging her contributory negligence. The case was reversed and remanded for a new trial.

Facts of the Case

Kristi M. Dodson graduated from high school in 1998 and married in 2000. During her high school years, she was involved in numerous activities and had several friends. Shortly after getting married, she developed various health problems and began to display "erratic behavior." In 2001, while hospitalized at Avera McKennan Hospital, she presented as very depressed, and on April 1, about 10 days after admission, she attempted to commit suicide. She was found unconscious but was successfully resuscitated. A diagnosis of bipolar disorder was made during this hospitalization. Three days after her serious suicide attempt, Mrs. Dodson was transferred to the South Dakota Human Services Center (HSC) for long-term treatment. After approximately a week in this facility, she was discharged home. She committed suicide the following day.

Mr. Dodson, individually and as special administrator of the estate of his wife, brought a medical malpractice action against the physicians and hospitals involved in his wife's psychiatric care on the days and weeks preceding the incident. The jury for this trial was given specific instructions to apply the affirmative defenses of contributory negligence and assumption of the risk. For the defense of contributory negligence, the jury was told to apply an objective reasonable-person standard to Mrs. Dodson's conduct, and there was an instruction on the assumption of risk. The instruction for contributory negligence included language stating, "A plaintiff who is contributorily negligent may still recover damages if that contributory negligence is slight or less than slight when compared with the negligence of the defendants" (*Dodson*, 703 N.W.2d, p 355).

The jury found that the Avera McKennan Hospital and the physician there were not negligent, but HSC or the physician who provided her care in that facility breached the applicable standard of care for Mrs. Dodson and that this breach was the legal cause of her injuries. However, they also found that Mrs.