THE COURTS AND TREATMENT DECISIONS FOR THE MENTALLY ILL AND MENTALLY IMPAIRED: AN IMPERFECT SOLUTION

by THE HONORABLE ANNE E. LAZARUS*

The issue of treatment of the mentally ill and mentally impaired has always been a difficult one for society in general and for the judiciary in particular. In many instances, courts are called upon to make difficult decisions which greatly impact the lives of individuals who are unable to make those decisions for themselves. Unfortunately, courts are generally ill-equipped—lacking both specialized medical/psychiatric knowledge and necessary support staff—to handle such matters. Furthermore, Pennsylvania courts are faced with two statutory schemes—the Mental Health Procedures Act (hereinafter "MHPA")[1] and the Guardianship Act[2]—which are not structured to work in tandem and are, indeed, jurisdictionally allocated to separate divisions of the state court system. Matters under the Guardianship Act fall under the jurisdiction of the Orphans' Court Division,[3] while those cases under the MHPA are handled by the civil division. The result is that a person might be involuntarily committed for treatment pursuant to the MHPA and have a guardian appointed pursuant to the Guardianship Act. However, after initial treatment is complete, the guardian would not have the authority to readmit his or her ward into the mental health treatment facility—even if such treatment were necessary—unless and until the ward again met the requirements of the MHPA.[4] Thus, two separate divisions of the court are each able to address only part of the problem, but neither has the authority to address the problem as a whole.

This essay is based on a presentation given at the November 2002 symposium "Lawyering For the Mentally Ill," sponsored by the *Temple Political and Civil Rights Law Review*. It will attempt to illustrate a few of the difficulties confronted by courts and lawyers in the context of incapacity proceedings,[5] with an emphasis

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* Judge, Philadelphia Court of Common Pleas, Orphans' Court Division.

1. 50 Pa. Consol. Stat. § 7101 *et seq.* (2002).

2. 20 Pa. Consol. Stat. § 5501 *et seq.* (2002).

3. *See id.* §§ 711(11), 712(2) (outlining the jurisdiction of the orphans' court division of the court of common pleas).

4. The Guardianship Act specifically denies a court appointed guardian the authority to admit his or her ward to an inpatient psychiatric facility. 20 Pa. Consol. Stat. § 5521(f)(1). Under the MHPA, a person may be subject to involuntary treatment if it is determined that, as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a clear and present danger of harm to others or to himself. 50 Pa. Consol. Stat. § 7301.

5. The MHPA will not be addressed herein as the author, an Orphans' Court judge, has no jurisdiction thereunder.

on situations involving an incapacitated individual's refusal to accept treatment, and will conclude that the courts are perhaps the least appropriate venue in which to address these types of matters. It will conclude by suggesting that the real solution would be an improvement in the quality and availability of social service agencies to support an increasingly aging population, a large segment of which has serious mental health concerns.

The Commonwealth of Pennsylvania has the nation's second largest percentage of population over the age of sixty-five.[6] Along with this growth in the elderly population has come an increase in the number of guardianship petitions filed before the Orphans' Court. Indeed, the majority of guardianship proceedings arise in the context of eldercare.[7] It is an unfortunate fact of life that often, as individuals reach the end of their lives, there remain no family members who are either willing or able to care for them. And even in those cases where family members are present, the elderly individual often lacks a power of attorney[8] or advanced health care directive[9] which would enable a family member to act as substitute decision maker in the absence of formal guardianship proceedings. While the use of powers of attorney and advanced directives has become more widespread, many people lack the resources or knowledge necessary to gain access to the legal advice necessary to obtain the appropriate documents.[10] Ideally, an individual would have an opportunity to pre-determine the person or persons to administer her finances and to make those personal care decisions necessary in the event of incapacity. However, as indicated above, that is not always possible. As a result, the elderly can end up in court, often for the first time in their lives.

When an incapacity petition is filed, it is an unfortunate fact that families often feud over whether their relative is in fact incapacitated and, if so, who will be appointed guardian.[11] When one party involves the court in "family business," it

6. The Gerontology Center at Penn State, *Aging and Pennsylvania,* available at http://geron.psu.edu/aging.htm (visited 3/12/03). Florida possesses the highest percentage of elderly residents. *Id.*

7. While, to the author's knowledge, no statistics are kept with regard to guardianship proceedings, this assertion is based on personal observation of the matters coming before the court.

8. *See* 20 Pa. Consol. Stat. § 5601 *et seq.* (regulating and outlining the power of attorney).

9. *See id.* § 5401 *et seq.* (Advanced Directive for Health Care Act).

10. The proliferation of powers of attorney, while more convenient and less costly than petitioning the court for guardianship, has unfortunately opened up new opportunities for abuse, especially given the fact that powers of attorney are not subject to direct court supervision as guardianships are. However, the scope of this article is limited to guardianships and, accordingly, powers of attorney will not be discussed in depth herein.

11. There often exists a misconception that, if all family members agree that an individual is incapacitated, the court will issue something akin to a default judgment and not engage in an inquiry as to whether or not the person is, indeed, incapacitated. The statute requires the court to make specific findings of fact regarding "(1) the nature of any condition or disability which impairs the individual's capacity to make and communicate decisions; (2) the extent of the individual's capacity to make and communicate decisions; and (3) the need for guardianship services." 20 Pa. Consol. Stat. § 5512.1. Additionally, simply because an individual brings a guardianship petition before the court and asks to be appointed guardian does not mean that the court will, absent objection from any other interested party, automatically appoint that individual as guardian. To the contrary, the court will make a determination as to the fitness of the proposed guardian. If it is determined that the appointment of the individual proposed would not be in the best interests of the incapacitated person, another individual may be appointed as guardian.

seems as though emotions run higher than they otherwise would. Given that most guardianship proceedings occur when medical treatment is necessary and, often, an emergency matter, a feuding family only exacerbates the situation and removes the focus from what is ultimately important—the welfare of the incapacitated person. It would be preferable if government or community organizations were better equipped to intervene and provide social and legal services at an earlier time, thereby, at least in some cases, obviating the need to go to court.

Incapacity petitions are also frequently brought by a hospital to which an individual has been taken on an emergency basis. The person is in immediate need of medical care and the hospital staff has determined that he or she is unable to give consent due to mental incapacity. Many times the hospital's social services department is unable to locate a relative willing to assume the role of substitute decision maker. When this occurs, the hospital—which desires to treat the individual but cannot do so absent a valid consent—will have no alternative but to initiate limited or plenary guardianship proceedings before the Orphans' Court for the appointment of a substitute decision maker.

Frequently, this scenario is complicated by the fact that the alleged incapacitated person is actively refusing the treatment which has been deemed by doctors to be medically necessary. In these instances the courts are asked to substitute their judgment for that of the incapacitated individual or appoint someone else to do so—ideally someone who will make a thoughtful and reasoned decision in the best interests of his or her ward.

When a petition is filed for the appointment of a guardian, the court must make a determination as to whether counsel should be appointed to represent the alleged incapacitated person. The statute indicates that "[i]n appropriate cases, counsel shall be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that individual."[12] In Philadelphia, the court has taken the position that "appropriate cases" for the appointment of counsel include those situations where: (1) the alleged incapacitated person requests counsel; (2) invasive medical treatment may be called for; or (3) the alleged incapacitated person's refusal to permit medical treatment is at issue.[13]

Once appointed, counsel's job is to represent the interests of the alleged incapacitated person. However, it is not always clear what those "interests" are. Often, counsel is faced with a conundrum. The following fact scenario, while not based on any single case in particular, is illustrative of the difficult issues and hard questions faced by the court and by appointed counsel.

> Ellen Elderly is a diabetic who has developed gangrene in one of her legs. She has made a determination that she does not wish to have her

12. *Id.* § 5511(a).

13. *See In re Cheryl Dyarman*, 21 Fiduc. Rep. 2d 227 (O.C. Div. Cumber. 2001)(involving court appointed counsel for an alleged incapacitated person where petitioners sought emergency guardianship for the purpose of authorizing electroconvulsive therapy); *Matter of Jessie Pickins*, 17 Fiduc. Rep. 2d 130 (O.C. Div. Crawf. 1996)(illustrating the appointment of counsel where the alleged incapacitated person was refusing life-saving medical treatment); *Estate of E.K., an Alleged Incapacitated Person*, 15 Fiduc. Rep. 2d 369 (O.C. Div. Allegh. 1995)(allowing court appointed counsel upon request of the alleged incapacitated person).

> leg amputated. Medical personnel have informed her that she may die if an amputation is not performed. Ellen informs her attorney that she is aware of the prognosis and the possible repercussions if she fails to consent to the amputation. Ellen's psychiatrist has told counsel that his client suffers from a major depressive episode which is, to a degree of medical certainty, affecting Ellen's judgment and that, *but for* the depression, Ellen would agree to the life-saving amputation.

In light of this information, what is counsel's obligation to Ellen? Does it change depending upon whether Ellen is incapacitated because of a temporary depressive disorder or due to a chronic mental incapacity such as Alzheimer's disease? These are difficult questions—questions that individuals trained solely in the law are not always prepared to confront. Few lawyers—and even fewer judges—have medical or psychiatric training. The best a court can do in situations like this is to appoint an individual as guardian who possesses understanding, compassion, and common sense and is willing to make the difficult choices which will impact significantly upon the ward's quality of life—and often, death.

This hypothetical illustration is typical of cases which regularly come before the Orphans' Court. While the courts and the bar do their best to cope with the proliferation of individuals requiring guardianships, the real issue is the lack of social services which can take the place of a family in helping to care for an increasingly aging population, a large segment of which has serious mental health concerns. Until such time as those services are of a quality substantially better than those currently available and until such time as funds are appropriated to maintain that standard, judges will continue to be called upon to make decisions for which they are ill-prepared.