Guardian's Authority to Involuntarily Hospitalize the Incompetent Ward

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A Guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

Section 5-312(a) (3) Uniform Probate Code

If Section 5-312(a) (3) is accepted as a composite or representative definition of a guardian of the person's state law statutory authority to deal with the care and custody of his incompetent ward in matters relating to medical management, any private hospital could admit, on the signature of the guardian, any so-called "lucid" incompetent. The limitation to a consideration of private hospital admission is made because it is almost universal practice for state or governmental hospitals to demand a civil commitment order before admitting an involuntary patient, whether declared incompetent or not. The so-called "lucid" incompetent is the adjudicated incompetent who still can be heard to protest the decisions made for him by his guardian.

The labeling and attendant distinction of the "lucid" incompetent is useful in categorizing those cases where courts have been called upon to render judgments relating to radical medical procedures such as experimental psychosurgery[1] or kidney transplants[2] or negative medical procedures such as a discontinuance of medical support systems.[3] In such cases it has readily been seen that the bare authority of a guardian under state statutes is not sufficient to authorize medical procedures or cessation of them. It has been agreed that specific court authority is required, and probably that of a court exercising equity jurisdiction.

Outside of radical situations there has appeared to be a general consensus that a guardian or conservator of the person of an incompetent can authorize the hospitalization and resulting medical care and treatment of his ward under the doctrine of "substitute judgment."[4] The theory of "substitute judgment" is based on the purported principle that in each instance a guardian qualified by a court as such will not act in a manner in regard to the care and custody of his ward other than he would for his own child.[5] Cracks appear in the doctrine, however, especially when the incompetent can be said to be "competent."[6] The California Attorney General has ruled that a "competent" conservatee (a "competent" incompetent, if you will) may not be forced into medical treatment without a court determination of the appropriateness of the specific medical treatment. Other courts have gone further in determining that they lack jurisdiction to force an unwilling incompetent to accept treatment.[7] But these are the larger and more ultimate questions unless one considers that involuntary hospitalization *per se* implies involuntary treatment, which may very well be the full circle depending upon the effect of the "right to treatment" concept.

It is apparent, however, that the first attack in the courts will be concerned not with

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forced treatment of incompetents by their guardians, but with the initial right of a guardian to involuntarily privately hospitalize his ward without specific court authority. There is currently no decision known to this writer directly on this point, but two recent decisions seem to be the harbingers.

In the first, *Bartley v. Kremens,*[8] a Pennsylvania statute authorizing a parent or guardian of a child under 18 to "voluntarily commit" his child or ward to a mental health facility for examination, treatment and care was held violative of the Fourteenth Amendment. The court reasoned that "voluntary commitment" by the parent or guardian could be an "involuntary commitment" on the part of the ward to which the due process requirements of the Fourteenth Amendment applied. Having decided the application of due process, the court next considered whether a parent or guardian could effectively waive the constitutional right of a child to due process. The court noted that the Supreme Court had not yet decided the issue,[9] but that it was in agreement with a New York District Court decision[10] that "in the absence of evidence that the child's interests have been fully considered," parents may not effectively waive personal constitutional rights of their children.[11] The balance of the opinion details the necessary due process requirements which must be met in order to validate an involuntary commitment.

In the second case, *J. L. and J. R. v. Parham,*[12] the court invalidated as unconstitutional the Georgia Juvenile Commitment Law with much the same analysis as was made in the *Bartley* case, although *Bartley* was not cited. The court gave short shrift to the defendant's argument that the statute was merely a codification of a parent's natural right and duty to provide for the child's maintenance and protection and that the exercise by the parent of that traditional role supplied all the due process that was required under the Constitution. The decision turns on the court's citation of "evidence" that "there are some parents who abuse that authority and who under the guise of admitting to a mental hospital actually abandon their children to the state"[13]; ". . . . It is apparent that it affords to parents, guardians, the Department of Human Resources as custodian and superintendents" the "unchecked and unbalanced power over [the] essential liberties . . . of these children that is universally mistrusted by our whole scheme of American Government." [14] Unlike the *Bartley* case, the court here did not attempt to define what due process safeguards would have to be instituted by the state in order to cure the defects in the statute.

If, then, these two decisions have circumscribed the law of involuntary commitment of juveniles, what effect can be foreseen on the authority of a guardian of an incompetent adult? It is believed that the effect can be clearly perceived and defined.

The action of a guardian of an incompetent in placing his ward in a private mental hospital against the will of the ward would, upon challenge by the ward in court, result in the release of the ward and possible liability of the guardian, hospital and admitting physician. Why? Because without a court order based on all the procedural due process requirements such as those set out in *Bartley,* the court-appointed guardian acting under his state statutes relating to guardianship is in no better legal position than the parent or guardian deprived of his traditional role in the *Bartley* and *Parham* cases.

Intermixed with the general statutes on guardianship are often found provisions permitting the court to issue orders for the "restraint and safekeeping"[15] of the ward upon a finding that the ward is dangerous to himself or others. Could a guardian rely on such an order to authorize him to involuntarily hospitalize his ward? Probably yes, if the statute authorizing such an action complied with all of the now rapidly developing procedural due process requirements such as "notice," "right of counsel," "personal presence," "jury trial" and "burden of proof"[16], as well as the evolving standards of commitment including definitions of "mental illness" and "dangerousness."[17]

The new atmosphere is best seen in a provision of the Uniform Probate Code to the effect that a guardian may have custody of the ward and dictate his place of abode if such

authority is consistent with "any order by a court of competent jurisdiction relating to detention or commitment of the ward."[18] The stage is therefore set whereby the prudent practitioner will not rely on the general guardianship statutes to clothe his client with authority to involuntarily place the ward in a private hospital, but will in each instance "double up," *i.e.*, as a dual proceeding have the ward declared incompetent and obtain a civil order of commitment.

In the past it had been the practice of many merely to by-pass the civil commitment statutes when a proposed patient was in need of involuntary hospitalization, because in many states it would be the prerogative of the hospital administrator to release the patient if no longer in need of hospitalization, and when the need arose again for hospitalization (as it frequently did a short time after discharge), the moving party, spouse, father, etc., had to file a new proceeding for civil commitment. It was supposed and is now probably considered to be economical practice to institute only a guardianship proceeding and have the guardian "sign in" the ward on as many occasions as may be necessary, thus obviating the need for repeated commitments. This procedure has been made possible by state statutes which permit a declaration of incompetence on the ground of "mental illness," there being no separate statutory difference in the definition of mental illness for purposes of guardianship *vis-a-vis* civil commitment.

All this now appears suspect. Again, a harbinger can be found. A Federal District Court in Pennsylvania[19] has held a state statute unconstitutional which permitted a summary revocation of a mental patient's leave of absence by a director of the state hospital. The court found that the principles of due process announced by the U.S. Supreme Court in *Morrisey v. Brewer,* 408 U.S. 471 (1972), concerning revocation of criminal paroles applied as well to revocation of leave for mental patients. If a director of a state hospital cannot recall a mental patient without a full due process hearing, it doesn't take much imagination to apply the concept to an involuntary readmission of an incompetent by a guardian. It is all only a matter of time. Once the path has been clearly laid out, it is only a matter of building the road.

The judgment reached here on the direction of the law is not the result of individual clairvoyance. It is understood that state legislative drafting groups are not restricting themselves to a redesigning of civil commitment statutes, but are reconsidering the guardianship statutes as well in regard to involuntary hospitalization.

Until state statutes are changed to comply with due process requirements, psychiatrists working in the field would be well advised to insist on a court order before admitting a ward merely on the signature of a duly appointed guardian where the ward is resisting the hospital admission. The court order can take the form of a civil commitment, where available for private placements, or in some states it can be based on a specific statutory provision for involuntary hospitalization in the guardianship code. Where no specific statutory provisions exist, it may well be that a court would enter an involuntary order of hospitalization merely on the basis of the general guardianship code. In all events, the psychiatrist should seek the protection of a court in this area.

REFERENCES

1 *Kaimowitz v. Department of Mental Health*, Civil Action No. 73-19434-AW (Cir. Ct. of Wayne Co. Mich., July 10, 1973)

2 *Strunk v. Strunk,* 445 *S.W.* 2d 145, 35 A.L.R. 3d 683 (Ky. 1970)

3 *Matter of Quinlan,* 355 *A.* 2d 647 (N.J. 1976)

4 *Strunk v. Strunk,* 445 *S.W.* 2d 145, 148

5 ". . . a guardian, having custody, might arrange for voluntary care arrangements like that which a parent of a minor and incapacitated child could establish." Am. Jur. New Topic Service, Uniform Probate Code, Sec. 189, footnote 90

6 Opinion of California Attorney General, No. CV. 74-327 (December 17, 1975)

7 See Sullivan: Judicially-ordered involuntary treatment of the mentally ill. 31 Journal of the Missouri Bar 254 (June, 1975)

8 402 *F. Supp.* 1039 (E.D. Pa., 1975), probable jurisdiction noted No. 75-1064, 44 U.S.L.W. 3531,

March 22, 1976
9 402 *F. Supp.* 1039, 1047 footnote 9
10 *New York State Association for Retarded Children*, 357 *F. Supp.* 752, 762 (E.D. N.Y., 1973)
11 402 *F. Supp.* 1039, 1048
12 412 *F. Supp.* 112 (M.D. Ga., 1976), stay order U.S. Supreme Court, 44 *L.W.* 3563
13 *Ibid.* at 137
14 *Ibid.* at 139
15 Sec. 475.120, Mo. Rev. Stat., 1969
16 See note 8, *supra*
17 Roth: Some comments on labelling. III The Bulletin of the American Academy of Psychiatry and the Law 123 (1975)
18 Section 5-312(a) (1), Uniform Probate Code
19 *Meisel v. Kremens*, 405 *F. Supp.* 1253 (E.D. Pa., 1975)