Taylor, Alleged Incapacitated Person

Incapacitated persons — Court's right to question respondent

Where petitioner fails to make prima facie case of incapacity without testimony from respondent, court may not question respondent over his objection. (Hunter — Incompetents 2 (b)).

In the Orphans' Court Division of the Court of Common Pleas of Montgomery County. Estate of Robert L. Taylor, Jr. Petition for finding of partial incapacity and appointment of permanent limited guardian of estate. No. 01-0454.

Thomas K. Johnson II, for petitioner.

James W. Mannion, for respondent.

OPINION BY OTT, J., APRIL 27, 2001:

This is a contested incapacity proceeding. On February 12, 2001, the Philadelphia law firm of Dechert Price & Rhoads ("Dechert") petitioned this court to adjudicate Robert L. Taylor, Jr.,

("Mr. Taylor") who is 45 years of age, a partially incapacitated person and to appoint Supportive Care Services, Inc., as the permanent limited guardian of Mr. Taylor's estate.[1] Dechert filed the petition at the behest of the Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania, incident to Mr. Taylor's settlement of a federal lawsuit assigned to him. The pertinent facts of that case follow.

On October 24, 1997, Mr. Taylor filed a *pro se* complaint in federal court,[2] alleging that he was severely beaten by three prison guards while detained in the Delaware County Prison in 1994. In May of 1999, the District Court appointed the Dechert firm as counsel for Mr. Taylor and it filed an amended complaint on January 10, 2000. The case settled during trial in November of 2000. Mr. Taylor will realize a net settlement in the mid five-figures.[3] Because Judge Fullam had concerns about Mr. Taylor's capacity to manage this sum of money, he tailored an order dated January 2, 2001 which provided, *inter alia* for a direct payment to Mr. Taylor of only $10,000, and for Dechert to petition the Montgomery County Orphans' Court "for a determination of whether a guardian should be appointed for the part of Mr. Taylor's estate consisting of the total settlement remaining after deducting [Mr. Taylor's] legal costs and the $10,000 to be paid directly to him." Judge Fullam's order then directed distribution of the balance of Mr. Taylor's settlement funds either outright to Mr. Taylor or to the court-appointed guardian of his estate.

The undersigned deemed this an appropriate case to appoint counsel and, accordingly, by order dated February 14, 2001, appointed James F. Mannion, Esquire, counsel for Mr. Taylor. See 20 Pa.C.S.A. §5511(a)(2). Following a pretrial conference, the matter proceeded to a hearing on March 29, 2001.

Dechert began by introducing medical testimony from Carl Hammer, M.D., a staff psychiatrist at Norristown State Hospital. The testimony was presented in the form of written interrogatories and answers thereto supplied by Dr. Hammer which were admitted into evidence by agreement of counsel.[4] Dr. Hammer's testimony

1. Supportive Care Services, Inc. is a non-profit corporation with offices in Wilmington, Delaware, and is recognized by this court as a guardianship support agency. See 20 Pa.C.S.A. §5551.

2. *Taylor v. Cartwright, et al.*, C.A. 97-CV-6583.

3. The specific terms of the settlement are subject to a confidentiality agreement.

4. The interrogatories and corresponding answers were admitted as Exhibit P-1. Also admitted by agreement was Exhibit P-2, which consisted of excerpts from the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition (DSM-IV) pertinent to Dr. Hammer's diagnosis.

revealed that he has rendered inpatient services consisting of psychiatric assessments, medication monitoring and psychotherapy to Mr. Taylor on an almost-daily basis from July 2000 to the present at Norristown State Hospital. Dr. Hammer diagnosed Mr. Taylor as suffering from schizoaffective disorder, bipolar type, and noted that Mr. Taylor has been only partially compliant with treatment. To that end, Mr. Taylor has accepted medications for his delusional ideations, both grandiose and persecutory, but has refused medications recommended to stabilize his moods, denying that his periods of hyperverbosity, hostility and verbal aggressiveness require such medication. Mr. Taylor has also refused to take recommended atypical antipsychotic medications. Dr. Hammer further observed that Mr. Taylor has been known to be manipulative of his peers and sometimes intimidates more disadvantaged patients for his own profit. Dr. Hammer pointed out that Mr. Taylor participates in therapeutic activities both on and off his unit, including a workshop program five days each week, and engages in off-grounds activities with staff supervision.

More to the point, when asked to opine whether Mr. Taylor's ability to receive and evaluate information effectively and communicate decisions was impaired to such an extent that he is partially or totally unable to manage his financial resources — the criteria relevant to our inquiry — Dr. Hammer responded: "[n]o."[5] Dr. Hammer explained this opinion by noting that Mr. Taylor "is knowledgeable about the value of common items, knows the source and extent of his assets, able [sic] to conserve assets and to conduct transactions, and has sufficient capacity to make or communicate responsible decisions concerning the use and management of his entitlements."[6] Moreover, Dr. Hammer mentioned that Mr. Taylor denies suffering from depression and maintains his activities of daily living and physical conditioning without the need for assistance. Dr. Hammer did temper these opinions by noting that, "[s]hould the patient *discontinue* his present medication (Trilafon 64 mg/day) and continue to *refuse* other atypical antipsychotics recommended (Clozapine, Risperodal, Zyprezia, Seroquel), his capacity to manage his financial affairs could worsen."[7] Dr. Hammer commented that, in spite of Mr. Taylor's "denial of illness and the risk of non-compliance with medi-

5. Exhibit P-1, p. 4.

6. Exhibit P-1, p. 5.

7. Exhibit P-1, p. 8. (emphasis in original).

cation in a community placement, patient has not been a danger to himself or others for the past several months."[8] The doctor added that Mr. Taylor would benefit from a structured supervised setting to assure compliance and lessen the risk of decompensation.

Dechert next presented testimony from Frank Horvath, a master's-level social worker who has been employed at Norristown State Hospital for more than 31 years. He has been the social worker on Mr. Taylor's ward for the past six months and has interacted with him on a daily basis throughout this period. Mr. Horvath explained that, although Mr. Taylor resides on a locked unit, he does have some privileges which permit him to go back and forth to his workshop assignment in another building, and he may leave the grounds with staff for specific purposes.

He explained that Mr. Taylor has been at Norristown State Hospital for several years, initially entering through the forensic unit pursuant to criminal charges lodged in Delaware County and, since their resolution, has remained involuntarily pursuant to Sections 304 and/or 305 of the Mental Health Procedures Act.[9] Mr. Horvath further explained that Mr. Taylor is not presently on the active discharge list, meaning that it has not yet been determined that Mr. Taylor will no longer benefit from in-hospital treatment and the discharge process has not yet commenced.

Mr. Horvath testified that Mr. Taylor's mental illness manifests itself in his becoming angry, upset, loud, and verbally threatening toward others. He stated that Mr. Taylor is sometimes impulsive, especially with respect to challenging certain of the hospital's rules and regulations which he resents. Indeed, Mr. Taylor has expressed anger at Dr. Hammer for his failure to approve his release. Mr. Horvath confirmed Mr. Taylor's unwillingness to take certain medication and his reluctance to acknowledge the need for them.

Mr. Horvath frequently accompanies Mr. Taylor on his excursions to the community where he banks and shops. He sometimes assists Mr. Taylor in filling out bank transaction documents, but acknowledges that Mr. Taylor has been able to cash checks and to deal with certificates of deposit and money orders. Mr. Horvath explained that Mr. Taylor is a money-lender within Norristown State Hospital, regularly collecting his debts and the interest earned thereon from other patients. Mr. Horvath expressed concern

8. Exhibit P-1, p. 7.

9. 50 P.S. §§7304 and 7305.

about Mr. Taylor's penchant for keeping large amounts of cash on his person and in several lockers at the hospital, but admitted that he is not aware of Mr. Taylor's having lost any money or of others taking advantage of him. Mr. Horvath confirmed that Mr. Taylor regularly purchases items through catalogs and by telephone successfully. Mr. Taylor also pays his bills, with the exception of those emanating from Norristown State Hospital. As to those, Mr. Horvath explained that Mr. Taylor refuses to acknowledge any financial responsibility because he is being held involuntarily for treatment that he feels he does not require.

When pressed on cross-examination, Mr. Horvath conceded that his greatest concerns about Mr. Taylor's financial decision-making stem from Mr. Taylor's spending priorities, particularly the numerous expensive guitars Mr. Taylor has purchased for his musical pursuits.

Had Dechert rested after producing evidence only from Dr. Hammer and Mr. Horvath, there is no question but that this Court would have dismissed the petition. The burden on a petitioner alleging incapacity is one of clear and convincing evidence: 20 Pa. C.S.A. §5511(a). Dr. Hammer's opinion unequivocally denied the existence of an incapacity. To the extent Mr. Horvath expressed concern regarding Mr. Taylor's judgment, he was equivocal and failed to provide meaningful examples when invited to do so. Undoubtedly, Dechert, as petitioner, was aware of the evidentiary shortcomings of its witnesses' opinions. Accordingly, it sought to call Mr. Taylor as a witness in support of its petition. Mr. Taylor's counsel objected. Thereafter, the undersigned questioned Mr. Taylor on the record over the objection of his counsel. Thus, the issue is presented as to whether an alleged incapacitated person can or ought to be compelled to testify at a hearing where his or her capacity is at issue. Surprisingly, there is a dearth of authority on this question. [10]

Our search has revealed only one appellate case which touches upon this issue and then only in dictum. *In re Ryman*, 139 Pa. Super. 212, 11 A.2d 677 (1940), involved a petition filed under the Mental Health statute then in effect, which provided for the appointment of guardians of the estates of "feeble minded persons." The petitioner

10. The incapacitated persons statute does not address the issue but requires a petitioner to present "testimony in person or by deposition from individuals qualified by training or experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional, and physical condition, adaptive behavior and social skills. . . ." 20 Pa. C.S.A. §5518.

succeeded in having the trial court appoint a guardian for her father on the ground he met the statutory criteria of being "so mentally defective that he is unable to take care of his property and in consequence thereof is liable to dissipate or lose the same and to become the victim of designing persons." The specific issue on appeal was the respondent's absence from the hearing. The statute required the respondent's presence "unless there is positive testimony to the effect that such person cannot be brought into the court with safety to himself." The Superior Court reversed on the grounds the lower court should have required the respondent be present since there was no testimony showing his safety would be compromised. The Court noted the attendance by one who is the subject of such a petition "is deemed most important because the court, or jury, should have, if possible with safety to the respondent, the benefit of a personal view of his actions and conduct — and his testimony, *if he desires to give it* — on the hearing or at the trial:" Id at 216, 11 A.2d at 680.

In the case of *In Re Denniston*, 63 Pittsburgh Legal Journal 769 (1915), a proceeding under an earlier version of the statute at issue in *Ryman*, the Allegheny Court of Common Pleas was asked by the niece and nephew of Mr. Denniston to determine whether their uncle was feeble minded or mentally defective so as to be unable to take care of his property. In denying petitioners' request that Mr. Denniston be produced as a witness in their case, the court stated: "[c]onceding that the act is intended primarily for the protection of the weak minded person, if clearly so found, it is manifest that the evidence must be produced by the petitioners themselves; they can not expect the respondent to help them to succeed:" *Id.* at 773. The court's opinion did note, however, that the court itself examined the respondent on a variety of matters and gave counsel on both sides the right to submit additional questions to be asked by the court.

The case of *Wismer Estate*, 15 FIDUC. REP. 308 (1965) was brought under the Incompetents' Estates Act of 1955, 1956 P.L. 1154, §102 *et seq.*, as amended 1957 P.L. 794, 1963 P.L. 125, 50 P.S. §3102, and was decided by the late Honorable Alfred L. Taxis, Jr., of this Court. There, two daughters of an alleged incompetent sought the appointment of a guardian of their father's estate. In refusing petitioners' request to call their father during the presentation of their case, Judge Taxis noted that the petitioners had not yet introduced evidence of incompetency and concluded "there was no reason or justification for the Court to compel him to testify:" *Id.* at 309.

Judge Taxis again examined the issue of compelling an alleged incompetent to testify against himself in *In re Tose*, 21 FIDUC. REP. 562 (1971). There, the petitioner, the alleged incompetent's estranged wife, was seeking, *inter alia*, an order compelling her husband to submit to a private psychiatric exam with a physician of her choosing. Pointing out that the court's right to appoint a competent physician to make a mental examination was quite different from the examination being requested:

> Beyond all of the foregoing the obvious question remains: how could the court have compelled the respondent in any event to submit to a meaningful psychiatric examination over his objection? There would be a strong argument that such examination, to the extent that it utilized respondent's answers or statements, would be testimonial and would violate his right not to testify against himself in an incompetency proceeding. . . . The filing of a petition without solid medical evidence available and the persistence in the motion for a secret medical examination in the circumstances described, add further to the doubt whether the proceedings were initiated in good faith.

Id. at 586.

Instantly, we are not confronted with the heavy-handed tactics attempted against the alleged incompetent in *Tose*, and there is no doubt about the petition's good faith basis, its having been initiated at the behest of Judge Fullam. Nevertheless, that does not remove entirely our instinctual hesitation about forcing an individual who is the subject of an incapacitated person's proceeding to testify on his own behalf. The *Ryman* case indicates, in dictum, that such testimony can be obtained only on a voluntary basis. Some of the other cases cited above suggest that compelling a respondent to testify violates the right not to incriminate oneself. We, however, do not believe that the constitutional privilege arises in these cases.

The Fifth Amendment of the United States Constitution "protects the individual against being involuntarily called as witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings:" *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L.Ed.2d 274 (1973). Article 1, Section 9 of the Pennsylvania Constitution provides the same protection. Instantly, we do not see how the answers to questions relevant to an inquiry into an alleged incapacitated person's mental state have any criminal implications.

Our caution arises instead from the "dangerous" and potentially

abusive nature of such proceedings, as noted in the *Tose* and other cases cited therein by Judge Taxis. We must balance this concern against the statute's "preventive, protective, and compassionate" purposes: *Id.* at 564. To that end, we proffer the following procedural framework for use in incapacitated persons' hearings where the respondents (*pro se* or through counsel) object to giving testimony.

The petitioner will have the initial burden of making out at least a *prima facie* case of incapacity *without* the respondent's own testimony. We suggest that this is a lesser burden than the "clear and convincing" standard required before an adjudication of incapacity can be made. If this initial case is set forth, the respondent will be subject to questions from the bench. In theory, this colloquy will be in the form of an interview, rather than direct or cross examination. Furthermore, no questions will be posed by counsel for either the petitioner or the respondent unless the alleged incapacitated person (or his counsel) acquiesces to same. If counsel for the respondent chooses to conduct direct examination, counsel for the petitioner will be given the opportunity to cross examine the respondent. Thereafter, counsel for the petitioner will offer other evidence (if available and necessary) to attempt to meet the "clear and convincing" burden. If counsel succeeds, counsel for the respondent will then offer his evidence to attempt to rebut the petitioner's case.

Applying this analysis to the facts at hand, Dechert's initial evidence consisted of a conclusion that Mr. Taylor *is* able to manage his money (by Dr. Hammer) and a disapproval of the way he spends his money (by Mr. Horvath.) The opinions of these men did not set forth a *prima facie* case. Because Dechert could not jump this hurdle, Mr. Taylor should not have been subjected to the court's questions over his counsel's objection. Instead, the petition should have been dismissed. Accordingly, we enter the following Order.

Order

And Now, this 27th day of April, 2001, after hearing, petitioner Dechert's having failed to establish by clear and convincing evidence that Robert L. Taylor is an incapacitated person, the petition is hereby Dismissed.

EDITORS' NOTE: See *Common. v. Pomponi*, 447 Pa. 154, 284 A.2d 708.